Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

MOTION RECORD OF THE PLAINTIFF SABRINA HEYDE

June 28, 2021

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Theberge Developments Limited

Court File No. 15-64526CP

ONTARIO
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TAB 1

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

NOTICE OF MOTION

The Plaintiff Sabrina Heyde, will make a Motion to Justice R. Smith on April 23, 2021 and July 28, 2021 at 10:00 a.m., or as soon after that time as the Motion can be heard.

PROPOSED METHOD OF HEARING: The Motion is to be heard

[ ] In writing under subrule 37.12.1(1) because it is ;

[ ] In writing as an opposed motion under subrule 37.12.1(4);

[ ] In person;

[ ] By telephone conference;

[X] By video conference. A link to the videoconference will be provided by the Court a day prior to the hearing.

THE APRIL 23, 2021 MOTION IS FOR ORDERS

(a) That Theberge Developments Limited release the contact information of all class members who have the term "inclusive of a storage unit" in their agreements of purchase and sale;

(b) Declaring that the Notice of Proposed Class Action Settlement Approval Hearing attached to this Notice of Motion as Schedule "A" is approved;

(c) Approving the form, content and manner of distribution of the settlement approval hearing and opt-out notice; and

(d) Such further and other relief as this Honourable Court may deem just.

THE JULY 28, 2021 MOTION IS FOR ORDERS

(e) Declaring that the terms of settlement in this matter as set out in the Minutes of Settlement, are fair, reasonable and in the best interests of Class Members;

(f) Declaring that the terms of settlement set out in the Minutes of Settlement, are approved pursuant to section 29 of the *Class Proceedings Act*, S.O. 1992, Chapter 6 ("*CPA*") and shall be implemented in accordance with their terms;

(g) Approving payment of Class Counsel fees, disbursements and taxes; and

(h) Such further and other relief as this Honourable Court may deem just.

THE GROUNDS FOR THE MOTIONS ARE

(a) The parties have agreed to a settlement;

(b) The proposed settlement is fair, reasonable and is in the best interest of Class Members;

(c) The notice program is a reasonable method of notifying the Class in respect of certification and settlement.

(d) *CPA* including sections 2, 19, 20, 21, 22, 27.1, 27.2, 32, 33, 33.1, and 34(2);

(e) Rule 37 of the *Rules of Civil Procedure*, R.R.O 1990, Reg 194; and

(f) Such further and other grounds as the lawyers may advise.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the Motion:

(a) Affidavit of Sabrina Heyde; and

(b) Such further and other evidence as the lawyers may advise and this Honourable Court may permit.

March 23, 2021

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Lawyers for the Defendant
Theberge Developments Limited

TAB 2

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

AFFIDAVIT #1 OF SABRINA HEYDE

(Sworn: June 24, 2021)

I, Sabrina Heyde, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am the representative Plaintiff and Class Member in this proceeding, and, as such, have knowledge of the matters deposed herein. To the extent I do not have personal knowledge, I verily believe the information set forth to be true.

2. When I use the terms “we”, “us” or “our” in this my Affidavit, I am referring to KMH Lawyers (“KMH Lawyers” or “Class Counsel”), particularly Miriam Vale Peters and myself.

3. No portion of this Affidavit is meant to waive, nor should it be understood or interpreted to be a waiver of solicitor-client privilege, litigation privilege, settlement privilege or any other privilege related or potentially attaching to any of the information conveyed herein.

4. Unless otherwise noted, capitalized terms that I have used in this Affidavit, which are not specifically defined herein, have the meanings attributed to them in the Settlement Agreement.

5. I swear this Affidavit in support of the motion for Court approval of the Settlement reached between the Parties and for approval of Class Counsel Fees.

6. On May 9, 2015, I retained Class Counsel to commence the Action. I signed two retainer agreements in respect of the Action both of which are attached as Exhibits to the Affidavit of Matthew Miklaucic ("Mr. Miklaucic's Affidavit")

7. Since retaining Class Counsel, I have committed myself to the advancement of the Action.

8. In furtherance of that commitment, I have been in regular contact with Class Counsel, by telephone, by e-mail and in person.

9. Since being retained, Class Counsel has kept me informed of the progress of the Action. More particularly, they have provided regular updates, material documents, recommendations and sought my input and instructions in relation to all material matters.

10. Throughout, my knowledge has been informed by my interactions with Class Counsel and the documents I have received, reviewed and considered. Those documents have been numerous, but I have dedicated myself to understanding them, questioning them and hearing from Class Counsel about them.

11. As such, I believe that I have a very good understanding of the issues in the Action and the issues relevant to the Settlement.

The settlement and key settlement terms

12. The Settlement was reached following adversarial, arm's length negotiations during several days of pre-trial presided over by Justice R. Smith. The Defendant aggressively denied liability for the claims asserted by the class members and disagreed with our claims for damages and costs. I attended the pre-trial and was an active participant.

13. Over the course of the litigation, there was also a mediation and a settlement meeting prior to the pre-trial, and I was actively involved and engaged in those settlement discussions as well.

14. The Settlement has been memorialized in a Settlement Agreement dated June 1, 2021 ("Settlement Agreement"), which supersedes any correspondence or communications between the parties. Attached and marked as **Exhibit "A"** to this my Affidavit is a true copy of the Settlement Agreement.

15. Key terms of the Settlement Agreement include the following:

(a) The Defendant will pay a settlement amount of CAD $150,000 to the Class Members (less the CPF Levy);

(b) The Defendant will pay a settlement amount of CAD $100,000 to the First Subclass Members (less the CPF Levy);

(c) In exchange for the above settlement amounts, I on behalf of the class members (excluding people who have chosen to opt out) will sign a release;

(d) The Action will be dismissed;

(e) The Related Action will be dismissed as against the Class Members' lawyers and including Class Counsel;

(f) The Defendant has undertaken not join or add any class members as parties to the Related Action; and

(g) In order for the settlement to take effect, this Court must approve the settlement.

16. I am aware from Class Counsel that the process to have the Settlement approved is taking place in two stages. The first stage was approval of the Notice of Settlement that was distributed to the Class Members. The second stage is approval of the Settlement. Class Members may object to the Settlement or Class Counsel Fees as part of the approval process.

The fairness and reasonableness of the Settlement

17. Based on Class Counsel's recommendation (as summarized in Mr. Miklaucic's Affidavit) and after many detailed discussions over many years, I accepted the Settlement as set out in the Settlement Agreement.

18. I was particularly concerned about the importance of recovery to the class members. As noted in my Affidavit in support of the certification motion, many class members were first-time home buyers with modest means. Some of them continue to own their units at Alta Vista Ridge,

and others like myself do not. Many of the class members purchased their units in or around 2014. Every month, many class members continue to pay rental fees in respect of the hot water unit, and a settlement would provide immediate relief. I felt that a settlement now would be better than a potential win later.

19. Also, this litigation has been ongoing for many years with no end in sight. Even if liability was established at a common issues trial, there would likely be appeals, which would further delay recovery. In addition, I understand that there may be complicated or prolonged processes to establish damages for each Class Member.

20. I also understand that there is always a litigation risk, which means that we may lose even if we considered the case to be strong. Although I felt confident that liability would be established, there is always a chance that we would not be successful.

21. Even more importantly, as noted in Mr. Miklaucic's Affidavit, I was concerned about the Defendant's ability to pay or recovery risk.

22. I understand that, under the Settlement Agreement and subject to the particular wording in it, unless a Class Member has excluded him, her or itself from the Action, the claims brought and other claims that could have been brought in the Action will be released forever.

23. I understand this to mean that, if the Settlement is approved, no Released Claims can be brought or continued against Releasees at any time after the Agreement becomes effective.

24. Class Counsel has reviewed the key monetary and non-monetary terms of the Settlement Agreement with me and have explained their rationale. I understand:

(a) The Settlement Amount of CAD $250,000 will be the sole monetary contribution from the Defendant to the Class and First Subclass;

(b) The levy from the Class Proceedings Fund ("CPF") will be deducted from the Settlement Amount;

(c) The Defendant undertakes not to add or join Class Members to the Related Action;

(d) The effect and binding nature of the Settlement Agreement;

(e) In order for the Settlement to take effect, this Court must approve the settlement of this Action.

(f) if the Settlement becomes effective, the case against the Defendant will be dismissed with prejudice (meaning it cannot be brought again);

(g) if we later discover new facts related to the claims, that discovery will not change the binding effect of the Settlement Agreement and the releases given; and

(h) Class Members are unlikely to be completely restored to the position they were in before they took possession of their units vis-à-vis the storage lockers and heating systems. That is, after receiving compensation, they will likely still have paid more out of pocket for the rental of the heating system or with respect to the storage locker.

25. Given the risks explained to me, I accept that the Settlement Funds are fair and adequate consideration to be paid in exchange for the Released Claims in light of those matters that weighed heavily in the negotiation of the Settlement.

26. I appreciate that the Action raises complex factual and legal matters and that it would not be feasible to pursue my claim on an individual basis. Absent the class action mechanism, I would not have pursued any remedy against the Defendant.

27. Given these circumstances and for the reasons set out herein, I believe the Settlement to be fair, reasonable, and in the best interests of the Class. Accordingly, I have instructed Class Counsel to seek this Honourable Court's approval of the Settlement including Class Counsel Fees.

Fee approval

28. Class Counsel undertook this Action on a contingency basis such that they would not receive payment of their fees unless and until a recovery was obtained for the benefit of the Class Members.

29. Class Counsel has informed me that the value of Class Counsel's docketed time on this file, as at the date of this affidavit is approaching $245,000 plus taxes.

30. I have been further informed that Class Counsel estimates that they will spend the following additional time to:

(a) Prepare for and attend at the Settlement Approval Hearing;

(b) Distribute the settlement funds to the Class Members; and

(c) Respond to inquiries from Class Members regarding the Settlement Agreement.

31. Class Counsel have advised me that they wish to request Class Counsel Fees in the amount of $125,000 inclusive of taxes. It has been explained to me that Class Counsel could seek an additional $83,250, but they have chosen not to do so. Their requested fee represents a substantial reduction from the full contingency fee provided by the Second Retainer Agreement (Exhibit "M" to Mr. Miklaucic's Affidavit).

32. I support this Court's approval of Class Counsel fees of $125,000 inclusive of taxes.

Miscellaneous

33. Attached and marked as **Exhibit "B"** to this my Affidavit is a true copy of my Affidavit sworn January 4, 2016, without exhibits.

34. I make this Affidavit in support of the motion herein.

SWORN by Sabrina Heyde at the City of Ottawa, in the Province of Ontario, before me on June 24, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits
(or as may be)

SABRINA HEYDE

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

This is Exhibit "A" referred to in the Affidavit of Sabrina Heyde sworn by Sabrina Heyde at the City of Ottawa, in the Province of Ontario, before me on June 24, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Heyde* v. *Theberge Developments Limited

Ontario Superior Court of Justice File No. 15-64526CP

Proceeding under the *Class Proceeding Act, 1992*

SETTLEMENT AGREEMENT

Made as of June 1, 2021

Between

SABRINA HEYDE

(the **"Plaintiff"**)

and

THEBERGE DEVELOPMENTS LIMITED

(the **"Defendant"**)

Contents

RECITALS

A. **WHEREAS** the Action was commenced by the Plaintiff in Ontario on behalf of certain original purchasers and current owners of condominiums at Alta Vista Ridge in Ottawa arising out of the purchase and sale of the condominiums units between 2011 and 2015 from the Defendant ("**Alta Vista Ridge**") as set out in the Statement of Claim;

B. **AND WHEREAS** the Defendant was the developer of Alta Vista Ridge;

C. **AND WHEREAS** the Defendant commenced the Related Action against persons or entities who are alleged to be responsible for Alta Vista Ridge, including the Purchasers' Lawyers;

D. **AND WHEREAS** the Action was certified as a class proceeding and the Plaintiff was appointed the representative plaintiff;

E. **AND WHEREAS** the Defendant has disputed liability and it does not admit, through the execution of this Settlement Agreement or otherwise, any allegation of unlawful conduct alleged in the Action, and otherwise denies all liability and asserts that it has complete defences in respect of the merits of the Action;

F. **AND WHEREAS** the Parties through their counsel have engaged in settlement discussions and negotiations with a view to resolving the Action and the Related Action as against the Purchasers' Lawyers only;

G. **AND WHEREAS** as a result of those settlement discussions and negotiations, the Parties have reached this Settlement with the material terms outlined in the lawyer for the Defendant's letter of January 27, 2021 and the Class Counsel's letter of January 29, 2021, and they have entered into this Settlement Agreement, which embodies all the terms and conditions of the Settlement between the Defendant and the Plaintiff, both individually and on behalf of the Settlement Class, subject to the approval of the Court;

H. **AND WHEREAS** the Defendant is entering into this Settlement Agreement in order to achieve a final resolution of all claims asserted or which could have been asserted by the Plaintiff and the Settlement Class in the Action, and to avoid further expense of burdensome and protracted litigation;

I. **AND WHEREAS** Class Counsel has reviewed and fully understands the terms of this Settlement Agreement and, based in their analyses of the facts and law applicable to the Plaintiff's claims, having regard to the burdens and expense in prosecuting the Action, including the risks and uncertainties associated with trials and appeals, and having regard to the value of the Settlement Agreement, have concluded that this Settlement Agreement is fair, reasonable and in the best interests of the Class;

J. **AND WHEREAS** the Parties have intended and acknowledge that the Settlement provides a simplified and convenient procedure for the Class in addressing Alta Vista Ridge;

K. **AND WHEREAS** the Parties therefore wish to and finally resolve the Action against the Defendant, and the Related Action as against the Purchasers' Lawyers only, without admission of liability and in particular agree that the compensation to the Class is not an acknowledgement of any legal right to compensation in these circumstances;

L. **AND WHEREAS** the Parties acknowledge that the Settlement is contingent on approval by the Court as provided for in this Settlement Agreement, and entered into with the express understanding that this Settlement shall not derogate from the respective rights of the Parties relating to the Action and the Related Action in the event that this Settlement Agreement is not approved, is terminated or otherwise fails to take effect for any reason; and

M. **AND WHEREAS** the Plaintiff and Defendant agree that neither this Settlement Agreement nor any statement made in the negotiation thereof shall be deemed or construed to be an

admission by, or evidence against, the Defendant, or evidence of the truth of any of the Plaintiff's allegations, which allegations are expressly denied by the Defendant;

NOW THEREFORE, in consideration of the covenants, agreements and releases set forth in this Settlement Agreement and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, it is agreed by the Parties that the Related Action as against the Purchasers' Lawyers only shall be settled and dismissed with prejudice, and it is agreed by the Parties that that Action shall be settled and dismissed with prejudice, all without costs as to the Plaintiff, the Settlement Class or the Defendant, subject to the approval of the Court, on the following terms and conditions:

SECTION 1 – DEFINITIONS

For the purposes of this Settlement Agreement, including the Recitals hereto:

1) **"Action"** means the Ottawa action styled *Heyde* v. *Theberge Developments Limited*, commenced in the Court bearing Court File No. 15-64526CP;
2) **"Administration Expenses"** means all fees, disbursements, expenses, costs, taxes and any other amounts incurred or payable by the Plaintiff, Class Counsel or otherwise for the approval, implementation and administration of this Settlement, and any other costs associated with notice and/or claims administration and notice of settlement approval hearing and, where the settlement is approved, notice of settlement approval, but excluding Class Counsel Fees and Class Counsel Disbursements;
3) **"Class"** and **"Class Members"** mean any person

a. 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 the Defendant at Alta Vista Ridge;

b. 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 ...";

4) **"Class Counsel"** means KMH Lawyers;

5) **"Class Counsel Disbursements"** means the disbursements and applicable taxes incurred by Class Counsel and the Plaintiff in the prosecution of the Action;

6) **"Class Counsel Fees"** means the fees of Class Counsel, and any applicable taxes or charges thereon;

7) **"Court"** means the Ontario Superior Court of Justice;

8) **"CPA"** means *Class Proceedings Act, 1992*, S.O. 1992, c.6, as amended;

9) **"CPF"** means the Class Proceedings Fund created pursuant to Section 59.1 of the *Law Society Act* and administered by the Class Proceedings Committee of the Law Foundation of Ontario;

10) **"CPF Levy"** means a levy from the Settlement Amount equal to the amount of financial support paid to the Plaintiff by the CPF plus 10% Net Settlement Proceeds to which the CPF is entitled pursuant to Ontario Regulation 771/92 after it approved the Plaintiff for financial support in 2016;

11) **"Effective Date"** means the date when the Court's Order approving this Settlement Agreement becomes a Final Order;

12) **"Execution Date"** means the date on which the last of the Parties signs this Settlement Agreement;

13) **"Fees and Disbursement Approval Date"** means the date when the Order approving the Class Counsel Fees and Class Counsel Disbursements becomes a Final Order;

14) **"Final Order"** means the later of: (a) the date of a final judgment entered by the Court, the time to appeal such judgment having expired without any appeal being taken, if an appeal lies, and (b) the disposition of all appeals taken;

15) **"First Subclass"** means Class Members 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;

16) **"Net Settlement Proceeds"** means the Settlement Amount less Class Counsel Fees, Class Counsel Disbursements and Administration Expenses;

17) **"Notice"** means the form of notice approved by the Court, which inform(s) the Class Members of:

    a. the principal elements of the Settlement;

    b. the date and location of the Settlement Approval Motion;

    c. Class Counsel Fees and Class Counsel Disbursements to be requested by Class Counsel; and

    d. the process to object to the Settlement should any Class Member wish to do so.

18) **"Notice Approval Motion"** means the motion for an Order of the Court:

a. approving the form, content and manner of distribution of the settlement approval hearing notice; and

b. such other relief as the Parties may request.

19) **"Parties"** means the Plaintiff and the Defendant, each being a party to this Settlement Agreement;

20) **"Purchasers' Lawyers"** means the law firms and lawyers who provided independent legal advice to the Plaintiff and the Settlement Class named as defendants in the Related Action in connection with the purchase of Alta Vista Ridge units, being Kelly Manthorp Heaphy Professional Corporation and John Doe 1-100 (but specifically excludes Andre Munroe and Kelly Santini LLP);

21) **"Related Action"** means the Ottawa action styled *Theberge Developments Limited v. Kelly Santini LLP et al.* commenced in the Court bearing Court File No. 17-72825;

22) **"Released Claims"** means any and all manner of claims, demands, actions, suits, causes of action, whether class, individual, representative or otherwise in nature, whether personal or subrogated, damages of any kind (including compensatory, punitive or other damages) whenever incurred, liabilities of any nature whatsoever, including interest, costs, expenses, class administration expenses, penalties, and lawyers fees (including Class Counsel Fees and Class Counsel Disbursements), known or unknown, suspected or unsuspected, foreseen or unforeseen, actual or contingent, and liquidated or unliquidated, in law, under statute or in equity, that the Releasors, or any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have or hereafter can, shall or may have, relating in any way to any conduct occurring anywhere, from the beginning of time to the date hereof relating to any conduct alleged (or which could have been alleged) in the Action and the

Related Action as against the Purchasers' Lawyers only, including, without limitation, any such claims which have been asserted, would have been asserted, or could have been asserted, directly or indirectly, whether in Canada or elsewhere, as a result of or in connection with, related to, or arising from, any conduct described in the Action and Related Action on account of, arising out of, resulting from, Alta Vista Ridge;

23) **"Releasees"** means:

a. when the release is granted by the Plaintiff and the Settlement Class: jointly and severally, individually and collectively, the Defendant and its respective present and former, direct and indirect, parents, subsidiaries, divisions, affiliates, partners, principals, insurers, and all other person, partnerships or corporations with whom any of the former have been, or are now, affiliated, and all of their respective past, present, and future officers, directors, employees, stockholders, shareholders, agents, lawyers, trustees, servants and representatives; and the predecessors, successors, purchasers, heirs, executors, administrators, trustees and assigns of each of the foregoing (relating to the Action);

b. when the release is granted by the Defendant: the Purchasers' Lawyers and their respective successors, heirs, executors, administrators, trustees and assigns (relating to the Action);

24) **"Releasors"** means, jointly and severally, individually and collectively, the parties granting a release or releases to one or more of the Releasees, including their respective successors, heirs, executors, administrators, trustees and assigns;

25) **"Second Subclass"** means Class Members who signed an Acknowledgement prior to close of sale;

26) **"Settlement"** means the settlement provided for in this Settlement Agreement;

27) **"Settlement Agreement"** means this agreement, including the Recitals hereto;

28) **"Settlement Amount"** means the all-inclusive sum of CAD$405,224.04 to be paid in full and final settlement of any and all claims against the Defendant, inclusive of Net Settlement Proceeds, Class Counsel Fees, Class Counsel Disbursements, CPF Levy, any honorarium payable to the Plaintiff and Administration Expenses;

29) **"Settlement Approval Motion"** means the motion for an Order of the Court:

   a. approving the Settlement;

   b. approving the manner of distribution of the Net Settlement Proceeds;

   c. dismissing the Action with prejudice and without costs; and

   d. such other relief as the Parties may request.

30) **"Settlement Class"** means the Class Members except any person who validly opts out of this Action.

SECTION 2 – PAYMENTS

2.1 The Settlement Amount

1) Subject to and following the Final Order approving the Settlement, the Settlement Amount shall be distributed in accordance with section 6 of this Settlement Agreement.

2) The Settlement Amount shall be the total amount payable by the Defendant in relation to the Action and shall be all-inclusive of Class Counsel Fees, Class Counsel Disbursements, CPF Levy, costs and interests of and relating to the Action, any honorarium payable to the Plaintiff and the Administration Expenses.

2.2 No Further Payments

1) The Settlement Amount shall be paid by the Defendant in full satisfaction of the Released Claims against the Releasees.
2) The Plaintiff, the Class Members, the Purchasers' Lawyers and Class Counsel, including their heirs, executors, predecessors, successors, assigns and agents, have no obligation to pay anything to the Defendant or any of the Releasees in relation to this Settlement Agreement or the Action.

SECTION 3 –NOTICE APPROVAL MOTION

3.1 Materials

1) As soon as reasonably practicable, Class Counsel will bring the Notice Approval Motion.
2) As part of the Notice Approval Motion, the Plaintiff shall seek an Order that the Defendant disclose the identities of the two Class Members who have settled their claims related to the First Subclass out of the of the list of sixty-one purchasers provided by the Defendant on February 26, 2021. The Defendant shall consent or take no position on this Order.

3.2 Where Consent Required

1) The Defendant shall consent to the Notice Approval Motion for the purposes of implementing the Settlement and the Defendant's consent should not be taken as an admission of liability or damages.
2) If this Settlement is not approved by the Court or it is terminated in accordance with its terms, the Parties shall consent to an Order of the Court vacating and setting aside any relief granted by the Court by way of the Notice Approval Motion.

3.3 Costs

1) Each Party shall bear its own costs of the Notice Approval Motion.

SECTION 4 – NOTICE OF PROPOSED CLASS ACTION SETTLEMENT APPROVAL HEARING

4.1 Mode of Dissemination

1) Once approved, the Notice shall be disseminated as follows:
   a. Direct notice shall be provided by the Plaintiff by means through which is conventionally communicates with each Class Member, whether by direct e-mail or postal mail;
   b. Class Counsel may cause to be issued a press release containing the content of the Notice; and
   c. Class Counsel may post the Notice to their firm's accounts on Twitter, Facebook and other such channels, in addition to their firm's website.
2) Class Counsel shall provide a copy of the Notice to any person that has contacted them in respect of the Action.

SECTION 5 – SETTLEMENT APPROVAL HEARING

5.1 The Settlement Approval Motion

1) As soon as reasonably practicable after the Notice Approval Motion, Class Counsel shall bring the Settlement Approval Motion.

5.2 Where Consent Required

1) The Defendant shall consent to the Settlement Approval Motion concerning the Court's Approval of the Settlement and the distribution of the Net Settlement Proceeds, except, for clarity any aspect of the Settlement Approval Motion that concerns Class Counsel Fees, Class

Counsel Disbursements, CPF Levy, any honorarium payable to the Plaintiff and Administration Expenses, on which the Defendant shall take no position.

5.3 Form of Order

1) The Order approving this Settlement Agreement shall be in such form or manner as agreed to by the Parties and approved by the Court.

5.4 Date Upon Which Settlement is Final

1) This Settlement shall become final on the Effective Date.

5.5 Dismissal of Claims

1) Contemporaneously with the Settlement Approval Motion, Class Counsel shall bring a motion for an order dismissing the following matters with prejudice and without costs:
    a. the Action; and
    b. the Related Action as against the Purchasers' Lawyers only.

5.6 Pre-Motion Confidentiality

1) Until the Notice Approval Motion is brought, the Parties shall keep all of the terms of the Settlement Agreement confidential and shall not disclose them without the prior written consent of the Parties, except as required for the purposes of financial reporting, communications regarding insurers, legal representatives in related proceedings, and/or the preparation of financial records (including tax returns and financial statements) as necessary to give effect to its terms, or as otherwise required by law.

5.7 Costs

1) Each Party shall bear their own costs of the Settlement Approval Motion and any other motion, if necessary, contemplated in this section.

SECTION 6 – DISTRIBUTION OF NET SETTLEMENT PROCEEDS

6.1 Class Counsel's Fees and Disbursements

1) Class Counsel shall bring a motion for approval of the Class Counsel Fees and the Class Counsel Disbursements contemporaneously with or immediately following the Settlement Approval Motion. Within 30 days of the later of the Effective Date or the Fee and Disbursement Approval date, the Defendant shall pay the Class Counsel Fees and the Class Counsel Disbursements to KMH lawyers, in trust for the following amounts:
    a. $125,000 all inclusive for Class Counsel Fees and taxes;
    b. $25,224.04 all inclusive for Class Counsel Disbursements that have been paid by the Plaintiff personally in the amount of $15,469.84 and the Class Proceedings Fund in the amount of $9,754.20; and
    c. $25,000 all inclusive for the CPF Levy consisting of $15,000 for amounts allocated to the Class and $10,000 for amounts allocated to the First Subclass.
2) Class Counsel shall provide to the Defendant verification for all Class Counsel Disbursements at least seven days (7) prior to the Settlement Approval Motion.
3) Class Counsel will seek the Court's approval for an honorarium to be paid to the Plaintiff in the amount of $5,000 on a *quantum meruit* basis for the contribution she has made in the prosecution of this Action for the benefit of the Class.
4) The Class Counsel Fees and the Class Counsel Disbursements shall be deemed to be incurred equally between the issues related to the Class and the First Subclass.

6.2 Claims and Claimants

1) Members of the Settlement Class shall be eligible for the relief provided in this Settlement Agreement.

2) Each member of the Settlement Class shall be a **"Claimant"** for the purposes of receiving compensation from the Net Settlement Proceeds.

6.3 Calculation of Compensation

1) Repayment to the CPF including the CPF Levy shall be paid prior to payment to the Settlement Class.

2) The Net Settlement Proceeds shall be divided and distributed equally amongst the members of the Settlement Class as follows:

Category	Amount to be Distributed	Number of Class Members
Class	**$150,000 all inclusive, less the CPF Levy**	**114**
First Subclass	**$100,000 all inclusive, less the CPF Levy**	**60**
Honorarium	**$5,000 all inclusive**	**Paid to the Plaintiff**

Distribution of Net Settlement Proceeds

3) The Net Settlement Proceeds shall be distributed amongst the Claimants in the following manner:

   i. Class Counsel shall provide the names and addresses of the Settlement Class, along with the exact quantum to be paid to each Settlement Class member, to the Defendant prior to the Settlement Approval Motion.

   ii. The Defendant shall provide to Class Counsel the letter and cheques, without postage, addressed to the Settlement Class within forty-five (45) days after the Effective Date for distribution to the Settlement Class.

iii. Settlement cheques that are not deliverable to the Claimants or which are not cashed by a Claimant within six (6) months of issuance will become stale-dated, ineligible for redemption, and shall not be reissued.

6.4 Cy-Près Distribution

1) Within five (5) months of the date of the Settlement Class' cheques under section 6.3, the Defendant shall notify Class Counsel of any amounts remaining in the Net Settlement Proceeds (the **"*Cy-Près* Amount")** and, to the extent possible, provide the names of the Settlement Class members that did not cash their cheques.
2) Class Counsel shall then have one (1) months from the date that the Defendant notified Class Counsel as set out in subparagraph 1) of this section, to again contact a Claimant to cash a settlement cheque.
3) Any funds remaining after distribution of the Net Settlement Proceeds, whether as a result of failure to locate any Claimants, or as a result of stale-dated cheques, the *Cy-Près* Amount shall be distributed to the charity "Their Opportunity" by the Defendant or such other organization as the Court may order. Within thirty (30) days of payment to "Their Opportunity", the Defendant shall provide to Class Counsel proof of the charitable contribution in the form of an official receipt from the charity.

SECTION 7 – STEPS TO EFFECTUATE SETTLEMENT AGREEMENT

7.1 Reasonable Efforts

1) The Parties shall take all reasonable steps to effectuate this Settlement Agreement and to secure its approval and the prompt, complete and final dismissal with prejudice of the Action on a without costs basis as against the Defendant, including cooperating with the Plaintiff's efforts

to obtain the approval and the Orders required from the Court and the implementation of this Settlement Agreement.

2) Each Party shall bear its own costs in relation to any steps contemplated in or taken in accordance with this section.

7.2 Action in Abeyance

1) Until the Parties have obtained the Final Order approving the Settlement or this Settlement Agreement is terminated in accordance with its terms, whichever occurs first, the Parties agree to hold in abeyance all other steps in the Action other than the Notice Approval Motion and the Settlement Approval Motion contemplated by this Settlement Agreement and such other matters required to implement the terms of this Settlement Agreement, unless otherwise agreed to in writing by the Parties.

SECTION 8 – RELEASES AND DISMISSALS

8.1 Release of the Releasees

1) Upon the Effective Date, and in consideration of payment of the Settlement Amount and for other valuable consideration set forth in this Settlement Agreement, the Releasors forever and absolutely release, relinquish and forever discharge the Releasees from the Released Claims that any of them, whether directly, indirectly, derivatively, or in any other capacity, ever had, now have, or hereafter can, shall, or may have.

2) The Plaintiff, the Settlement Class and the Defendant acknowledge that they may hereafter discover facts in addition to, or different from, those facts which they know or believe to be true regarding the subject matter of the Settlement Agreement, and it is their intention to release fully, finally and forever all Released Claims and, in furtherance of such intention, this release

shall be and remain in effect notwithstanding the discovery or existence of new or different facts.

3) Except as provided herein, this Settlement Agreement does not settle, compromise, release or limit in any way whatsoever any claim by the Settlement Class or the Defendant against any person other than the Releasees.

8.2 No Further Claims

1) Upon the Effective Date, the Releasors shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Ontario or elsewhere, on his or her own behalf or on behalf of any class or any other person, any proceeding, cause of action, claim or demand against the Releasees, or any other person who may claim contribution or indemnity, or other claims over, relief from the Releasees, whether pursuant to statute or at common law or equity in respect of any Released Claim, except for the Defendant's claims against its insurers and those claims in the Related Action other than claims asserted against the Purchasers' Lawyers. For greater certainty and without limiting the generality of the foregoing, the Releasors shall not assert or pursue a Released Claim, against any Releasee under the laws of any foreign jurisdiction.
2) The Defendant undertakes not to join or add any Class Members to the Related Action.
3) As of the date of this Settlement Agreement, Class Counsel do not and will not represent plaintiffs in any other proceeding related to any matter raised or which could have been raised in the Action.
4) Upon the Effective Date, each member of the Settlement Class shall be deemed to irrevocably consent to the dismissal, without costs, with prejudice and without reservation, of their Action against the Releasees.

5) Except as provided in section 8.1 1), this Settlement Agreement does not settle, compromise, release or limit in any way whatsoever any claim by Settlement Class Members or the Defendant against any person other than the Releasees.

8.3 Material Term

1) Without in any way limiting the ability of the Parties to assert that other terms in this Settlement Agreement are material terms, the releases and reservation of rights contemplated in this section shall be considered a "**Material Term"** of the Settlement Agreement and the failure of the Court to approve the releases and/or reservation of rights contemplated herein shall give rise to a right of termination pursuant to Section 10.1 of the Settlement Agreement.

SECTION 9 – EFFECT OF SETTLEMENT

9.1 No Admission of Liability or Concessions

1) The Plaintiff and the Defendant expressly reserve all of their rights if the Settlement is not approved, is terminated or otherwise fails to take effect for any reason.
2) This Settlement Agreement, whether or not it is implemented, anything contained in it, any and all negotiations, discussions, documents, and communications associated with this Settlement Agreement, and any action taken to implement this Settlement Agreement, shall not be deemed, construed, or interpreted to be:
    a. an admission or concession by the Defendant of any fact, fault, omission, wrongdoing or liability, or the truth of any of the claims or allegations made or which could have been made against it in the Action, or the application of the applicable laws to any of the claims made in the Action or Related Action; or
    b. an admission or concession by the Plaintiff, Class Counsel or the Class of any weakness in the claims of the Plaintiff and the Class, or that the consideration to be

given hereunder represents the amount that could or would have been recovered from the Defendant after the trial of the Action or Related Action.

9.2 Agreement Not Evidence or Presumption

1) This Settlement Agreement, whether or not it is implemented, and anything contained herein, and any and all negotiations, discussions, documents, communications, and proceedings associated with this Settlement Agreement, shall not be referred to, offered as evidence or received in evidence in any pending or future civil, quasi-criminal, criminal or administrative action or disciplinary investigation or proceeding in any jurisdiction as evidence, a presumption, concession, or admission of anything save as set out in section 9.1 2).
2) Notwithstanding section 9.2 1), this Settlement Agreement may be referred to or offered as evidence in order to obtain the Orders or directions from the Court contemplated by this Settlement Agreement, in a proceeding to approve and/or enforce this Settlement Agreement, to defend against the assertion of Released Claims, as may be necessary, or as otherwise required by law.

SECTION 10 – TERMINATION

10.1 Right of Termination

1) In the event that:
    a. the Court declines to approve this Settlement Agreement or any material part hereof;
    b. the Court issues an Order approving this Settlement Agreement that is materially inconsistent with the terms of the Settlement Agreement; or
    c. the Order approving this Settlement Agreement is reversed on appeal and the reversal becomes a Final Order;

the Plaintiff and Defendant shall each have the right to terminate this Settlement Agreement by delivering a written notice within thirty (30) days following an event described above, subject to the Parties using best efforts and good faith to attempt to resolve any issues in furtherance of resolution of the Action on such modified terms as may be required to obtain Court approval.

2) In addition, if the Settlement Amount is not paid in accordance with Section 2.1 1), the Plaintiff shall have the right to terminate this Settlement Agreement by delivering a written notice.
3) Any Order, ruling or determination made or rejected by the Court with respect to Class Counsel Fees, Class Counsel Disbursements, CPF Levy, any honorarium payable to the Plaintiff, or Administration Expenses shall not be deemed to be a material modification of all, or a part, of this Settlement Agreement and shall not provide a basis for the termination of this Settlement Agreement.
4) Except as provided for in subsection 10.4 2), if the Plaintiff or the Defendant exercises the right to terminate, the Settlement Agreement shall be null and void and have no further force or effect, and shall not be binding on the Parties, and shall not be used as evidence or otherwise in any litigation or in any other way for any reason.

10.2 Steps Required on Termination

1) If this Settlement Agreement is terminated after the Court has heard or decided one or more of the motions contemplated herein, either the Defendant or the Plaintiff shall, as soon as reasonably practicable after termination, on notice to the other Party, bring a motion to the Court for an Order:
    a. declaring this Settlement Agreement null and void and of no force or effect except for the provisions of those sections listed in subsection 10.4(2); and

b. setting aside and declaring null and void and of no force or effect, *nunc pro tunc*, all prior Orders or judgments entered by the Court in accordance with the terms of this Settlement Agreement.

2) Subject to subsection 10.4 2), the Parties shall consent to the Order(s) sought in any motion made under subsection 10.2.

10.3 Notice of Termination

1) If this Settlement Agreement is terminated, a notice of the termination will be given to the Class in the form and content to be agreed upon by the Parties or ordered by the Court.

2) The notice of termination, if necessary, shall be disseminated in a manner agreed upon by the Parties or ordered by the Court.

10.4 Effect of Termination

1) In the event this Settlement Agreement is terminated in accordance with its terms:

a. the Parties will be restored to their respective positions prior to the execution of this Settlement Agreement, except as expressly provided for herein;

b. this Settlement Agreement will have no further force or effect and no effect on the rights of the Parties except as specifically provided for herein;

c. all statutes of limitation applicable to the claims asserted in the Action shall be deemed to have been tolled during the period beginning with the execution of this Settlement Agreement and ending with the day on which the Orders contemplated by subsection 10.2 are entered; and

d. this Settlement Agreement will not be introduced into evidence or otherwise referred to in any litigation against the Defendant.

2) Notwithstanding the provisions of subsection 10.2, if this Settlement Agreement is terminated, the provisions of Sections 10.1 2), 10.1 3), 10.1 4), 10.2, 10.3, 10.4, 10.5, 10.6, 11.1, 11.2, 11.3, 11.4, 11.5, 11.6, 11.7, 11.10, 11.12, 11.15, 11.17, and the definitions applicable thereto (but only for the limited purpose of the interpretation of those sections), shall survive termination and shall continue in full force and effect. All other provisions of this Settlement Agreement and all other obligations pursuant to this Settlement Agreement shall cease immediately.

10.5 Disputes Relating to Termination

1) If there is a dispute about the termination of this Settlement Agreement, the Parties agree that the Court shall determine the dispute on a motion made by a Party on notice to the other Party.

10.6 Handling of Confidential Information in the event of Termination

1) In the event of termination, it is understood and agreed that all documents and information exchanged by the parties in order to reach the Settlement are and remain subject to settlement privilege, except to the extent that the documents or information were, are or become publicly available.
2) In the event of termination, within thirty (30) days of such termination having occurred, Class Counsel shall destroy all documents or other materials provided by the Defendant or containing or reflecting information derived from such documents for the purposes of reaching and implementing this Settlement. Class Counsel shall provide counsel for the Defendant with a written certification by Class Counsel of such destruction. Nothing contained in this section shall be construed as requiring Class Counsel to destroy any of their work product. However, any documents or information provided by the Defendant in connection with this Settlement Agreement may not be disclosed to any person in any manner, or used, directly or indirectly,

by Class Counsel or any other person in any way for any reason, without the express prior written permission of the Defendant. Class Counsel shall take reasonable steps and precautions to ensure and maintain the confidentiality of such documents, information and any work product of Class Counsel that discloses such documents and information.

SECTION 11 – MISCELLANEOUS

11.1 Motions for Directions

1) Any of the Parties may apply to the Court for directions in respect of the interpretation, implementation and administration of this Settlement Agreement.
2) All motions contemplated by this Settlement Agreement shall be on notice to the Parties.

11.2 Headings, etc.

1) In this Settlement Agreement:
    a. the division into sections and the insertion of headings are for convenience of reference only and shall not affect the construction or interpretation of this Settlement Agreement;
    b. the terms “this Settlement Agreement”, “the Settlement Agreement”, “hereof”, “hereunder”, “herein”, “hereto”, and similar expressions refer to this Settlement Agreement and not to any particular section or other portion of this Settlement Agreement; and
    c. “person” means any legal entity including, but not limited to, individuals, corporations, sole proprietorships, general or limited partnerships, limited liability partnerships or limited liability companies.

11.3 Computation of Time

1) In the computation of time in this Settlement Agreement, except where a contrary intention appears:

    a. where there is a reference to a number of days between two events, the number of days shall be counted by excluding the day on which the first event happens and including the day on which the second event happens, including all calendar days; and

    b. only in the case where the time for doing an act expires on a holiday, as holiday is defined in the *Rules of Civil Procedure*, RRO 1990, Reg 194, the act may be done on the next day that is not a holiday.

11.4 Ongoing Jurisdiction

1) The Court shall exercise jurisdiction with respect to implementation, administration, interpretation and enforcement of the terms of this Settlement Agreement.

11.5 Governing Law

1) This Settlement Agreement shall be governed by and construed and interpreted in accordance with the laws of the Province of Ontario and the laws of Canada applicable therein.

11.6 Severability

1) Subject to section 11.6 2), any provision hereof that is held to be inoperative, unenforceable or invalid in any jurisdiction shall be severable from the remaining provisions which shall continue to be valid and enforceable to the fullest extent permitted by law.

2) The following terms are not severable:

    a. Material Terms; and

    b. Any term giving rise to a right of termination as set out in section 10.1.

11.7 Entire Agreement

1) This Settlement Agreement constitutes the entire agreement among the Parties, and supersedes all prior and contemporaneous understandings, undertakings, negotiations, representations, promises, agreements, agreements in principle and memoranda of understanding in connection herewith. None of the Parties will be bound by any prior obligations, conditions or representations with respect to the subject matter of this Settlement Agreement, unless expressly incorporated herein.

11.8 Amendments

1) This Settlement Agreement may not be modified or amended except in writing and on consent of all Parties hereto, and any such modification or amendment after settlement approval must be approved by the Court.

11.9 Binding Effect

1) If the Settlement is approved by the Court and becomes final, this Settlement Agreement shall be binding upon, and enure to the benefit of, the Plaintiff, the Settlement Class members, the Purchasers' Lawyers, the Defendant, the Releasees and the Releasors or any of them, and all of their respective heirs, executors, predecessors, successors and assigns.

11.10 Counterpart

1) This Settlement Agreement may be executed in counterparts, all of which taken together will be deemed to constitute one and the same agreement, and a facsimile or electronic signature shall be deemed an original signature for purposes of executing this Settlement Agreement.

11.11 Survival

1) The representations and warranties contained in this Settlement Agreement shall survive its execution and implementation.

11.12 Negotiated Agreement

1) This Settlement Agreement and the underlying Settlement have been the subject of arm's-length negotiations and discussions among the undersigned and counsel. Each of the Parties has been represented and advised by competent counsel, so that any statute, case law, or rule of interpretation or construction that would or might cause any provision to be construed against the drafter of this Settlement Agreement shall have no force and effect. The Parties further agree that the language contained in or not contained in previous drafts of this Settlement Agreement, or any agreement in principle, shall have no bearing upon the proper interpretation of this Settlement Agreement.

11.13 Language

1) The Parties acknowledge that they have required and consented that this Settlement Agreement and all related documents be prepared in English. Nevertheless, if required to by the Court, Class Counsel and/or a translation firm selected by Class Counsel shall prepare a French translation of the Settlement Agreement, the cost of which shall be an Administration Expense. In the event of any dispute as to the interpretation or application of this Settlement Agreement, only the English version shall govern.

11.14 Recitals

1) The recitals to this Settlement Agreement are true, constitute material and integral parts hereof and are fully incorporated into, and form part of, this Settlement Agreement.

11.15 Acknowledgements

1) Each Party hereby affirms and acknowledges that:
    a. they or a representative of the Party with the authority to bind the Party with respect to the matters set forth herein has reviewed this Settlement Agreement;

b. the terms of this Settlement Agreement and the effects thereof have been fully explained to them or the Party's representative by their counsel;

c. they or the Party's representative fully understands each term of the Settlement Agreement and its effect; and

d. no Party has relied upon any statement, representation or inducement (whether material, false, negligently made or otherwise) of any other Party, beyond the terms of the Settlement Agreement, with respect to the first Party's decision to execute this Settlement Agreement.

11.16 Authorized Signatures

1) Each of the undersigned represents that they are fully authorized to enter into the terms and conditions of, and to execute, this Settlement Agreement on behalf of the Parties identified above their respective signatures and their law firms.

11.17 Notice

1) Any notice, instruction, motion for court approval or motion for directions or court Orders sought in connection with this Settlement Agreement or any other report or document to be given by any Party to any other Party shall be in writing and delivered by email, facsimile or letter by overnight delivery to:

For the Plaintiff, the Class and Class Counsel in the Proceeding:

KMH Lawyers

B0001-2323 Riverside Drive
Ottawa, ON
K1H 8L5

Miriam Vale Peters
Tel: 613-733-3000
Fax: 613-523-2924
E-Mail: mvp@kmhlawyers.ca

E-Mail: mvp@kmhlawyers.ca

For the Defendant:

Spiteri & Ursulak LLP
1010-140 Laurier Avenue West
Ottawa, ON
K1P 5J3

Norman Mizobuchi
Tel: 613-563-1010
Fax: 613-563-1011
E-mail: nm@sulaw.ca

IN WITNESS OF WHICH the Settling Parties have executed this Settlement Agreement.

Sabrina Heyde on her own behalf and on behalf of the Class

Name of Authorized Signatory: Sabrina Heyde

Signature of Authorized Signatory: Sabrina Heyde
Plaintiff

Theberge Developments Limited

Name of Authorized Signatory: Joey Theberge

Signature of Authorized Signatory:
President, Theberge
Developments Limited

This is Exhibit "B" referred to in the Affidavit of Sabrina Heyde sworn by Sabrina Heyde at the City of Ottawa, in the Province of Ontario, before me on June 24, 2021 in accordance with O. Reg. 431/20, Administering Oath or Declaration Remotely.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No. 15-64526 CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SABRINA HEYDE

Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED, JOEY THEBERGE and OTTAWA-CARLETON CONDOMINIUM CORPORATION NO. 958

Defendants

Proceeding under the *Class Proceedings Act, 1992*

AFFIDAVIT #1 OF SABRINA HEYDE
(Sworn January 4, 2016)

I, **SABRINA HEYDE**, of the City of Ottawa, in the Province of Ontario, **HEREBY MAKE OATH AND SAY AS FOLLOWS:**

1. I am the proposed representative Plaintiff in the within action and as such have knowledge of the matters to which I hereinafter depose except where I have acquired such information from others or from documents which are attached in which case I believe such information to be true.

OVERVIEW

2. This claim is against the builders of a new condominium development in Ottawa known as Alta Vista Ridge ("Alta Vista Ridge"). The central allegation against the Defendants is that they have failed to provide storage units and failed to provide all of the

components required for heating, ventilation and air conditioning system ("HVAC"). Both of these items were included as part of the purchase price in the agreements of purchase and sale.

3. There is also a subclass. For certain purchasers, the allegation is that their units do not conform with the floor plans that were specified in the agreements.
4. Alta Visa Ridge is located at or in the vicinity of Russell Road in Ottawa. Blackcomb Private and Everest Private are the two streets bordering the condominium development so each unit has either a Blackcomb Private or Everest Private address.
5. As I understand it, there are 7 blocks in Alta Vista Ridge that are currently constructed. There is a total of 138 units within Alta Vista Ridge.
6. Alta Vista Ridge's condominium corporation is Ottawa-Carleton Condominium Corporation No. 958 ("CCC No. 958"). The declaration and description of CCC No. 958 was registered on or about November 27, 2014. Attached and marked as **Exhibit "A"** to this my Affidavit is a true copy of the CCC No. 958's declaration.
7. I will devote the majority of this Affidavit to explaining how this claim arose, why the claims raised in this action are common to all proposed class members and why, in my opinion, a class proceeding is the overwhelmingly preferable way to bring this action forward. In the final sections of this Affidavit, I will summarize the evidence in support of all five criteria for certification under the *Class Proceedings Act, 1992*.

ALTA VISTA RIDGE

8. I reside at 314A Everest Private ("the Unit") in Alta Vista Ridge. This is in Block 4 of Alta Vista Ridge. The Unit's legal description is:

> Unit 1, Level A, Ottawa-Carleton Standard Condominium Plan No. 958 and its appurtenant interest; subject to and together with easements as set out in schedule A as in OC1640741; City of Ottawa

9. Attached and marked as **Exhibit "B"** to this my Affidavit is a true copy of the Unit's parcel register December 22, 2014.
10. Attached and marked as **Exhibit "C"** to this my Affidavit is a true copy of the Unit's transfer dated December 22, 2014.
11. Interim closing for my Unit took place on or about October 24, 2014. At that time, I took possession of the Unit.
12. By letter dated October 21, 2014, a true copy of which is attached and marked as **Exhibit "D"** to this my Affidavit, Andre Munroe, lawyer for Theberge Developments for the sale of the Unit, wrote my real estate lawyer Sean Kelly outlining the interim closing provisions for the agreement of purchase and sale.
13. My final closing took place on December 22, 2014 at which time I became the registered owner of the Unit.
14. I believe that the closing dates and interim closing dates for some members of the proposed class took place at the same time, and the closing dates and interim closing dates for other members of the proposed class took place at other times. To the extent that I am aware, the other relevant closing dates were in or about the fall of 2014 and thereafter.

AGREEMENT OF PURCHASE AND SALE

15. In the summer or fall of 2011, I decided that I wanted to purchase a one or two-bedroom new condominium development. I had done some research and had two developments in mind—one was located near Pinecrest Avenue and the other was Alta Vista Ridge. Since

the Pinecrest development did not have two-bedroom units, I focused on Alta Vista Ridge.

16. On October 8, 2011, I met with Kate Shaver, my real estate agent, at the sales centre for Alta Vista Ridge on St. Laurent Boulevard. We met with Jace Baart, the real estate agent for Theberge Developments. Mr. Baart showed me the floor plans for the units that were not sold.

17. Mr. Baart told me that the Unit was a good buy because it was on the ground floor, and it was a walkout. He told me that I could walk out from the living room onto a terrace without any steps up. I decided that I definitely wanted a walkout, but I wanted to think about it. Ultimately, I decided to purchase the Unit because it was a walkout.

18. On or about October 8, 2011, I entered into an Agreement of Purchase and Sale with Theberge Developments for the purchase of the Unit.

19. Occupancy was initially scheduled for June 30, 2013.

20. Attached and marked as **Exhibits "E"** and **"F"** to this my Affidavit are true copies of the Agreement of Purchase and Sale and Disclosure Statement. Theberge Developments or its lawyer drafted the Agreement of Purchase and Sale and the Disclosure Statement.

21. I note the following provisions in the Agreement of Purchase and Sale:

> 1. (b) The base price for the Unit, which included a storage unit, was $214,900;
>
> …
>
> 7. (a) The Vendor agreed to construct the Unit and the common elements in a good and workmanlike manner in substantial conformity with the plans and specifications approved by the Purchaser. The Vendor shall have the right to make minor deviations from the plans and specifications, and to substitute other material for that provided for in the plans and specifications provided that any materials substituted shall be of a quality equal to or better than the material in the plans or specifications. The Purchaser agrees to accept any variations or substitutions provided that same do not diminish the value of the Unit or

substantially alter the common elements [Section 7(a) of the Agreement of Purchase and Sale];

7. (b) The Purchaser acknowledges that variations in colours, shades of colours and textures of materials may occur in finishing materials such as wood, marble, ceramic tile, cushion flooring, broadloom, bathroom fixtures, cabinetry, paint, stain and the Purchaser agrees that the Vendor is not responsible for such variations. Materials and colours will be as close as possible but not necessarily identical to the Vendor's samples [Section 7(b) of the Agreement of Purchase and Sale];

…

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, warranty, 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 [Section 18(a) of the Agreement of Purchase and Sale]; 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 [Section 27 of the Agreement of Purchase and Sale].

22. At Schedule "D" of the Agreement of Purchase and Sale is a listing of the Alta Vista Ridge Specifications for each unit. For my Unit, I understood that "forced air heating/cooling" was included in the purchase price.

23. In the Disclosure Statement, which was part of the Agreement of Purchase and Sale, the standard unit is defined in Schedule "2". Under the heating and mechanical section, "Forced Air Heating/Cooling" was listed.

24. Sections 2.2 and 2.3(b) and (c) of the Disclosure Statement state, as follows:

2.2 <u>Development:</u>

…

> **The Condominium will consist of approximately 82 Dwelling Units and approximately 72 Parking Units (not including visitor parking located on the common elements) located on three above ground levels and one underground level.** The Declarant proposes to construct thirty-one 1-bedroom units and fifty-one 2-bedroom units. The Declarant reserves the right, prior to registration of the Declaration and Description, to change the number of available Dwelling Units, Parking Units and visitor parking spaces, including a reduction in the number of visitor parking spaces. **There will be no storage units.**
>
> The Dwelling Units on the lower garage level and on the second level will have exclusive use of the terrace area adjoining the Dwelling Unit as shown on the plans. The balance of the Dwelling Units will have the exclusive use of the balcony adjoining the applicable Dwelling Unit.
>
> …
>
> 2.3(b) Hydro and gas consumption will be metered individually and therefore payable by the Dwelling Unit owner.
>
> (c) Each owner of a Dwelling Unit within the building 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 heater 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.
>
> [**My emphasis**]

25. It is my understanding that the base price for units for members of the proposed class varied depending on the type of unit that was purchased. It is my understanding that Theberge Developments used a standardized Agreement of Purchase and Sale for all purchasers, and the terms of the respective agreements were substantially similar to those set out above.

26. I believe that all members of the proposed class would have received an identical Disclosure Statement.

27. It was and continues to be my understanding that the base price for the Unit included a storage unit and HVAC.

28. At closing, the sale price after adjustments was $256,931.82 to account for the various upgrades that I made to the Unit. Attached and marked as **Exhibit "G"** to this my Affidavit is a true copy of a Statement of Adjustments as of December 22, 2014.

COLOUR AND UPGRADE MEETING

29. On September 11, 2013, Graeme Ayre who is the Customer Relations Manager for Theberge Developments or acting as agent for Joey Theberge, e-mailed me to schedule an appointment in order for me to choose the Unit's colour and material selections. I was advised that the meeting would take approximately 2.5 hours. The appointment was scheduled for September 17, 2013 at 5:30 pm. Attached and marked as **Exhibit "H"** to this my Affidavit is a true copy of the e-mail correspondence from September 11, 2013.
30. I didn't bring the Agreement of Purchase and Sale to any of the design meetings.
31. I remember two meetings with Mr. Ayre at the design centre to pick colour and materials. My aunt and uncle accompanied me to the first meeting, and I went to the second meeting alone.
32. I very distinctly remember the process at the design meetings. At the meetings, I selected upgrades and finishes for the Unit.
33. Mr. Ayre and I sat at a table with a bunch of samples. As I made the selections, Mr. Ayre would jot things down as I selected them on his copy of the colour and upgrade selection form, and then would complete a form on his computer. I couldn't see Mr. Ayre's notations until after the selection process was complete. After the selections were made, Mr. Ayre printed out the forms, and I reviewed and signed them.

34. I note that over the course of the design process, I signed several versions of the selection sheets. Each time I made a change to the Unit's design, Mr. Ayre would update the sheets, present them to me for signature. I would review the sheets, and sign them.

35. As part of this litigation, I have reviewed my e-mail, and discovered that Mr. Ayre sent me an e-mail on June 27, 2014 attaching the design sheets signed on March 4, 2014 and other documents. Attached and marked as **Exhibit "I"** to this my Affidavit is a true copy of the e-mail and the attachments.

36. In his June 27 e-mail, Mr. Ayre wrote that he had attached a copy of my "selection sheets." I don't think that I opened the attachment in June 2014. The first time that I did was this year as part of this litigation. In June 2014, I believe that I just filed the e-mail away in my inbox assuming nothing was out of the ordinary.

37. On the second last page of Exhibit "I" is a document that I do not recall signing. The document states as follows:

> 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

38. I am certain that at no point prior to closing was there any discussion about the HVAC system. I don't recall signing any documents after the agreement of purchase and sale related to the HVAC system.

39. I can tell you without any doubt in my mind that I was never informed by Theberge Developments or anyone else associated with the Defendants that I would be signing a

document relating to the HVAC. I am also sure that no one explained the consequences associated with this form.

40. I certainly was not given the option of reviewing the form in private, on my own time or in consultation with my lawyer.
41. Without waiving privilege in any way, I know that I never met with my lawyer Sean Kelly to discuss the substance of this form.
42. I don't recall signing this form.

DISCOVERY OF THE "AMENDMENT"

43. Approximately one week after I moved into the Unit in or about October 2014, I received a bill from Reliance Home Comfort. I looked at the bill, and saw that I was being billed for the period prior to interim occupancy. I also noticed that I was being billed for "Reliance Home Comfort Service", which confused me. It seemed to me that I was being billed for the HVAC as well as the hot water tank rental.
44. When Mr. Ayre came by to inspect the Unit, I told him about the bill, and he said that he would take care of the amounts owing prior to the interim occupancy period. I also asked about the billing for the HVAC. I told him that I wasn't supposed to be billed for that. He said, "You signed an amendment." I was shocked, and asked to see the "amendment".
45. Over the next few months, I asked to see an original copy of the "amendment" on four separate occasions. Each time, Mr. Ayre told me that he had already provided it to me. After the fourth request, Mr. Ayre said "Well, I can send you a higher resolution copy of it."
46. In late January 2015, I met with Mr. Theberge and Mr. Ayre. I brought my co-worker Jennifer Antwi-Boasiako with me. She audio-recorded the meeting. Attached and marked

as **Exhibit "J"** to this my Affidavit is a true copy of the complete audio recording, and transcript of the portion relating to the "amendment".

47. Mr. Theberge and Mr. Ayre showed up to the meeting without the "amendment". Mr. Ayre stated that he didn't realize I wanted to see the original. I asked who had it, and he first told me that he had given it to a police officer. I asked for the name of the officer, and he said he couldn't disclose that information to me. Later on in the conversation, Mr. Theberge said that the document was with his lawyer and that I was free to take look at it. Mr.Theberge also offered me that I could drop by his office between the hour of 9 am and 10:30 am the following day or the day after.
48. During the meeting Mr. Theberge also told me that he had started an "internal investigation" on the issue of the "amendment". Mr. Theberge requested that I put my allegation in writing, and his lawyer would investigate.
49. On February 4, 2015, I met with Joey Theberge, and he showed me the document (Exhibit "I").
50. I believe that is around the time that I discovered that the document had been sent to me in June 2014 (Exhibit "I").
51. I certainly never agreed to amend the Agreement of Purchase and Sale.
52. I have heard from many members of the proposed class that they have learned that they signed a similar document. This document was never identified or explained to them. These individuals have told me that they only learned about the document after occupancy or closing at the time that they received their monthly invoice.
53. Certain people have advised that they had a similar experience to mine. I understand that Chantal Laroche, another owner in Alta Vista Ridge, learned that she signed a document

similar to me at a colour/upgrade meeting. Attached and marked as **Exhibit "K"** to this my Affidavit is a true copy of Ms. Laroche's document.

54. The common issue is that this document was signed after execution of the agreement of purchase and sale, and was not identified or explained to the members of the proposed class.

55. Had this document been shown or explained to me, I would not have signed it without first speaking to my lawyer Sean Kelly.

56. Every month since occupancy, I have received a statement from Reliance Home Comfort for its "Rental Home Comfort Service". I pay a fee for rental of the HVAC. Attached and marked as **Exhibit "L"** to this my Affidavit is a true copy of the invoices from October 2, 2014 until November 8, 2015. The rental charge has increased, and my total current bill is now $85.97 per month.

57. There is absolutely no reason why I would have committed to rent a piece of equipment to which I was already entitled under the Agreement of Purchase and Sale.

58. I think that Mr. Ayre, Mr. Theberge and Theberge Developments deliberately or purposefully misled me with respect to the document and the circumstances surrounding execution. I should have been able to consult my lawyer, but I was not afforded the opportunity to do so.

59. I don't know if I ever signed that document, and since I have never been provided with an original of the document, I cannot verify my signature.

60. I think that at some point after execution of the Agreement of Purchase and Sale, Mr. Ayre, Mr. Theberge and Theberge Developments discovered that the Agreement of

Purchase and Sale was not complete, and that they sought to fix that mistake with this document.

61. It is my belief that the Defendants acted in bad faith when they had me sign the document at the colour and upgrade meeting.

AMENDMENTS TO THE AGREEMENT OF PURCHASE AND SALE

62. I have reviewed my purchase file, and I note that I did sign certain amendments to the Agreement of Purchase and Sale over the three-year period after the agreement was signed. For example:

    a. Attached and marked as **Exhibit "M"** to this my Affidavit are true copies of two amendments to the Agreement of Purchase and Sale dated October 19, 2011 and dated October 25, 2011 respectively. These amendments related to the rescission period.

    b. Attached and marked as **Exhibit "N"** to this my Affidavit is a true copy of an amendment to the Agreement of Purchase and Sale dated July 2, 2014.

63. I note that for these amendments:

    - The document is entitled "Adendum to the Agreement of Purchase and Sale" or "Amendment to the Agreement of Purchase and Sale";
    - A witness signed the document; and
    - I signed the Amendment. I remember signing these amendments either at my lawyer's office or at home.

64. I would expect that other purchasers would have signed similar amendments on similar terms under similar circumstances.

65. For the document that pertains to the air handler and hot water tank, the document was apparently signed in the presence of the builder with no witnesses.

DAMAGES RELATED TO THE HVAC

66. When I received my first monthly invoice, I discovered that I was paying for the Unit's HVAC.
67. I have visited the website www.ecologix.ca, and have attached and marked as **Exhibit "O"** to this my Affidavit certain information on the "ECRW Series – Reliance Rental Air Handler". The Defendants would know if this unit is the same as the one for my Unit, but for the purpose of this Affidavit, I have assumed that it is.
68. I am advised that the hot water tank and air handlers installed in Blocks 1 and 2 of Alta Vista Ridge are different than the hot water tank and air handler installed in Blocks 4 to 7. I do not know about the hot water tank and air handlers installed in Block 3.
69. I am advised that the owners in Blocks 1 and 2 are also renting their hot water tank and air handlers from Reliance Home Comfort, and are paying more than $100 per month.
70. As shown in Exhibit "L", I have been paying approximately $85 per month to Reliance Home Comfort for the rental cost of the hot water tank and air handler. So long as I own the Unit, I will need to pay that bill. The same applies for other owners as well.
71. In or about June 2014, I learned that the air handler and water tank unit was rented from Reliance Home Comfort in September 2014. As of June 2014, the buyout price for the air handler alone was $2,430. The cost of the buyout decreases $10 per month. For example, if I were to purchase the air handler in December 2015, the cost would be approximately $2,360. I don't know if the pricing has changed since then.

72. Regarding the water tank, the buyout price was $2,780 as at June 2014. I don't know if the cost of the buyout for the water tank decreases per month or if it has changed altogether.
73. I do not know how much the Defendants paid for the hot water tanks and air handler units that were installed.
74. Because "forced air/heating cooling" are likely included in the definition of a standard unit in CCC No. 958's bylaws, it is my understanding that the air handler and water tank unit are covered under the condominium's insurance policy. In other words, the air handler and water tank unit belongs to them, and I cannot buy it out.
75. In my view, Theberge Developments have been unjustly enriched because it should have supplied the air handler unit, and now I have been forced to pay for it.
76. Attached and marked as **Exhibit "P"** to this my Affidavit is a true copy of a memorandum dated March 30, 2015 regarding the hot water tank and heat exchange units.

FIRST SUBCLASS – STORAGE UNITS

77. At the time that I took occupancy of the Unit, I discovered that I did not have a storage unit even though it was expressly included in the Agreement of Purchase and Sale.
78. As I understand it, there are storage units constructed in the underground parking garage underneath Blocks 4 to 7 of Alta Vista Ridge. I expected that my storage unit would be assigned by the Defendants at some point after occupancy.
79. By e-mail dated October 14, 2014, a true copy of which is attached and marked as **Exhibit "Q"** to this my Affidavit, Mr. Ayre e-mailed me and other owners in Alta Vista

Ridge to advise that 21 storage lockers were available for purchase. The cost was $2,500 or $5,000 per locker depending on the size.

80. I contacted Dymon Storage, and was advised that a 5x5 foot storage unit rents for $79 plus HST per month and a 5x10 foot storage unit rents for $135 plus HST per month.

81. If I were to sell my Unit, I cannot offer it with a storage unit. That decreases the future sale price of the Unit.

82. At one point, I had heard rumblings that Mr. Theberge was planning to build storage lockers in the parking garage. That hasn't happened.

83. In or about February 2015, I attended the "turnover" meeting of CCC No. 958. Mr. Theberge attended. Someone in attendance asked Mr. Theberge about when the owners would receive their storage lockers. Mr. Theberge answered that there had been a typo in the agreement of purchase and sale.

SECOND SUBCLASS — FLOOR PLAN

84. For ease of reference, below I have reproduced the floor plan which was attached at Schedules "B" and "C" of the Agreement of Purchase and Sale and a video of my unit (Exhibit "J").

THEBERGE HOMES

ALTAVISTA RIDGE

OTTAWA ONTARIO

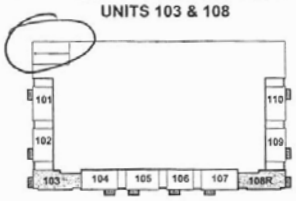
960 SQ. FT.

+ 50 SQ.FT. TERRACE

2 BEDROOMS 2 BATHS

The CANTERBURY

UNITS 103 & 108



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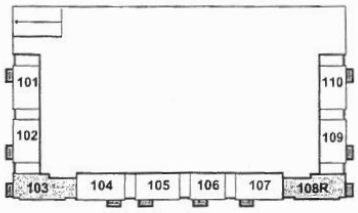

85. On October 22, 2014, two days before occupancy, I met with Mr. Ayre at the Unit to complete my pre-delivery inspection. During the inspection, Mr. Ayre casually but nervously pointed out the landing that had been constructed to exit the Unit. Attached and marked as **Exhibit "R"** to this my Affidavit is a true copy of a photograph of the landing .
86. This was the first occasion that I saw the finished Unit. I was shocked to see that the Unit was no longer a walkout, and that there was a one foot or so high ledge to climb to get out onto the patio.
87. Mr. Ayre told me that this landing "would be dealt with". My bigger issue, which I expressed to him, was that the Unit was supposed to be a walkout. I was less concerned about the landing, and more concerned that the Unit was not what I had intended to purchase. I told Mr. Ayre that this Unit was supposed to be a walkout. He said, "I don't know what would give you that idea? There are no walkouts in this building."
88. Several weeks later, I was walking my dog, and saw that at least one other unit was a "real" walkout in that no step up was required to exit to the patio.
89. The Unit was not supposed to be below grade.
90. By e-mail dated December 6, 2014, I wrote Mr. Ayre to describe some of the problems that I was experiencing with the Unit. With respect to the current litigation, I told Mr. Ayre that the floor plan for the unit included a sliding door to the terrace, but a swing door had been installed. I again expressed that the floor plan was supposed to be a walkout.

91. In his response, Mr. Ayre didn't address the floor plan issue specifically. Attached and marked as **Exhibit "S"** to this my Affidavit is a true copy of our e-mail correspondence on December 6, 2014.

92. As part of the claim to Tarion, I wrote that my Unit was not a walkout, but it was built at least one foot below ground. I wrote "there is no way to exist the unit through the patio/courtyard doors without climbing one-foot high ledge to the patio door." Attached and marked as **Exhibit "T"** to this my Affidavit is a true copy of my original claim to Tarion.

93. As a result of the various deficiencies within the Unit, Doug Lappan who I believe is an inspector with Tarion, inspected my Unit on or about May 22, 2015. With respect to the floor plan issue that I have described above, Mr. Lappan wrote that:

> There was an observed unfinished landing and step from the unit to the door leading to the exterior patio area for this unit. The dispute is the intend [sic] of the agreement to provide a walkout unit and therefore remove the need to provide a landing and step. You did advised [sic] that there was a unit which was also considered as a walkout and did not have the landing or the step.
>
> The dispute of this being a walkout unit is contractual. The landing and step would be considered a unit complaint where the exterior wall and patio area would be considered a common element complaint.
>
> This claim does not fall within the statutory warranties provided under the *Ontario New Home Warranties Plan Act.*

94. Attached and marked as **Exhibit "U"** to this my Affidavit is a true copy of Tarion's warranty assessment report dated May 28, 2015.

95. Attached and marked as **Exhibit "V"** to this my Affidavit is a true copy of the Certificate of Completion and Possession/Warranty Certificate dated October 22, 2014.

96. It is my understanding that there are other original purchasers who purchased walkout units, and the Defendants have provided units that are below grade. Their solution to the problem is the installation of a step and landing. In addition, these units were supposed to have sliding doors instead of swing doors.

97. Between the landing and the swing door, there is a significant encroachment on the living space. For example, the square footage of my Unit is approximately 950 square feet. There is a 50 square foot patio. The proposed landing makes approximately 1/3 of my living room unusable. Furthermore, I can't put in a dining room table. Attached and marked as **Exhibit "W"** to this my Affidavit is a true copy of photographs of my living space as described.

98. I understand that the Unit is one of the larger condos in Alta Vista Ridge. There are other units that are 700 square feet so the landing and door take up a larger proportion of the living space.

99. In addition to the usable space that is lost, there is a heating problem. The Unit is below grade, which means that it requires more heat.

REQUIREMENTS FOR CERTIFICATION (SECTION 5 OF THE *CLASS PROCEEDINGS ACT, 1992*)

100. This affidavit is sworn in support of a motion to certify this action as a class proceeding on behalf of the original purchasers of Alta Vista Ridge.

101. I understand that the following requirements must be satisfied in order for an action to be certified as a class proceeding:

a. The Statement of Claim makes out a claim recognizable in law;

b. The proposed class is identifiable;

c. The claims of the class members raise common issues;

d. A class proceeding is the preferable procedure for the resolution of the common issues; and

e. The representative plaintiff will fairly and adequately represent the class, does not have any interests in conflict with the class, and presents a workable plan of proceeding for bringing the action forward.

102. Below I have summarized why the claims raised in this action are common to all of the original purchasers in Alta Vista Ridge and why, in my opinion, a class proceeding in the overwhelmingly preferable way to bring this action forward.

1. Cause of action (section 5(1)(a))

103. Attached and marked as **Exhibit "X"** to this my Affidavit is a true copy of the Statement of Claim.

104. Attached and marked as **Exhibit "Y"** to this my Affidavit is a true copy of the draft Statement of Defence.

2. Identifiable class (section 5(1)(b))

105. The proposed class consists of all persons who were either:

a. Original purchasers of a condominium unit or units purchased from the Defendants Theberge Developments ("Theberge Developments") at Alta Vista Ridge that are currently constructed; or

b. Persons who received a transfer or assignment of an original purchaser's interest in such original purchaser's respective agreement or agreements of purchase and sale prior to final closing; and

c. Who completed the final closing with respect to such unit or units.

106. The first proposed subclass is defined as all persons:

a. Who are part of the class as defined in paragraph 105; and

b. Persons who purchased a unit or units whose Agreement of Purchase and Sale included a storage locker.

107. The second proposed subclass is defined as all persons:

a. Who are part of the class as defined in paragraph 105; and

b. Persons who purchased a unit or units whose floor plans provided are in breach of the provisions of the agreement of purchase and sale.

108. I don't know for certain how many class members there are. I believe that there are approximately 138 units in Alta Vista Ridge. I don't know precisely how many people own multiple units or how many units have more than one owner. I expect that the Defendants could give a much more accurate estimate of the number of people in the class.

109. In or about the winter of 2015 to the present, at various times, I met, spoke or corresponded with several potential class members whose agreements of purchase and sale who advised that they did not receive a storage locker and that they were renting an HVAC unit from Reliance Home Comfort. I made a list of those potential class members, and I am sure that there are others who are not included. Attached and marked as **Exhibit "Z"** to this my Affidavit is a true copy of the list.

110. The class is readily identifiable and can be easily communicated with.

3. Common issues (section 5(1)(c))

111. To the best of my knowledge, information and belief, the agreements of purchase and sale are all standard form agreements drafted by the Defendants or their counsel. I believe that these agreements are similar or identical in all respects material to this litigation.

112. I believe that all members of the proposed class would have received an identical Disclosure Statement.

113. The evidence set out above shows that all of the proposed class members are now paying a monthly fee for HVAC and have not received a storage locker notwithstanding the terms in their respective agreements of purchase and sale.

114. Many of the members of the proposed class have also told me that they have now learned that they signed a document similar to the one attached at Exhibit “I” at a colour and upgrade meeting. These people tell me that they had no idea that they signed such a document.

115. Regarding the subclass, there are at least 6 or 7 owners who contracted for walkout units at ground level. Their units do not conform with their agreements of purchase and sale in that their units are below grade and the Defendants installed swing doors instead of sliding doors. The Defendants have installed or are in the process of installing landings that make a large proportion of their living space unusable.

116. For these reasons, I believe that the issues raised in the Statement of Claim are common to all prospective class members and prospective subclass members and that a class action will resolve all of the outstanding issues.

4. Preferability of a class action (section 5(1)(d))

117. As described above, I have met or spoken with many of the original purchasers in Alta Vista Ridge. Although some owners hold these units as rental properties, the vast majority reside in Alta Vista Ridge. Many owners, like me, are first-time home buyers, who chose the development because of the “affordable” price tag. Alta Vista Ridge is not nor was it ever intended to be a high-end condominium development.

118. Many of the owners cannot afford to sue the Defendants or have been told that the legal fees for an individual claim would far exceed the amount of damages that could possibly be recovered. Most potential class members cannot afford the investment of time, money and resources needed to properly advance a case of this nature given the financial pressures, which many are currently facing.

119. Even if a group of owners did possess the resources and time to band together, it would be highly inefficient and ineffective for them to litigate the same issue of contractual interpretation against these Defendants. I believe that it would be far preferable to have a single determination of the legal and factual issues in one class proceeding. The prosecution of a single case is the only real prospect for a meaningful adjudication of the claim. If individual owners are left to pursue these issues, I am sure they will never be adjudicated.

120. By virtue of the Disclosure Statement, which expressly defines the standard unit across CCC No. 958, it makes sense to have a uniform interpretation of whether the HVAC system was included within the standard unit and whether the agreements of purchase and sale included a storage locker. For the subclass, section 7 of the agreement of purchase and sale should be singularly interpreted to determine what deviations, if any, under the agreement are permissible.

121. I believe that all of these factors render a class proceeding the overwhelmingly preferable procedure to advance this claim. I can conceive of no benefit or fairness in requiring each owner to assert its rights under a common agreement with respect to common items in multiple trials conducted repeatedly.

5. Suitability of the class representative (section 5(1)(e))

122. I believe that I am a member of the class described above. I have a real and genuine interest in resolving this issue for myself and the benefit of all prospective class members. I have come to realize that if no one challenges Theberge Developments and Mr. Theberge, they will start another condominium project and take advantage of other vulnerable purchasers.

123. I am aware of the duty owed by a class representative and will fairly and adequately represent the interests of the class if the Court appoints me. I am fully committed to contributing my time, knowledge, energy and leadership to bring this case forward.

124. I appreciate that the Plaintiff's role is to protect the interests of the class. I do not believe that I have any interest in conflict with the members of the proposed class.

125. Attached and marked as **Exhibit "AA"** to this my Affidavit is a true copy of our plan of proceeding, which sets out a method of advancing this case on a timely basis on behalf of the class and a method of notifying class members of the action and of developments in the case.

126. I make this Affidavit in support of a motion for an Order certifying this action under the *Class Proceedings Act, 1992*, and for no other or improper purpose.

SWORN BEFORE ME)
at the City of Ottawa in)
the Province of Ontario)
this 4th day of January, 2016)
)
_____)
A Commissioner, etc)

_____
Sabrina Heyde

TAB 3

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

AFFIDAVIT #1 OF MATTHEW MIKLAUCIC
(Sworn: June 24, 2021)

I, Matthew Miklaucic, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a lawyer at KMH Lawyers ("KMH Lawyers" or "Class Counsel"). KMH is counsel to the Plaintiff in the above-captioned action. As a lawyer, I have the knowledge set out herein. Where that knowledge is based on information obtained from others, I have so indicated, and I believe that information to be true.

2. No portion of this Affidavit is meant to waive, nor should it be understood or interpreted to be a waiver of solicitor-client privilege, litigation privilege, settlement privilege or any other privilege related or potentially attaching to any of the information conveyed herein.

3. Unless otherwise noted, capitalized terms that I have used in this Affidavit, which are not specifically defined herein, have the meanings attributed to them in the Settlement Agreement.

4. I am swearing this Affidavit in support of the Settlement Agreement reached between the parties to this class and particularly with respect to the appropriateness of the Settlement Agreement (Exhibit "A" to Sabrina Heyde's Affidavit ("Ms. Heyde's Affidavit")) approval of the retainer agreements between Class Counsel and the Plaintiff and approval of Class Counsel Fees to be paid from the Settlement Funds.

5. The Settlement Agreement contemplates a two-stage process leading to approval of the Settlement and its implementation, which are set out at sections 3 and 5 of the Settlement Agreement. Class Counsel was first required to first bring a motion to approve the notice of the Settlement Approval Hearing and then subsequently a motion approving the settlement.

6. The motion to approve the Notice of Class Action Settlement Approval Hearing was heard on April 23, 2021. Attached and marked as **Exhibit "A"** to this my Affidavit is a true copy of the Order dated April 23, 2021.

Nature of the class action

7. The Statement of Claim was issued on June 3, 2015 and subsequently amended. Attached and marked as **Exhibit "B"** to this my Affidavit is a true copy of the Third Amended Statement of Claim.

8. In general terms, the Class Members were purchasers of condominium units in Alta Vista Ridge, a 138-unit residential development in Ottawa. In the Statement of Claim, it is alleged that

the Defendant Theberge Developments Ltd., developer of Alta Vista Ridge, misrepresented what would be provided with each unit and, in particular, whether a forced air system and storage locker were included in the purchase price. In the Statement of Claim, the class is seeking damages (including punitive damages) from the Defendant based on breach of contract, tort and breach of the *Condominium Act*.

9. The Defendant denied all liability in its Statement of Defence, which was delivered on July 25, 2019. Attached and marked **as Exhibit "C"** to this my Affidavit is a true copy of the Statement of Defence.

Certification and appeal

10. On September 21, 2016, we brought the certification motion. Justice R. Smith granted the motion for certification on March 9, 2017. Attached and marked as **Exhibits "D"** and **"E"** to this my Affidavit are true copies of the Reasons for Decision on Certification Motion and the Order dated March 9, 2017 ("Certification Order").

11. On August 23, 2017, the Defendant brought a motion seeking leave to appeal the certification motion to Divisional Court. The motion for leave was granted on August 23, 2017. Attached and marked as **Exhibit "F"** to this my Affidavit is a true copy of the Divisional Court Endorsement of Justices Nordheimer, Stewart and Padillo.

12. On May 10, 2018, the appeal was heard by Justices Charbonneau, Myers, and Gomery. A portion of the appeal was allowed. Attached and marked as **Exhibits "G"** and **"H"** to this my Affidavit are true copies of the Reasons for Judgment and the Order dated July 20, 2018 ("Divisional Court Order").

13. On April 11, 2019, the Defendant brought a motion seeking leave to appeal the Divisional Court appeal. The motion for leave was dismissed. Attached and marked as **Exhibit "I"** to this my Affidavit is a true copy of the Endorsement of the Court of Appeal for Ontario.

14. As set out in the Certification Order and narrowed in the Divisional Court Order, the following common issues were set for trial:

(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 Theberge Developments liable for damages for the tort of negligent misrepresentation for failing to provide a forced air heating system for each class members' 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 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?

(e) Does signing of the "Acknowledgement" by members of the second subclass have any legal effect, as Theberge did not give any consideration in return for their signing?

The Related Action

15. Attached and marked as **Exhibit "J"** to this my Affidavit is a true copy of the Statement of Claim in Court File No 17-72825 ("Related Action").

16. In general terms, the Defendant (as plaintiff in the Related Action) sought contribution and indemnity in respect of the Action from Class Counsel, the conveyancing lawyers representing Class Members in their purchases of units at Alta Vista Ridge, the Defendant's real estate lawyer Andre Munroe and his law firm, Reliance Comfort Limited Partnership and some other professionals.

Status of the litigation (Related Action and the Action)

17. With respect to the Related Action, generally speaking, the only litigation step that has been taken by the Defendant (as plaintiff in the Related Action) is service of the Statement of Claim,

18. With respect to the Action, on September 10, 2019, we brought a motion to approve the litigation plan. Attached and marked as **Exhibit "K"** to this my Affidavit is a true copy of the Order dated September 13, 2019 attaching the litigation plan.

19. In accordance with the litigation plan (Exhibit "K"), the parties had completed both documentary discovery and examinations for discovery. Pre-trial has also been completed. According to the litigation plan, the trial was to be heard in 2021.

Factors considered in assessing the fairness and reasonableness of the settlement

20. As noted in Ms. Heyde's Affidavit, the parties settled the Action in June 2021 after several days of pre-trial.

21. In assessing the reasonableness of the settlement, we had access to and considered the pleadings, the Defendant's pleadings, productions, examinations for discovery and the evidence that was before the Court through certification.

22. In our view, we possessed adequate information from which to make an informed recommendation concerning the resolution of the Action as against the Defendant on the basis upon which it was resolved.

23. We, as Class Counsel, recommend approval of the Settlement Agreement (Exhibit "A" to the Affidavit of Sabrina Heyde). In our view, its terms are fair, reasonable and in the best interests of the Class. The Settlement Agreement delivers a substantial, immediate benefit to Class Members in exchange for the release of their claims. While we believed these claims to be meritorious, we were particularly concerned with recovery and the amount of time that would be required to achieve any benefit for the Class Members.

24. Below I explain aspects of our rationale for recommending the settlement to the Plaintiff, the Class Members and to the Court.

25. One factor underlying our recommendation to the client was litigation risk. Litigation always poses risks and uncertainties. Accordingly, this is a risk that at trial, a court may accept anticipated defences, or defences not presently known or anticipated, but which may be advanced in the future by any or all of the Defendants, with a possible trial result being a denial of some or all of the claims asserted in the action.

26. In addition, there is always a risk that the Defendant would appeal a trial result in favour of the Class, which adds further time and delay that are avoided by settlement.

27. Among the more significant elements in our assessment of risk regarding liability were:

(a) Whether the Defendant was allowed to deviate from the plans and specifications pursuant to section 7 of the Agreement of Purchase and Sale ("APS") or the Disclosure Statement;

(b) Whether doctrines of merger and waiver eliminated the Class Members' right to recovery after closing;

(c) The reasonableness of the purchasers' reliance on Theberge's statements with respect to the forced air heating system and storage unit; and

(d) Availability of punitive damages.

28. In our assessment of the liability risk, we did not accept the positions taken by the Defendant. However, we acknowledge that in the course of litigation there is always a risk that a Court will accept the evidence of the opposing side on reliance or an unfavourable interpretation of the APS.

29. While we generally expected success on liability, our primary concern was the Defendant's ability to satisfy a judgment/recovery risk and the length of time before the Class Members would recover any funds.

30. The Defendant is a small, local real estate development company. Based on the documentary disclosure in the current litigation, it is presumed that the Defendant typically sets up a new corporation for each project, develops that project and then transfers the corporation or land to the new owners or shareholders. As a result, it was not clear that the Defendant has or will have sufficient assets to satisfy judgment. It is also possible that Joey Theberge would continue the business of real estate development under a different corporation.

31. As noted in Ms. Heyde's Affidavit, we were also concerned about the importance of recovery to these litigants who had continued to pay storage and rental fees without any end in sight.

32. Even if successful at the common issues trial (and possibly an appeal), the Plaintiff would still be required to quantify damages, which would also be a prolonged process.

33. Expert evidence would be required with respect to damages for both the Class and the First Subclass. For the Class, damages would be calculated based on the class members' monthly Reliance bills and the percentage of the bill allocated toward heating of the unit as opposed to water. The class members agreed to a hot water tank rental under the APS, but not rental of the furnace. As a result, expert evidence (from an engineer) would be required to "divide" what portion of rental was attributable to damages in the action.

34. Even after the percentage was determined by the Court, Class Members' damages would have differed based on the following factors including:

(a) How long Class Members owned or continued to own their condos *i.e.* damages end once a unit is sold, which means different amounts for each Class Member;

(b) Prices for heating systems may have varied; and

(c) Different heating systems in different units, which may have also meant that the percentage allocation was different as between Class Members.

35. After the common issues trial, the Court may have directed individual references on damages. Alternatively, the Plaintiff may have asked the common issues judge to assess an aggregate damages pursuant to section 24 of the *Class Proceedings Act*. Either way, the process would have been lengthy.

36. We were also concerned about the "smallness" of the class action in light of the damages to be awarded to each unit as compared to judicial resources. Using Ms. Heyde as an example, she owned her unit from 2014 to 2019, which was approximately 60 months. In 2014, Ms. Heyde's total monthly bill was approximately $82. In 2019, Ms. Heyde's total monthly Reliance bill was $96. The average of those amounts is $89 per month. If the Court allocated a 50% percentage to damages or approximately $45 per month, the range for Ms. Heyde's total damages was between $1,560-$2,670. There are 114 class members to be decided.

37. As noted above, it is anticipated that the Defendant would have argued that the class members should have mitigated their damages by buying out the rentals from Reliance. Also, the

Defendant has argued that the class members received some benefit for renting the heating system because they were not responsible for repairs. If successful, both arguments would have reduced any amounts payable to the class.

38. With respect to the First Subclass, the quantum of damages for the lack of a storage locker would also have to be calculated. Ms. Heyde in her Affidavit sworn in support of the certification motion (Exhibit “B”) noted that the cost of purchasing a storage locker from the Defendant in 2014 was between $2,500 or $5,000 depending on the size. With 60 members of that class, the total damages are presently estimated to be between $150,000 and $300,000.

39. In our view, the negotiated settlement amounts compared to a good day in Court represent a good result for the class members. In addition to the certainty of receiving a payment, many have relief toward their monthly utilities or storage costs.

40. The Settlement eliminates these identified risks to recovery and instead provides an immediate and substantial benefit to Class Members in exchange for the release of their claims. It also ensures that the Defendant cannot add the class members or their lawyers as parties to the Related Action.

41. For these reasons Class Counsel recommend the approval of the Settlement as fair, reasonable and in the best interests of the class.

Amount of distribution and distribution procedure

42. The Net Settlement Proceeds are to be distributed equally to every Class Member and First Subclass Member by dividing the funds by the number of Class Members and First Subclass members.

43. Section 6.3 of the Settlement Agreement also sets out the following, simple procedure for the distribution of the settlement funds:

Category	**Amount to be Distributed**	**Number of Class Members**
Class	**$150,000 all inclusive, less the CPF Levy**	**114**
First Subclass	**$100,000 all inclusive, less the CPF Levy**	**60**
Honorarium	**$5,000 all inclusive**	**Paid to the Plaintiff**

44. Notably, there are no additional costs to the Class Members with respect to the distribution of the Settlement Funds.

Retainer agreements

45. Class Counsel entered two retainer agreements.

46. The first retainer agreement was entered with the Plaintiff on May 7, 2015 ("First Retainer Agreement"). Attached and marked as **Exhibit "L"** to this my Affidavit is a true copy of the First Retainer Agreement.

47. The second retainer agreement was entered with the Plaintiff on March 12, 2018 ("Second Retainer Agreement"). Attached and marked as **Exhibit "M"** to this my Affidavit is a true copy of the Second Retainer Agreement.

48. With respect to fees, the First Retainer Agreement provided that Class Counsel would receive either 30% or 33.3% percent of damages or settlement funds depending on when the case was resolved. In addition, Class Counsel had the option taking the costs awarded after a trial instead of the contingency fee.

49. According to the Second Retainer Agreement:

Part 2: Our Fees, Expenses, and Billing Arrangements

Percentage based on work done

A contingency agreement means that you will pay our legal fees based on the amount you recover.

Our percentage fee will be less if your claim is settled than if it goes to trial. If it is settled, the fee will depend on the stage at which the lawsuit is settled. Our percentage fee will be:

1. **30% of the settlement money**
   If we settle your claim at least 90 days before trial

2. **33 1/3% of the trial judgment**
   If we settle your claim less than 90 days before trial or at trial

For example, if your case goes to trial and the court awards you $100,000 for damages, our fee would be 33 1/3% of $100,000 or $33,330, plus legal expenses (also known as disbursements), which are described in further detail below.

There is one case where our percentage fee will no longer apply. You may want to go to trial even though we recommend that you settle. If you decide to go to trial despite our advice, you agree to pay our legal expenses and an hourly fee based on the actual time spent on this matter and the hourly rates described in *Part 3* below.

You understand that there are options for retaining a lawyer other than by way of a contingency fee agreement, including retaining a lawyer by way of an hourly-rate retainer. You also understand that hourly rate may vary among lawyers and that you can speak to other lawyers to compare rates.

All of the usual protections and controls on retainers between lawyers and clients as defined by the Law Society of Upper Canada and the common law apply to this contingency fee retainer agreement.

Costs

If we successfully settle your claim or win at trial, we will seek a sum of money called *costs* from the Defendant to help cover some of our legal fees and expenses. Although it is impossible to foresee exactly how much our legal fees and expenses will be, we estimate that if the matter went to trial and we were successful, our fees could be anywhere from $50,000 to $150,000. It could be more, and if it is, we would let you know.

As mentioned above in *Part 1*, if we are unsuccessful in settling your claim or we lose at trial, you will be responsible for paying any costs awarded against you to the Defendant. The class members will not be responsible for paying the costs against you.

Award or Settlement under $200,000

If the Court orders that the Defendant shall pay costs to you, and the damages awarded are less than $200,000 we may choose to receive the costs award as our fee instead of accepting the percentage fee as set out in Part 2 of this agreement. You understand that the amount of costs may be higher or

lower than a percentage fee would be. If we choose to receive costs paid by the Defendant instead of a percentage fee, the class would then receive 100% of the damages awarded less any disbursements.

Award or Settlement over $200,000

If the Court orders that the Defendant shall pay costs to you, and the damages awarded exceed $200,000, we shall be paid the costs award and the percentage fee as set out in Part 2 of this agreement. For example, if the damages awarded are $1 million, and the costs award is $500,000, I would be paid $333,000 (33.3%) plus $500,000 for the costs award plus disbursements. In the case of a settlement in this example, I would be paid $300,000 (30%) plus $500,000 for the costs award plus disbursements.

50. As set out below, Class Counsel is seeking fees for less than provided for under the Second Retainer Agreement or equal to the amount provided for under the First Retainer Agreement.

The Fees Requested and Factors Supporting the Request

51. Class Counsel is requesting to be paid $125,000 in fees. This is the exact amount specified in the Settlement Agreement.

52. We are prepared to accept this amount notwithstanding the provisions in the Second Retainer Agreement, which provides for a greater amount to be paid to Class Counsel. According to the Second Retainer Agreement, Class Counsel may request to be paid both the costs or fees and 33.3% of the settlement. If we were to request the fees specified under the Second Retainer Agreement, we would be asking for a total of $208,250 ($125,000 plus (33.3% of $250,000 or $83,250).

53. Prior to the commencement of the Action, Class Counsel assessed and assumed the following risks of prosecuting this Action with an uncertain outcome, including exposure to our own fees.

54. This is “small” class action in the way of damages. Based on my review of class action settlements since 2020, the fees awarded to Class Counsel in various actions regularly exceed $1 million: See, for example, *Kouyoumjian* v. *Johnson & Johnson*, 2020 ONSC 1948 (CanLII), Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP, 2020 ONSC 2793 (CanLII) and Shah v. LG Chem, Ltd., 2021 ONSC 396 (CanLII).

55. While I appreciate that each case has different complexities and challenges, and that some cases take longer than others to resolve or be heard, it is my impression appears that class action lawyers mainly accept retainers where the potential for significant fees is high as compared to the number of hours expended. That was not the case in the present proceeding.

56. Since the commencement of the Action in 2014 to this Affidavit, we have docketed time of approximately 1,031 hours.

57. The hourly rates and hours expended since the commencement of the Action up to and including the date of the Affidavit by the primary lawyers and clerks involved in this file are as follows:

TIMEKEEPER	RATE	HOURS
Miriam Vale Peters, Lawyer	$300	263.3
Miriam Vale Peters, Lawyer	$330	110.3
Miriam Vale Peters, Lawyer	$360	94.9
Miriam Vale Peters, Lawyer	$375	23.4
Joanie Roy, Lawyer	$200	32.6
Sara-Louise Drury, Lawyer	$200	5.2
Sara-Louise Drury, Lawyer	$225	39.3
Various Articling Students	$125	138.3
Brenda Desjardins, Law Clerk	$150	192.6
Brenda Desjardins, Law Clerk	$175	123.3
Brenda Desjardins, Law Clerk	$200	7.6
Laura Thompson, Law Clerk	$175	0.2
Jamie Limebeer, Legal Assistant	$110	0.2

58. In terms of time, our unbilled fees is approximately $244,062.50.

Class Proceedings Fund ("CPF") and Disbursements

59. In September 2016, Ms. Heyde entered into an agreement with the CPF whereby CPF agreed to fund the Action's reasonable disbursements on an ongoing basis and, in exchange, would receive, in accordance with the *Law Society Act*, R.S.O. 1990, c. L.8 ("the *Act*"), O. Reg. 771/92, s. 10(3)

(a) The amount of any financial support paid under section 59.3 of the *Act*, excluding any amount repaid by a plaintiff; and

(b) 10 per cent of the amount of the award or settlement funds, if any, to which one or more persons in a class that includes the plaintiff who received financial support under section 59.3 of the *Act* is entitled.

60. As a result of the Settlement, CPF will be paid $25,000 for the levy.

61. At all material times, Ms. Heyde has paid the disbursements for the Class Action out of pocket. We then submitted a claim for reimbursement to CPF, and then paid that reimbursement to Ms. Heyde.

62. CPF did not pay 100% of Ms. Heyde's disbursements. As noted in the Settlement Agreement, Ms. Heyde personally paid $15,469.94, and CPF paid $7,754.20. Ms. Heyde and CPF will be reimbursed for these amounts.

63. I make this Affidavit for no improper purpose.

SWORN by Matthew Miklaucic at the City of Ottawa, in the Province of Ontario, before me on June 24, 2021.

Commissioner for Taking Affidavits
(or as may be)

MATTHEW MIKLAUCIC

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

This is Exhibit "A" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	FRIDAY, THE 23rd
	)	
JUSTICE ROBERT SMITH	)	DAY OF APRIL, 2021

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

ORDER

THIS MOTION made by the Plaintiff for an Order approving the Notice of Settlement and disclosure of identities of certain class members was heard on April 23, 2021 by videoconference at the Courthouse, 161 Elgin Street, Ottawa, Ontario K2P 2K1.

ON HEARING the submissions of counsel for the Plaintiff and counsel for the Defendant,

1. **THIS COURT ORDERS** that Theberge Developments Limited release the identities of those members of the First Subclass who entered into settlement agreements with Theberge Developments Limited.

2. **THIS COURT DECLARES** the Notice of Proposed Class Action Settlement Approval Hearing attached to this Order as Schedule "A" is hereby approved.

ENTERED AT OTTAWA
INSCRIT A OTTAWA
ON/LE 05/11/2021
DOCUMENT # 0411
IN BOOK NO. 73-13
AU REGISTRE NO. 73-13

Robert Smith J.

SCHEDULE "A"
TO ALL ORIGINAL PURCHASERS OF ALTA VISTA RIDGE ON BLACKCOMB PRIVATE IN OTTAWA

NOTICE OF PROPOSED CLASS ACTION SETTLEMENT APPROVAL HEARING

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHTS

Notice published under the *Class Proceedings Act, 1992*

If you are an original purchaser of a property at Alta Vista Ridge or Blackcomb Private in Ottawa and did not opt out of this class action, you are a Class Member. In particular, Class Members consist of all persons:

a) 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) Who received a Disclosure Statement containing the specification for a standard unit in Schedule "2" which included forced air heating/cooling;

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

d) 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; and

e) Who signed an Acknowledgement prior to close of sale.

PURPOSE OF THIS NOTICE

The parties have reached a proposed settlement of this class action lawsuit. The settlement must be approved by the Court before it will become effective. As a Class Member, your legal rights will be affected by this settlement. You can participate in the approval process and comment on, or object to, the settlement if you want to.

THE CLASS ACTION

This class action was brought by Sabrina Heyde in Ottawa, Ontario on June 3, 2015 against Theberge Developments. The lawsuit alleges that Theberge Developments breached its contractual or statutory obligations or misrepresented what would be provided within each condominium unit and particularly whether a forced air system and storage locker were included in the purchase price.

None of the allegations have been proven in Court. Theberge Developments denies any liability or wrongdoing.

TERMS OF THE PROPOSED SETTLEMENT

The full terms of the Settlement Agreement can be viewed at:

www.kmhlawyers.ca

The net settlement proceeds will be divided and distributed amongst the members of the Class Members as follows:

Category	Amount to be Distributed	Number of Class Members
Class	$150,000 all inclusive less the CPF Levy	113
First Subclass	$100,000 all inclusive less the CPF Levy	60
Honorarium	$5,000 all inclusive	Paid to the Plaintiff

Class Counsel will also be seeking approval of their legal fees and disbursements as well as payments to the Class Proceedings Fund. Those amounts are as follows:

a) $125,000 all inclusive for Class Counsel Fees and taxes;

b) $25,224.04 all inclusive for Class Counsel Disbursements that have been paid by the Plaintiff personally in the amount of $15,469.84 and the Class Proceedings Fund in the amount of $9,754.20;

c) $25,000 all inclusive for the Class Proceedings Fund Levy; and

d) $5,000 as an honorarium to Sabrina Heyde for her contribution in the prosecution of this Class Action for the benefit of the Class.

In exchange for these payments, the claim against Theberge Developments will be dismissed and Class Members will release any claim they have against Theberge Developments in relation to the matters alleged in the class action. This means that if the Settlement Agreement receives Court approval, you will not be able to start or continue with any other claim or legal proceeding against Theberge Developments in relation to the matters alleged in the class action.

SETTLEMENT IS SUBJECT TO COURT APPROVAL

The proposed settlement is a compromise of the disputed claims in the class action, and takes into account a variety of the risks inherent in lawsuits. The Court will decide whether to approve the proposed settlement at a settlement approval hearing to be held on **July 28, 2021 at 2 pm by video conference.**

At this hearing the Court will determine whether the Settlement Agreement is fair, reasonable and in the best interests of Class Members.

COMMENTS ON OR OBJECTIONS TO THE PROPOSED SETTLEMENT

If you approve of the proposed settlement you do not have to do anything. You may make comments on or object to the proposed settlement. Any comments or objections must be made in writing and sent to:

Theberge Developments Class Action
KMH Lawyers
B0001-2323 Riverside Drive
Ottawa, ON K1H 8L5
Attention: Miriam Vale Peters

Comments and objections should be sent no later than June 30, 2021. All written submissions received by June 30, 2021 will be brought to the attention of the Court.

A Class Member who objects to the proposed settlement and who wants to make submissions at the hearing must provide written submissions no later than July 20, 2021. That Class Member will be sent the coordinates for the video and may attend the hearing in person or send a representative to explain the reason for their objection.

Any Class Member is welcome to attend the Settlement Approval Hearing on **July 28, 2021,** but you are not required to attend.

ADDITIONAL INFORMATION

KMH Lawyers represents all Class Members in this class action.

Requests for additional information or questions about the class action or proposed settlement should be directed to Miriam Vale Peters of KMH Lawyers by phone at 613-733-3000 or by email at mvp@kmhlawyers.ca. Class Members may also visit the following website:

www.kmhlawyers.ca

INTERPRETATION

This notice is a summary of the terms of the Settlement Agreement and the class action. If there is a conflict between the provisions of this notice and the terms of Settlement Agreement, the Settlement Agreement prevails.

SABRINA HEYDE
Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED
Defendant

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

ORDER

KMH LAWYERS
2323 Riverside Drive
Suite B0001
Ottawa ON K1H 8L5

Miriam Vale Peters
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Tel: 613-733-3000
Fax: 613-523-2924

Lawyers for the Plaintiff
Sabrina Heyde

Box 173

This is Exhibit "B" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No.: 15-64526CP

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SABRINA HEYDE

Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED and JOEY THEBERGE

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

THIRD AMENDED STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service in this court office, WITHIN TWENTY DAYS after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $2,000 for costs, within the time for serving and filing your statement of defence you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $400 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date 3 June, 2015 Issued by "M. Rymdzak"

Local registrar

161 Elgin Street
Ottawa, ON
K2P 2K1

TO: THEBERGE DEVELOPMENTS LIMITED
904 Lady Ellen Place
Ottawa, Ontario
K1Z 5L5

AND TO: JOEY THEBERGE
904 Lady Ellen Place
Ottawa, Ontario
K1Z 5L5

CLAIM

1. The Plaintiff claims, as representative plaintiff under the *Class Proceedings Act*, 1992, S.O. 1992, c. 6. ("*Class Proceedings Act*"), on behalf of herself and all other purchasers of the condominium development known as Alta Vista Ridge, against all of the Defendants, jointly and severally:

    a. An Order pursuant to the *Class Proceedings Act* certifying this action as a class proceeding and appointing the Plaintiff as a representative Plaintiff for the class members and any appropriate subclass thereof;

    b. Damages and/or restitution in the amount of $2 million and such further and other amounts that are owing as a result of the Defendants' breach of contract, unjust enrichment, negligent misrepresentation or fraudulent misrepresentation, breach of fiduciary duty and breaches pursuant to the *Condominium Act*, as amended;

    c. In the alternative to subparagraph (b), damages in the amount to be determined at trial for diminution in value of the condominium units forming Ottawa-Carleton Condominium Corporation No. 958 as a result of the Defendants' breach of contract, unjust enrichment, negligent misrepresentation or fraudulent misrepresentation;

    d. A Declaration that the Defendants have been unjustly enriched at the expense of the Plaintiff and the other Class Members;

    e. An Order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

    f. A Declaration that the Defendants are jointly and severally liable for any and all damages awarded;

g. A Declaration that the corporate veil of Theberge Developments be pierced so that judgment may be granted against Joey Theberge personally;

h. An Order compelling the creation of a plan of distribution pursuant to the *Class Proceedings Act*;

i. Costs of this action on a substantial indemnity scale;

j. Costs of notice and administering the plan of distribution and recovery in this action plus taxes;

k. Interest in accordance with the *Courts of Justice Act*, R.S.O. 1990, Chap. C. 43 ("*Courts of Justice Act*"); and

l. Such further and other relief as this Honourable Court may deem just.

2. As against Theberge Developments Limited and Joey Theberge, punitive damages in the amount of $1 million.

PARTIES

3. The Representative Plaintiff Sabrina Heyde ("Heyde") is an original purchaser of a residential condominium unit located at or in the vicinity of Russell Road in Ottawa. This condominium unit is a unit in a residential condominium development project known as Alta Vista Ridge ("Alta Vista Ridge").

4. The facts set out herein pertain to Heyde and, with some variation, to all others similarly situated. Collectively, Heyde and all others similarly situated form a proposed class pursuant to the *Class Proceedings Act*.

5. The Defendant Theberge Developments Limited ("Theberge Developments") is a corporation incorporated pursuant to the laws of the Province of Ontario. Theberge Developments was, at all material times, the developer and declarant, or proposed declarant, of Alta Vista Ridge and vendors under Agreements of Purchase and Sale entered into by Heyde and all other members of the proposed class.

6. The Defendant Joey Theberge was at all material times a director, officer and shareholder of Theberge Developments. At all material times, Joey Theberge was the controlling or directing mind of Theberge Developments as a corporate trustee. At all material times, Joey Theberge had knowledge of the actions of this Defendant.

ALTA VISTA RIDGE

7. Heyde resides at 314A Everest Private ("the Unit") in the City of Ottawa. The Unit is one of approximately 138 homes and urban flats in Alta Vista Ridge.

8. The Unit's legal description is, as follows:

> Unit 1, Level A, Ottawa-Carleton Standard Condominium Plan No. 958 and its appurtenant interest; subject to and together with easements as set out in schedule A as in OC1640741; City of Ottawa

9. Interim closing took place on or about October 24, 2014 at which time Heyde took possession of the Unit.

10. The declaration and description of the condominium property were registered on or about November 27, 2014 thus creating the Ottawa-Carleton Condominium Corporation No. 958.

11. Final closing for the purchase by Heyde took place on or about December 22, 2014 at which time she became the registered owner of the Unit

12. The closing dates for some members of the proposed class took place at the same time, and the closing date for other members of the proposed class took place at other times. To the extent that Heyde is aware, the other relevant closing dates were in or about the fall of 2014 and thereafter.

PROPOSED CLASS

13. The proposed class is defined as all persons:

    a. who were either:

        i. original purchasers of a condominium unit or units purchased from Theberge Developments at Alta Vista Ridge that are currently constructed; or

        ii. persons who received a transfer or assignment of an original purchaser's interest in such original purchaser's respective agreement or agreements of purchase and sale prior to final closing; and

    b. who completed the final closing with respect to such unit or units; and

    c. Whose agreements did not include the following provision:

    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 associate to same upon taking occupancy of the Unit.

14. The first proposed subclass is defined as all persons:

    a. who are part of the class as defined in paragraph 13; and

b. persons who purchased a unit or units whose Agreement of Purchase and Sale included a storage locker.

15. The second proposed subclass is defined as all persons:

a. who are part of the class as defined in paragraph 13; and

b. persons who purchased a unit or units whose floor plans provided are in breach of their agreements or agreements of purchase and sale.

16. Heyde, as representative plaintiff, on her own behalf and on behalf of the members of the proposed class and proposed subclasses, subject to certification of the class by this Honourable Court pursuant to the *Class Proceedings Act*, states that Theberge Developments breached the agreements of sale by:

a. Failing to provide a storage unit;

b. Failed to provide heating, ventilation and air conditioning system ("HVAC") or alternatively that HVAC is not included in the base price of the unit or units; and

c. On behalf of the subclass, by failing to deliver units that conform to the floor plans specified within the respective agreements of purchase and sale.

AGREEMENTS OF PURCHASE AND SALE

17. On or about October 9, 2011, Heyde entered into an Agreement of Purchase and Sale with Theberge Developments for the purchase of the Unit.

18. At or about the time that the parties entered into the Agreement of Purchase and Sale, Heyde was provided with a Disclosure Statement, Condominium Documents and Declaration ("Disclosure

Statement") in accordance with section 72 of the *Condominium Act*, 1998, S.O. 1998, c. 19 ("*Condominium Act*").

19. Heyde says, and the fact is that Theberge Developments drafted the Agreement of Purchase and Sale and the Disclosure Statement (collectively the "APS").

20. Pursuant to the express or implied terms of the APS, *inter alia*:

    a. The base price for the Unit, which included a storage unit, was $214,900;

    b. The base price for the Unit included the HVAC;

    c. Theberge Developments agreed to construct the Unit and the common elements in a good and workmanlike manner in substantial conformity with the plans and specifications approved by Heyde. Theberge Developments shall have the right to make minor deviations from the plans and specifications, and to substitute other material for that provided for in the plans and specifications provided that any materials substituted shall be of a quality equal to or better than the material in the plans or specifications. Heyde agreed to accept any variations or substitutions provided that same do not diminish the value of the Unit or substantially alter the common elements [Section 7(a) of the Agreement of Purchase and Sale];

    d. Heyde acknowledged that variations in colours, shades of colours and textures of materials may occur in finishing materials such as wood, marble, ceramic tile, cushion flooring, broadloom, bathroom fixtures, cabinetry, paint, stain and Heyde agreed that Theberge Developments is not responsible for such variations. Materials and colours will be as close as possible but not necessarily identical to the Theberge Developments samples [Section 7(b) of the Agreement of Purchase and Sale];

e. Each owner of a dwelling unit within the building shall be responsible from Occupancy Date for all utilities, including separately metered hydro, water, and gas rates, telephone expenses, cable television service, hot water heater 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 [Section 2.3(b) of the Disclosure Statement];

f. 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, warranty, 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; [Section 18 of the Agreement of Purchase and Sale];

g. The parties had a duty of good faith and fair dealing; and

h. Such further and other terms that will be provided before the trial of this matter.

21. Heyde pleads and relies on the doctrine of *contra proferentem*.

22. The base price for units for members of the proposed class varied depending on the dwelling that was purchased. To the extent that Heyde is aware, the terms of the APS (as set out above) were substantially similar to those set out in paragraph 20 above.

BREACH OF CONTRACT/NEGLIGENT MISREPRESENTATION

23. In breach of the APS, Theberge Developments failed to provide a storage Unit and HVAC. Furthermore, or in the alternative, in breach of the APS, Heyde must pay for HVAC on a monthly basis and the cost of the air conditioning unit.

24. Heyde says, and the fact is that Theberge Developments installed a system in the Unit that combines both a hot water tank and HVAC, and that she pays a monthly rental fee in the approximate amount of $85 for this combined system.

25. Heyde says, and the fact is that she and other members of the proposed class are not responsible for any costs associated with this combined system or alternatively are not responsible for that portion of the combined system related to the HVAC.

26. The rental price for the hot water tank and HVAC systems for members of the proposed class may vary depending on the dwelling that was purchased. To the extent that Heyde is aware, the system is substantially similar to the system installed in the Unit.

27. In further breach of the APS, Theberge Developments failed to install at its own expense air conditioning in every unit at Alta Vista Ridge.

28. Furthermore, or in the alternative, Theberge Developments represented that:

    a. The base price for the Unit, which included a storage unit, was $214,900;

    b. The base price for the Unit included the HVAC including an air conditioning unit;

    c. Theberge Developments agreed to construct the Unit and the common elements in a good and workmanlike manner in substantial conformity with the plans and specifications approved by Heyde. Theberge Developments shall have the right to make minor deviations from the plans and specifications, and to substitute other material for that provided for in the plans and specifications provided that any materials substituted shall be of a quality equal to or better than the material in the plans or specifications. Heyde agreed to accept any variations or substitutions provided that same do not diminish the value of the Unit or substantially alter the common elements;

d. Heyde acknowledged that variations in colours, shades of colours and textures of materials may occur in finishing materials such as wood, marble, ceramic tile, cushion flooring, broadloom, bathroom fixtures, cabinetry, paint, stain and Heyde agreed that Theberge Developments is not responsible for such variations. Materials and colours will be as close as possible but not necessarily identical to the Theberge Developments samples;

e. Each owner of a dwelling unit within the building shall be responsible from Occupancy Date for all utilities, including separately metered hydro, water, and gas rates, telephone expenses, cable television service, hot water heater 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;

f. The parties had a duty of good faith and fair dealing; and

g. Such further and other representations that will be provided before the trial of this matter.

29. In reliance on these representations, Heyde entered into the APS on or about October 8, 2011 and completed the final closing with respect to the Unit.

30. These representations were false in that:

a. Theberge Developments failed to provide a storage Unit and HVAC including an air conditioning for each unit at Alta Vista Ridge;

b. Theberge Developments installed a system in the Unit that combines both a hot water tank and HVAC, and that she pays a monthly rental fee in the approximate amount of $85 for this combined system.

31. The rental price for the hot water tank and HVAC systems for members of the proposed class may vary depending on the dwelling that was purchased. To the extent that Heyde is aware, the system is substantially similar to the system installed in the Unit.

32. As a result of Theberge Developments' breach of contract and/or negligent misrepresentation, Heyde has suffered damages as set out below.

AMENDMENT TO AGREEMENT AND SALE OF THE AIR CONDITIONING UNITS

33. On or about September 17, 2013 or at a subsequent meeting, Heyde visited the Theberge Homes Design Centre, which was located at 115-1433 Wellington Street in Ottawa for the purpose of selecting upgrades and finishes for the Unit *i.e.* countertops for the kitchen and bathrooms, flooring, appliances, faucets and sinks, cabinetry and air conditioning among other updates and finishes, particulars of which to be provided prior to the trial of this matter.

34. Heyde says, and the fact is, that Graeme Ayre ("Ayre"), as agent for Theberge Developments and/or Joey Theberge, presented her with several documents for execution. Ayre, on behalf of Theberge Developments and/or Joey Theberge, negligently or fraudulently represented to her that the documents provided for execution related to upgrades and finishes for the Unit.

35. In reliance on this representation, Heyde signed all of the documents that were presented to her.

36. Thereafter, Heyde discovered that one of the documents presented for her signature on or about September 17, 2013 or at a subsequent meeting, contained the following terms:

> 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

("Hot Water & Fan Coil Amendment")

37. In representing to Heyde that the documents provided for execution related to upgrades and finishes for the Unit and by including the Hot Water & Fan Coil Amendment in these documents or by requiring Heyde to execute the Hot Water & Fan Coil Amendment at all, Theberge Developments and/or Joey Theberge misrepresented material facts to Heyde and caused loss and damage to Heyde.

38. In the alternative, in representing to Heyde that the documents provided for execution related to upgrades and finishes for the Unit while knowing that the Hot Water & Fan Coil Amendment was included in these documents or by requiring Heyde to execute the Hot Water & Fan Coil Amendment at all, Theberge Developments and/or Joey Theberge knowingly, willfully, intentionally and fraudulently misrepresented material facts to Heyde and caused loss and damage to Heyde.

39. Such fraudulent activity by Theberge Developments took place at the direction, instigation and command of Joey Theberge.

40. Furthermore, Heyde says, and the fact is that Theberge Developments and/or Joey Theberge's actions with respect to the Hot Water & Fan Coil Amendment are in breach of their duty of good faith and fair dealing pursuant to the APS and at law.

41. Furthermore, Theberge Developments and Joey Theberge as officer and director of Theberge Developments owed a fiduciary duty to each member of the Class to ensure that all

communications including the Hot Water & Fan Coil Amendment were not misleading or deceptive and as a result of the conduct described in this section, they are in breach of that duty.

42. Execution of the Hot Water & Fan Coil Amendment for some members of the proposed class took place at the same time, and the execution of the Hot Water & Fan Coil Amendment for other members of the proposed class took place at other times. To the extent that Heyde is aware, the execution of the Hot Water & Fan Coil Amendment took place prior to the final closing date for the units in Alta Vista Ridge.

43. At a time within the particular knowledge of the Defendants, Theberge Developments and Joey Theberge represented to Heyde and offered for sale an air conditioning unit notwithstanding the fact that they knew or ought to have known that air conditioning was included in the APS.

44. In reliance on this representation, Heyde paid the sum of $1,500 for an air conditioning unit.

45. In representing to Heyde that she was required to purchase an air conditioning unit even though it was included in the APS, Theberge Developments and/or Joey Theberge misrepresented material facts to Heyde and caused loss and damage to her.

CONDOMINIUM ACT

46. The *Condominium Act* provides that the declarant must deliver a copy of the disclosure statement. Furthermore, pursuant to section 74 of the *Condominium Act*, a purchaser must be notified of any material changes to information in a disclosure statement. A material change is defined as "a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the

such an agreement of purchase and sale under section 73, if the disclosure statement had contained the change or series of changes."

47. Section 133 of the *Condominium Act* provides that a declarant shall not "in a statement or information that a declarant is required to provide under this Act" make a material statement or provide material information that "false, deceptive or misleading." In that event, the owner may apply to the Superior Court for damages.

48. The Disclosure Statement, Declaration and the Hot Water & Fan Coil Amendment which was provided to Heyde and all purchasers at Alta Vista Ridge, stated, *inter alia*, as follows:

    a. There will be no storage units [s. 2.2 of the Disclosure Statement].

    b. The Dwelling Units on the lower garage level and on the second level will have exclusive use of the terrace area adjoining the Dwelling Unit as show on the plans [s. 2.2 of the Disclosure Statement].

    c. Each owner of a Dwelling Unit within the building 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 heater 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 [s. 2.3 of the Disclosure Statement].

    d. Under Schedule "2" of the Disclosure Statement, Definition of a Standard Unit includes Forced Air Heating/Cooling.

    e. No unit includes those pipes, fans, wires, cables, conduits, ducts, flues, shafts, firehoses, sprinklers, lighting fixtures, air-conditioning or heating equipment passing through the unit described above to service another unit or units or the Common Elements. The units shall

include those pipes, fans, wires, cables, conduits, ducts, flues, shafts, firehoses, sprinklers, lighting fixtures, air-conditioning or heating equipment which are pertinent to each particular unit and only to the extent that they lie within the unit boundaries as described in Schedule "C" [s. 1.4 of the Declaration].

f. No … heating or electrical installation contained in or forming part of the Unit shall be installed, removed, extended or otherwise altered without the prior written consent of the Corporation; provided however, that the provisions of this subparagraph shall not require any owner to obtain the consent of the Corporation for the purpose of painting or decorating, including the alteration of any wall floor or ceiling which is within any Unit [s. 4.6(a) of the Declaration].

g. Owners shall at all times maintain heat in their Unit about the freezing temperature of water. In the event the owner defaults in payment of any hydro charges, the Corporation may pay same to prevent any discontinuance of service to the Unit… [s. 5.1(a) of the Declaration].

h. [The] following insurance must be obtained and maintained by each Owner at such Owner's own expense:

    i. Insurance on any improvements to a Unit to the extent same are not covered as part of the standard unit … and for furnishings, fixtures, equipment, decorating and personal property and chattels of the Owner contained within the Unit … [s. 6.2(a) of the Declaration].

i. The HVAC system and hot water tank would be rented through Reliance [Hot Water & Fan Coil Amendment].

49. Joey Theberge and Theberge Developments approved the Disclosure Statement, Declaration and Hot Water & Fan Coil Amendment.

50. Joey Theberge and Theberge Developments knew or ought to have known that the information contained in the Disclosure Statement, Declaration and Hot Water & Fan Coil Amendment with respect to the storage locker and the HVAC was inaccurate, false, deceptive and misleading. They failed to take any steps to amend the Disclosure Statement and Declaration or advise the proposed class members that the Disclosure Statement and Declaration were inaccurate, false and misleading. Furthermore, Joey Theberge and Theberge Developments failed to deliver a revised or amended the Disclosure Statement and Declaration to the proposed class members.

51. Joey Theberge and Theberge Developments owed the proposed class members a duty, which they breached as particularized below. Joey Theberge and Theberge Developments owed the proposed class members a duty of care based on the special relationship between them. The special relationship arose from the obligations of Joey Theberge and Theberge Developments to comply with the statutory disclosure requirements of the *Condominium Act*, and from Joey Theberge and Theberge Developments' knowledge of the reliance which the proposed class members would place on the Disclosure Statement, Declaration and Hot Water & Fan Coil Amendment.

52. Joey Theberge and Theberge Developments breached the duty owed pursuant to the *Condominium Act* to the proposed class members as follows:

    a. By providing to them a Disclosure Statement, Declaration and Hot Water & Fan Coil Amendment, which were inaccurate, false, deceptive, misleading, and failed to contain material statements or information.

    b. By not providing to them an amended and accurate Disclosure Statement and Declaration. By so doing, Joey Theberge and Theberge Developments was aware that the Disclosure

b. By not providing to them an amended and accurate Disclosure Statement and Declaration. By so doing, Joey Theberge and Theberge Developments was aware that the Disclosure Statement and Declaration were inaccurate, false, deceptive, misleading, and failed to contain material statements or information. Joey Theberge and Theberge Developments were aware of the necessity of the delivery of revised or amended Disclosure Statement and Declaration, but Joey Theberge and Theberge Developments failed to provide these amended documents to the proposed class members.

53. Furthermore or in the altnerative, Joey Theberge and Theberge Developments were negligent, or reckless in allowing the Disclosure Statement and Declaration to contain information on their units' inclusions and exclusions which they knew or ought to have known was inaccurate, false, deceptive, misleading, and failed to contain material statements or information.

54. Joey Theberge and Theberge Developments were negligent or reckless in failing to provide an amended or accurate Disclosure Statement and Declaration once they became aware that these documents were false, deceptive, misleading, and failed to contain material statements or information.

CLASS – DAMAGES

55. As a result of Theberge Developments' breach of contract and/or negligent or fraudulent misrepresentation and breaches of the *Condominium Act*, Heyde has suffered the following damages, *inter alia*:

a. The diminution in value of the Unit as a result of the lack of a storage locker;

b. Compensation for all past rental fees paid toward the Hot Water & Fan Coil rental or alternatively that portion of the Hot Water & Fan Coil rental related to HVAC;

c. Damages in an amount equal to the cost of purchasing the Hot Water & Fan Coil from Reliance Home Comfort, particulars of which will be provided at the trial of this matter; and;

d. Such further and other damages that will be proven at the trial of this matter.

56. Heyde says, and the fact is, that Theberge Developments has been unjustly enriched because the base price for the Unit included the storage locker and HVAC, and Theberge Developments failed to provide these provisions. There is no juristic reason for this enrichment.

PUNITIVE DAMAGES

57. Theberge Developments and Joey Theberge's conduct have been highhanded, outrageous, oppressive, and represents a marked departure from ordinary standards of decent behaviour, justifying an award of punitive damages particularly since:

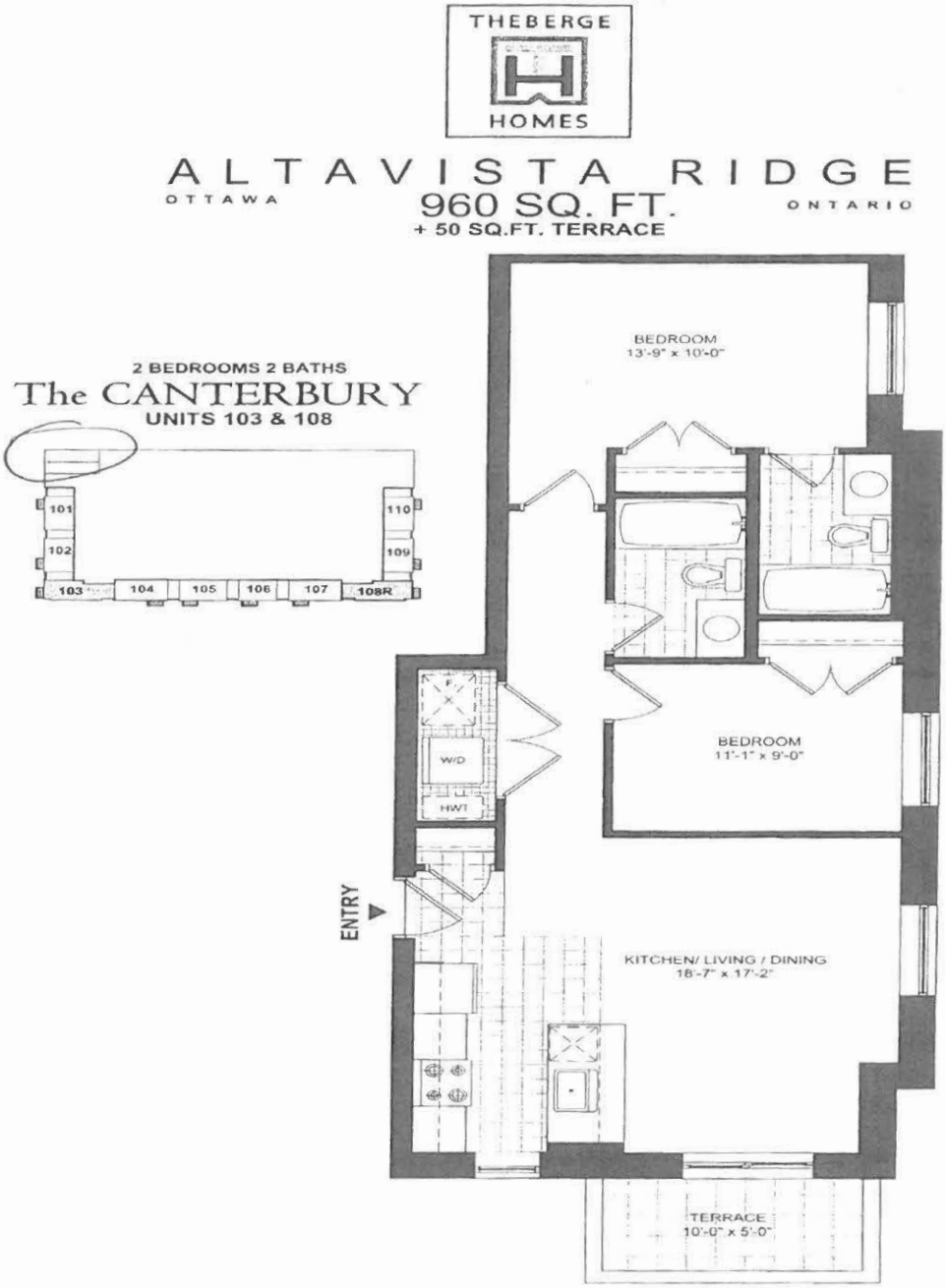
a. The conduct was planned and deliberate;

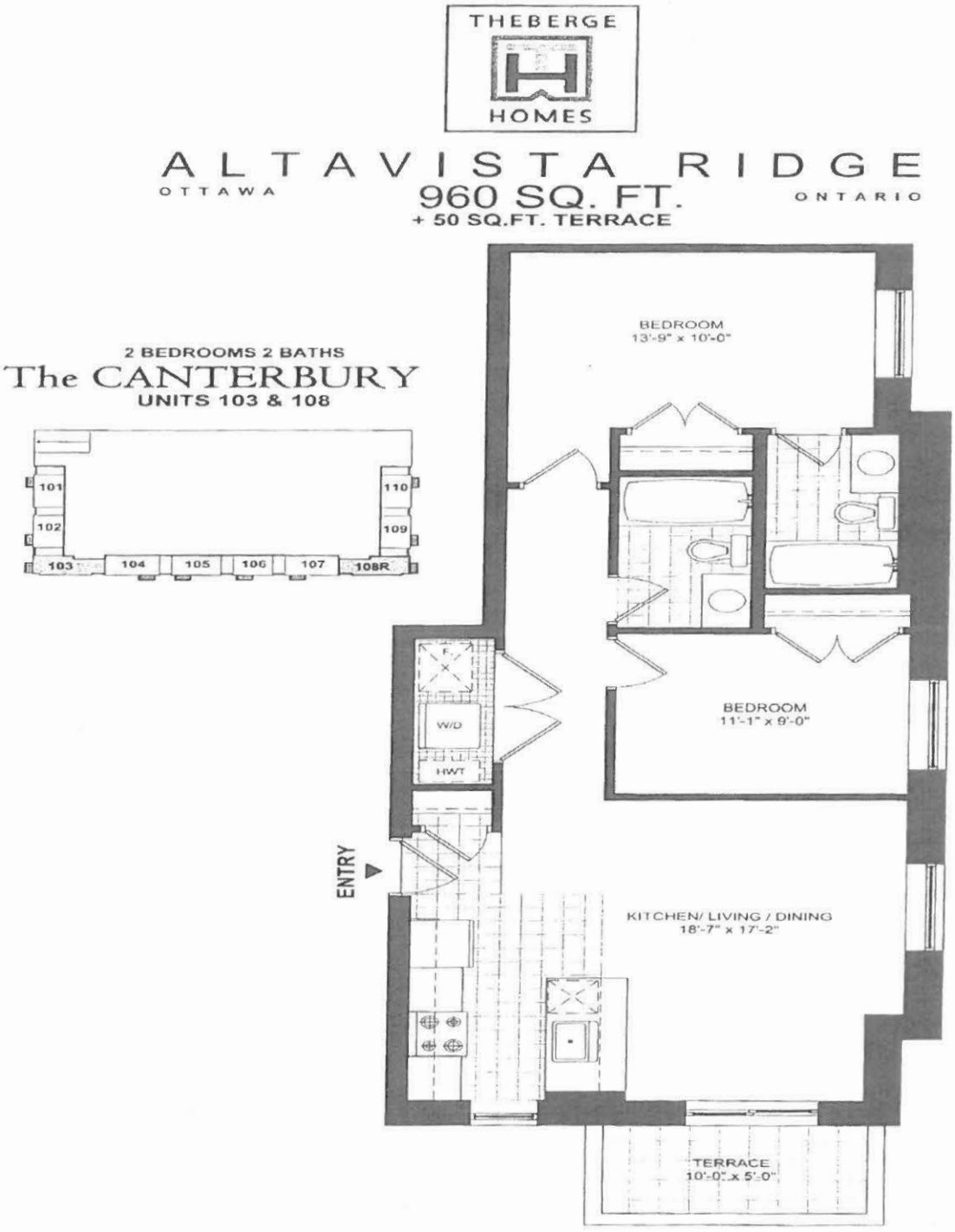
b. The conduct was motivated by, and resulted in, these Defendants making wrongful profits; and

c. A substantial award of punitive damages is necessary to demonstrate to these Defendants that it will not be permitted to profit from its misconduct, and deter like-minded developers from seeing such damages as a licence to profit through failing to adhere to the terms in purchase agreements.

SECOND SUBCLASS – FLOOR PLAN

58. At Schedules "B" and "C" of the APS, Theberge Developments included a floor plan for the Unit, which are reproduced below:





59. In accordance with the floor plans, it was an express term of Heyde's APS that the Unit include a walk-out unit. In addition, there was no step or landing between the Kitchen/Living/Dining area to the Terrace.

60. Furthermore or in the alternative, Theberge Developments represented that the Unit would be a walk-out unit or there was no step or landing between the Kitchen/Living/Dining area to the Terrace.

61. In reliance on that representation, Heyde entered into the APS on or about October 8, 2011 and completed the final closing with respect to the Unit.

62. This representation was false in that the Unit did not include a walk-out unit in that there is no way to exit to the Terrace without climbing an approximately one-foot ledge to the Terrace. Thereafter, the Defendants installed a landing and step, which is required to exit to the Terrace.

63. As a result of Theberge Developments' breach of contract and/or negligent misrepresentation, Heyde is entitled to damages based on the diminution in value in relation to the decrease in value of the Unit.

64. Furthermore, Heyde says, and the fact is that Theberge Developments has been unjustly enriched because the base price for the Unit included a walk-out unit without a step or landing, and this Defendant failed to provide the same. There is no juristic reason for this enrichment.

PIERCING THE CORPORATE VEIL OF THEBERGE DEVELOPMENTS

65. Heyde further alleges that for all intended purposes, Joey Theberge is the president and controlling mind, officer and director of Theberge Developments. By reason thereof, and by reason of the fraudulent misrepresentations and other unlawful actions of Joey Theberge, that the corporate veil of Theberge Developments be lifted and that judgment be granted against Joey Theberge.

GENERAL

66. Heyde pleads and relies upon the *Condominium Act*, as amended, the *Class Proceedings Act*, the *Courts of Justice Act* and the *Negligence Act* R.S.O. 1990, Chapter N.1.

67. The Plaintiff proposes that this action be tried in Ottawa.

June 3, 2015

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Lawyer for Plaintiff

SABRINA HEYDE
Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED and JOEY THEBERGE
Defendant

Court File No. 15-64526CP

1

3

AMENDED THIS 17 DAY / JOUR
MODIFIÉE DE
OF / DE June 20 16
PURSUANT TO RULE 26.02(a)
CONFORMÉMENT A LA REGLE
OR ORDER
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DATED THIS / FAIT CE
DAY / JOUR OF / DE 20
REGISTRAR, SUPERIOR COURT OF JUSTICE
GREFFIER, COUR SUPÉRIEURE DE JUSTICE

2

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

THIRD AMENDED STATEMENT OF CLAIM

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Lawyers for the Plaintiff
Sabrina Heyde

This is Exhibit "C" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SABRINA HEYDE

Plaintiff

– and –

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

STATEMENT OF DEFENCE

1. The Defendant Theberge Developments Limited ("**Theberge**") admits the allegations in paragraphs 4, 6, and 8 to 11 of the Fourth Fresh As Amended Statement of Claim (the "**Statement of Claim**").

2. The Defendant Theberge denies the allegations in paragraphs 3, 5, and 13 to 63 of the Statement of Claim, and disputes that the Plaintiff is entitled to any of the relief claimed in paragraphs 1 and 2 of the Statement of Claim, or at all.

3. The Defendant Theberge has no or insufficient knowledge of the allegations in paragraphs 7 and 12 of the Statement of Claim.

The Parties

4. The Defendant Theberge is a corporation incorporated pursuant to the laws of Ontario and is engaged in the business of building and marketing residences in Ottawa.

5. The Plaintiff Sabrina Heyde has been an Ontario lawyer since June 2012, was familiar with condominium documentation, and was on her condominium board at all material times. She articled at KMH Lawyers at the time she purchased her condominium and worked primarily for counsel of record in this proceeding.

Background

6. Theberge developed the residential development called "Alta Vista Ridge", located in Ottawa.

7. 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.

8. 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.

9. Purchasers of Terrace Towns and Urban Flats units commenced interim occupancy of their units for several months before they closed the transaction and took title to their unit. Purchasers of only two units closed under protest: one relating to the storage unit issue and one relating to the heating system issue.

10. Some purchasers bought "spec units" which are units in which the upgrades and finishes are preselected by Theberge and these purchasers bought the spec unit in the condition sold by Theberge.

11. The Plaintiff and class members were represented by real estate lawyers and closed the transaction after obtaining legal advice.

12. The Plaintiff and class members entered into the Agreement of Purchase and Sale with Theberge (the "**APS**"). The APS contained a number of clauses which granted Theberge the flexibility to alter a variety of items if Theberge deemed it necessary and, in most instances, in Theberge's unilateral discretion.

13. Section 4 of the APS provides that from the date of interim occupancy, the purchaser agreed to assume sole responsibility, to the absolute exoneration of Theberge, "for all utilities attributable to the Unit, including air-conditioning, heating charges, hydro charges, ... and all other charges and expenses attributable to the Unit which are not to be included in the monthly common expenses of the condominium corporation."

14. Section 7 of the APS provides that Theberge "shall have the right to make minor deviations from the plans and specifications, and to substitute other material for that provided for in the plans and specifications provided that any material substituted shall be of a quality equal to or better than the materials in the plans and specifications" and that the purchaser "agrees to accept any variations or substitutions provided that same do not diminish the value of the Unit or substantially alter the common elements."

15. Under section 12(a)(i) of the APS, the purchaser acknowledged that the *Ontario New Home Warranties Plan Act* warranties constituted the only warranties in the transaction. Similarly, under section 12(d), the purchaser expressly waived any duty in tort related to the condominium unit.

16. Section 16 of the APS provides that if before closing, any dispute arises out of the sale of the condominium, Theberge "shall have the option in its absolute discretion to terminate this Agreement on paying to the Purchaser by certified cheque the total of all sums paid by the Purchaser pursuant to the Agreement."

17. Section 18 of the APS contains an entire agreement clause. Under section 18(a) of the APS, the purchaser agreed that "there is no representation, warranty, collateral agreement or promise whatsoever affecting the Property or the transaction described herein except as expressed herein in writing." Under section 18(b) of the APS, the purchaser "acknowledges that, notwithstanding ... any statements made by the Vendor's sales representatives, there is no warranty or representation contained herein on the part of the Vendor as to the area of the Unit or any other matter."

18. Under section 27 of the APS, the purchaser acknowledged receipt of the disclosure statement (the "**Disclosure Statement**") prior to executing the APS.

19. The Plaintiff and class members in fact received a copy of the Disclosure Statement.

20. Under section 2.2, the Urban Flats' Disclosure Statement expressly states that "**There will be no storage units**."

21. Under section 2.3, Theberge reserves the right to modify the condominium units at its sole discretion, as follows:

> The Declarant reserves the right to modify the proposed dwelling units and floor layouts at its sole discretion within the parameters stated herein. The Declarant also reserves the right to vary the unit mix and to either combine units into larger units or to divide units

into smaller units so long as the percentage interest of such combined or divided units is equal in total to the units which they replace in total.

22. Section 2.3 of the Disclosure Statement also provides that the purchaser "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."

23. Section 12.1 of the Disclosure Statement advises the purchaser "to read all of the documents enclosed with the Disclosure Statement in their entirety and to review same with their legal and financial advisor," and strongly recommends "that all of the accompanying documents be carefully reviewed by all prospective Purchasers with their counsel."

The Alleged Storage Unit Issue

24. Theberge states that there was a drafting error on page 1 of the APS for some Urban Flats units. The drafting error was on the first page of the APS wherein it stated "Base Price for Unit (inclusive of a Storage Unit)".

25. At the outset of the project, Theberge did not anticipate having any storage units.

26. This drafting error was obvious to all purchasers. The Disclosure Statement states "There will be no storage units". This statement was on the same page and in the same section where the development is described in detail. It is in the same paragraph of that section which states that the condominium will consist of 82 dwelling units and approximately 72 parking units. Furthermore, the plans attached to the APS did not show any storage units.

27. All purchasers closed the purchase transaction. While a few purchasers raised an issue with respect to the drafting error on page 1 of the APS, all, with legal advice, agreed to close the purchase transaction, including the Plaintiff. The Plaintiff raised no issue relating to the storage unit at any time before closing, at closing, or in the months after closing. Despite the fact that storage units are on title, the Plaintiff and class members raised no objection to title, as required by the APS.

28. Having done so, these purchasers no longer have any claim or potential action against Theberge.

29. Any reliance placed by the Plaintiff, or any class member, on the alleged inclusion of a storage unit in the base price for the unit could not have been a reasonable one at law.

The Alleged Forced Air Heating System/Fan Coil Issue

30. Schedule "2" to the Disclosure Statements is entitled "Definition of a Standard Unit (to be delivered under section 43(f)(h) of the Act)" and some state "Forced Air Heating/Cooling".

31. Theberge negotiated the cost of "Cooling" or air conditioning as an additional feature that was not included in the base purchase price. Some purchasers purchased air conditioning as an extra cost and others negotiated its inclusion as a sales incentive.

32. During development, Theberge was approached about installing a heating system comprised of a hot water tank and fan coil, which was ideal for condominiums as it was small, economical, energy efficient, and replaced a full-sized furnace. This system would have to be

rented and Theberge agreed to commit only upon receiving positive feedback from the purchasers.

33. To ensure that each purchaser wanted this system and understood and accepted the rental fees, Theberge tasked its Customer Relations Manager Graeme Ayre to explain the heating system and rental fee at the upgrade meeting with each purchaser. Mr. Ayre discussed with each purchaser the heating system, including its advantages over a full-sized furnace, and the rental fees. The purchasers then executed a document in which they acknowledged the heating system rental fee which states, "I have been informed by Theberge ... and I accept that the below numbered fan coil and hot water tank will be rented from Reliance ... for which I accept a monthly rental fee" (the "**Acknowledgment**"). Purchasers were not required to execute the Acknowledgment and some declined to do so.

34. Theberge pleads and the fact is that the Plaintiff and class members received consideration for executing the Acknowledgment.

35. Based on the Acknowledgments and the purchasers' positive feedback, Theberge installed this heating system. If the feedback was negative either in terms of signatures or negative conversations, Theberge would not have installed this heating system. However, there was overwhelming acceptance of it.

36. Theberge specifically denies misrepresenting any material facts to the Plaintiff or to any class members. Theberge further denies any duty of good faith and fair dealing pursuant to the APS and at law. In the alternative, if such a duty of good faith and fair dealing did exist, which is not admitted but denied, such duty was not breached by Theberge, or its agents, whom at all material times dealt fairly and in good faith with the Plaintiff and class members.

37. Theberge further relies on the following materials facts:

(a) The heating system and content of the Acknowledgment was explained to the Plaintiff and class members;

(b) The content of the Acknowledgment is clear and easily understandable;

(c) The Plaintiff and class members were represented by counsel at all material times; and

(d) The Plaintiff and class members understood or ought to have understood the content of the Acknowledgment.

38. All purchasers closed the purchase transaction. While a few purchasers raised an issue with respect to the heating system rental fee, all, with legal advice, agreed to close the purchase transaction, including the Plaintiff. The Plaintiff raised no issue relating to the fan coil rental fees any time before closing. The Plaintiff's understanding is that the heating system belongs to the condominium corporation and she cannot buy it out.

39. Having done so, these purchasers no longer have any claim or potential action against Theberge.

40. Any reliance placed by the Plaintiff, or any class member, on the alleged inclusion of forced air heating system in the base price for the unit could not have been a reasonable one at law.

No Breach of Contract, Statute, or Duties Owed

41. Theberge denies that the Plaintiff and class members are entitled under law, including any contract, statute, or tort, to seek recovery from Theberge, and puts the Plaintiff to strict proof thereof. Theberge pleads that it acted reasonably at all times, and that it met any and all contractual, statutory, and common law obligations with respect to the purchasers.

42. Theberge denies that it has breached any of the terms of any contract with the Plaintiff or class members, or that the statements complained of could be or were in fact terms of any contract with the Plaintiff or class members. Theberge further states and the fact is it constructed the unit and the common elements in a good and workmanlike manner in substantial conformity with the plans and specifications reviewed and accepted by the Plaintiff and class members.

43. The Plaintiff and class members completed the closings of their units after they knew that a forced air heating system was not included with their condominium unit, either by signing the Acknowledgment or by taking interim occupancy and making rental payments for the heating system prior to closing.

44. The Plaintiff and class members also knew that there were no storage lockers included with their unit, when they took interim occupancy and they proceeded to close the transaction with this knowledge.

45. Furthermore, or in the alternative, any contractual obligations owed by Theberge regarding the heating system or storage unit merged on closing and Theberge has no liability to the purchasers, such as the Plaintiff and class members.

46. Furthermore, or in the alternative, by knowingly inducing Theberge to change its position in reliance on the Acknowledgments and the purchaser's acceptance of the rental fees, the Plaintiff and class members are estopped from claiming damages for the heating system issue.

47. Furthermore, or in the alternative, the Plaintiff and class members waived their right to claims for the heating system issue by foregoing reliance on the right to a forced air heating system in executing the Acknowledgment, purchasing air conditioning, and paying rental fees and closing the transaction. Similarly, the Plaintiff and class members waived their right to claims for the storage unit by foregoing reliance on the right to a storage unit by purchasing one from Theberge and by closing the transaction without a storage unit.

48. Theberge states that this Court has no jurisdiction over the subject matter of this proceeding, as the Plaintiff and class members reported any defects covered by the warranties to Tarion, and expressly agreed that any duty in tort related to the unit, the property, or the common elements, is expressly waived by them.

49. The Plaintiff and class members failed to raise the heating system and storage unit issues prior to closing, depriving Theberge of its right to exercise its option to terminate the APS on paying to the purchaser by certified cheque the total of all sums paid by the purchaser pursuant to the agreement. Theberge therefore pleads estoppel as a bar to the Plaintiff's action.

50. Theberge denies that the Plaintiff and class members are entitled to seek recovery for misrepresentation in the manner alleged in the Statement of Claim or otherwise, and puts the Plaintiff to strict proof thereof. Theberge denies that it owed a duty of care to the Plaintiff or

class members. In the alternative, Theberge denies that it was in breach of any duty which it may have owed to the Plaintiff or class members.

51. As stated above, the APS contains an entire agreement clause. As such, any representations, pre-contractual or otherwise, made by Theberge or its agents, which representations are denied, that are not contained within the written APS are of no force or effect by virtue of the operation of the entire agreement clause.

52. Theberge denies that it made false, deceptive, or misleading statements or representations, including with respect to the forced air heating system and storage unit, which enticed the Plaintiff or class members to purchase, or close on, a unit.

53. In the alternative, if any representations were made, which is denied, the statements were true when read as a whole in conjunction with the APS and Disclosure Statement.

54. Further, or in the alternative, all statements concerning the forced air heating system and storage unit made by Theberge, or anyone for whom they are in law responsible, were made with reasonable care and diligence.

55. Further, or in the alternative, if such statements were made, which is not admitted but expressly denied, Theberge denies that the Plaintiff and class members were entitled to or did in fact rely on such statements made by Theberge. Theberge further denies that any loss allegedly suffered by the Plaintiff and class members was caused by reasonable reliance on such statements.

56. Theberge denies any breach of the *Condominium Act, 1998*, S.O. 1998, c. 19. Theberge pleads and the fact is that there was no "material change" as defined in the *Condominium Act,* or at all. In any event, or in the alternative, Theberge provided the Plaintiff and class members with disclosure of all material changes relating to the forced air heating system and storage unit, or otherwise. In any event, or in the alternative, the *Condominium Act* misrepresentation claim under section 133 cannot be based on a misrepresentation in the APS.

57. Theberge denies that it owed fiduciary duties to the Plaintiff or any purchaser. In the alternative, Theberge denies it breached any fiduciary duty. On March 9, 2017, the Plaintiff's breach of fiduciary duty claim was struck without leave to amend for failing to disclose a reasonable cause of action.

58. Theberge denies that it has been unjustly enriched in the manner alleged in the Statement of Claim or otherwise. Theberge pleads that:

(a) It was not enriched, unjustly or otherwise, by the Plaintiff or class members in the manner alleged in the Statement of Claim or otherwise;

(b) None of the Plaintiff or class members suffered any economic deprivation in the manner alleged in the Statement of Claim or otherwise; and

(c) Theberge has a valid juristic reason for receiving and retaining the consideration paid in the manner alleged in the Statement of Claim or otherwise.

59. Further, or in the alternative, Theberge denies that any conduct or omission on their part would justify the imposition of a constructive trust, or resulting trust, or other remedy in favour of the Plaintiff or purchasers, individually or collectively.

60. Theberge further states that this action is barred pursuant to sections 4 and 5 of the *Limitations Act, 2002*, S.O. 2002 c. 24, Sched. B. In particular, Theberge states that the action was not commenced within two years of the Plaintiff's and the class members' discovery of their alleged claim or the date their claim ought to have been discovered through reasonable diligence, including by commencing interim occupancy and by executing Acknowledgments prior to interim occupancy. The Plaintiff did not commence this action until June 3, 2015 and did not add the Terrace Town units until, at the earliest, on January 14, 2016. Purchasers of blocks 1 and 2 units commenced interim occupancy between August 12, 2013 and September 3, 2013, and executed Acknowledgments before interim occupancy. Theberge pleads and relies on the doctrine of laches.

No Damages

61. Theberge expressly denies that the Plaintiff and class members have suffered any damages as alleged in their Statement of Claim or otherwise, and puts the Plaintiff to strict proof thereof. There is no basis in law or fact for claiming damages or the other relief set out in the Statement of Claim, or at all.

62. The condominium units have increased in value, and unit owners have not lost use of their property.

63. Further, or in the alternative, if the Plaintiff and class members have suffered damages, which is not admitted but expressly denied, the damages claimed by the Plaintiff are unreasonable, remote, excessive, and exaggerated. Further, and in any event, any damages suffered by the Plaintiff and class members were not caused by or the responsibility of Theberge,

but were the result of the Plaintiff's and class members' own actions or omissions, or were the result of their real estate lawyer's actions or omissions.

64. Further, or in the alternative, Theberge states that, should the Plaintiff have incurred some damages, which is not admitted but expressly denied, the Plaintiff and class members failed to take reasonable steps to mitigate their damages, thus disentitling themselves to any relief.

65. Further, or in the alternative, Theberge denies that it, at any time, acted with malice or intent to injure the Plaintiff and class members, or that it acted in a high-handed, outrageous, oppressive, arrogant, callous manner, in bad faith or in any other improper or unlawful manner in their dealings with the Plaintiff and class members as alleged in the Statement of Claim or otherwise. There is nothing in Theberge's conduct or motive entitling the Plaintiff and class members to punitive damages. Theberge acted reasonably and in good faith at all times.

66. Theberge states that the Plaintiff's and class members' losses, if any, arise from the Plaintiff's and class members' own negligence or wilful blindness in ignoring the legal advice provided to them prior to purchase. Theberge asserts that the Plaintiff and class members were contributorily negligent. Further, or in the alternative, Theberge states that, should the Plaintiff have incurred some damages, which is not admitted but expressly denied, any such damage or harm was the fault of other parties. Theberge pleads and relies on the provisions of the *Negligence Act*, R.S.O. 1990, c.N-1.

67. Theberge requests that this action be dismissed with costs on a substantial indemnity basis.

Date: June 25, 2019

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Norman Mizobuchi
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Lawyers for the Defendant

SABRINA HEYDE
PLAINTIFF

-AND-

THEBERGE DEVELOPMENTS LIMITED
DEFENDANT

Court File No. 15-64526CP

ONTARIO SUPERIOR COURT OF JUSTICE
Proceeding commenced at **OTTAWA**

STATEMENT OF DEFENCE

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Lawyers for the Defendant Theberge Developments Limited

This is Exhibit "D" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

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

This is Exhibit "E" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No.: 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE JUSTICE ROBERT SMITH	))	THURSDAY THE 9th DAY OF MARCH, 2017

BETWEEN:

SABRINA HEYDE.

Plaintiff

- and -

THEBERGE DEVELOPMENTS LIMITED AND JOEY THEBERGE

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

O R D E R

THIS MOTION made by the Plaintiff for an order certifying this action as a class proceeding and appointing Sabrina Heyde as the Representative Plaintiff, was heard on September 21, 2016 at the Courthouse, 161 Elgin Street, Ottawa, Ontario K2P 2K1.

ON READING all the materials filed, and on hearing the submissions of counsel for the Plaintiff and the Defendants,

1. **THIS COURT ORDERS** that the within action be certified as a class proceeding pursuant to the *Class Proceedings Act,* 1992, S.O. 1992, c. 6, as amended.

2. **THIS COURT FURTHER ORDERS** that this action be and is hereby dismissed as against the Defendant Joey Theberge.

3. **THIS COURT FURTHER ORDERS** that the Class (or "Class Members" as applicable) 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 . . ."

4. **THIS COURT FURTHER ORDERS** that the first Subclass is defined as follows:

(a) Members of the 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.

5. **THIS COURT FURTHER ORDERS** that the common issues of this class proceeding shall be as follows:

Where all of the 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 and a storage locker, 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 Developments did not give any consideration in return for their signing?

6. **THIS COURT FURTHER ORDERS** that Sabrina Heyde be appointed as Representative Plaintiff.

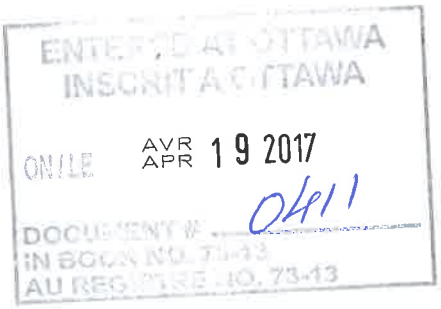
7. **THIS COURT FURTHER ORDERS** that KMH Lawyers be appointed as lawyers for the Class ("Class Counsel").

8. **THIS COURT FURTHER ORDERS** that the litigation plan should be revised based on the terms of this Order.

9. **THIS COURT FURTHER ORDERS** that the parties shall convene a case conference before Justice R. Smith to determine the litigation schedule and notice to class members, with the method of notice in substantially the same form as set out in paragraph 6 of the proposed Litigation Plan.

10. **THIS COURT FURTHER ORDERS** that Costs of the motion shall be addressed by this Court by way of separate order.

Registrar.



Court File No. 15-64526CP

SABRINA HEYDE Plaintiff	- and -	**THEBERGE DEVELOPMENTS LIMITED et al.** Defendants

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Ottawa
Proceeding Under the *Class Proceedings Act, 1992*

O R D E R

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Lawyers for the Defendants Theberge Developments Limited and Joey Theberge

This is Exhibit "F" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

SABRINA HEYDE
Plaintiff

-and

THEBERGE DEVELOPMENTS LIMITED and JOEY THEBERGE
Defendants

Court File No. 15-64526CP

DIVISIONAL COURT

BEFORE NORDHEIMER, STEWART & PATTILLO, JJ.

DATE AUG 2 3 2017

DISPOSITION - ~~THIS APPEAL~~

APPLICATION ~~IS~~ for leave to appeal is granted. The questions on the appeal are:

(1) Did the motion judge err in determining that a common issue was whether Theberge breached ss 72-74 and s. 132(2) of the Condominium Act?

(2) Did the motion judge err in determining that a common issue was whether Theberge was liable for damages for the tort of fraudulent misrepresentation for failing to provide a fund or insurance system or a change letter for each unit of the condominium?

(3) Did the motion judge err in holding that a common issue for all class members was the legal test of the "Reasonable person"?

(4) Did the motion judge err in finding that the real estate lawyers' advice would not be (over)

ONTARIO SUPERIOR COURT OF JUSTICE
Proceeding commenced at **OTTAWA**

MOTION RECORD
VOLUME I
(Leave to Appeal)

ORDER, REASONS, FACTA

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Theberge Developments Limited

relevant in assessing the views in the action?

Costs of this motion fixed at $5000 - all inclusive to be disposed of as directed by the panel hearing the appeal.

Stewart J.

Stewart, J.

Pratte J.

This is Exhibit "G" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

CITATION: Heyde v. Theberge Developments Ltd., 2018 ONSC 4257
COURT FILE NO.: 17-2325
DATE: 2018/07/20

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

BETWEEN:	)	
	)	
Sabrina Heyde	)	
	)	Miriam Vale Peters and Sarah Drury for
Plaintiff/Respondent	)	Plaintiff/Respondent
	)	
– and –	)	
	)	
Theberge Developments Ltd. and Joey Theberge	)	
	)	Norman Mizobuchi for
Defendants/Appellants	)	Defendants/Appellants
	)	**HEARD:** May 10, 2018

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

BY THE COURT

OVERVIEW

[1] This is an appeal of an order by Justice Robert Smith on March 9, 2017, certifying this proceeding as a class action.

[2] The class members are purchasers of condominium units in Alta Vista Ridge, a 138-unit residential development in Ottawa. They allege that the developer, Theberge Developments Ltd. ("Theberge"), misrepresented what would be provided with each unit and, in particular, whether a forced air system and storage locker were included in the purchase price. They claim general

and punitive damages from Theberge based on breach of contract, tort and breach of the *Condominium Act*.[1]

[3] Justice Smith, an experienced class actions judge, held that the action met the certification requirements at section 5(1) of the *Class Proceedings Act, 1992*.[2] He concluded that the statement of claim disclosed causes of action, although he rejected claims for breach of fiduciary duty against both Theberge and its president, Joey Theberge. Justice Smith identified a class and sub-class, and held that a class proceeding would be the preferable procedure for the resolution of the common issues. He found that Sabrina Heyde was a suitable representative plaintiff and KMH appropriate class counsel.

[4] Justice Smith identified six common issues. Based on the pleadings, all purchasers of the condo units knew that they would have to rent a forced air heater before the sale closed, either because they were asked to sign an acknowledgement to this effect or they occupied the unit on an interim basis before closing. Justice Smith accordingly premised the common issues on class members' knowledge of the true state of affairs before they took final possession. The first four common issues address Theberge's liability for failing to provide a forced air heating system with each unit in accordance with its Disclosure Statement and for failing to provide a storage locker to each subclass member. Justice Smith held that Theberge's liability for these omissions should be considered as a common issue based on (1) breach of contract, (2) breach of sections 72 to 74 and 133(2) of the *Condominium Act*, (3) negligent misrepresentation and (4) fraudulent misrepresentation. A fifth common issue was Theberge's liability for punitive damages. The sixth and last common issue was whether the acknowledgement signed by class members prior to closing had any legal effect, given that Theberge did not give them any fresh consideration in return for signing it.

[5] The motion judge stated that, at the common issues trial, Theberge could raise defences common to all class members, including whether their constructive or actual knowledge at

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[1] *Condominium* Act, 1998, S.O. 1998, c. 19. There are also claims against Theberge's president, Joey Theberge. They are however not relevant to this appeal.
[2] *Class Proceedings Act, 1992*, SO 1992, c 6 (the "*CPA*").

closing prevents them from making a claim, whether claims for breach of contract merged on closing, whether a limitation defence applies.

[6] In this appeal, Theberge says that Justice Smith erred in two ways. First, he erred in certifying three issues –liability for breaches of the *Condominium Act*, liability for fraudulent misrepresentation, and the legal impact of an acknowledgement signed by class members prior to closing – as common issues. Second, he wrongly certified the action as a class proceeding even though class counsel acted for and advised the representative plaintiff Sabrina Heyde when she purchased her condominium unit.

[7] For the reasons that follow, we grant the appeal in part.

ANALYSIS

The scope of the appeal

[8] Prior to considering the standard of review and the arguments raised by Theberge, we should state what exactly is and is not under review in this appeal.

[9] Further to section 30(2) of the *CPA*, a defendant must obtain leave to appeal a certification order. In its motion for leave to appeal, Theberge sought to challenge the overall decision to certify as well as almost every constituent element of the certification order. In their August 23, 2017 decision on the motion, however, Justices Nordheimer, Stewart and Pattillo limited Theberge's appeal to four questions:

(1) Did the motion judge err in determining that a common issue was whether Theberge breached ss. 72-74 and s. 133(2) of the *Condominium Act*?

(2) Did the motion judge err in determining that a common issue was whether Theberge was liable for damages for the tort of fraudulent misrepresentation for failing to provide a forced air heating system or a storage locker for each member of the subclass?

(3) Did the motion judge err in holding that a common issue of all class members was the legal effect of the "Acknowledgement"?

(4) Did the motion judge err in finding that the real estate lawyers' advice would not be relevant in considering the issues in the action?

[10] The relatively narrow scope of the appeal has two implications for our decision.

[11] First, we will not be considering arguments outside the scope of leave granted. In particular, we will not be revisiting Justice Smith's preferability analysis or determination that this is an appropriate case for a class action, or his conclusion that negligent misrepresentation and breach of contract claims ought to be tried as common issues.

[12] Theberge attempted to argue otherwise. He is unhappy, for example, with the way Justice Smith framed all of the common issues. In its notice of motion for leave to appeal, Theberge raised this issue, saying that he should be allowed to appeal whether "a motion judge's finding of fact that class members knew, or ought to have known, of the alleged defects and that they proceeded to close the purchase with this knowledge, precludes certification of a misrepresentation class action". Theberge's counsel repeated this argument at the appeal hearing.

[13] Theberge also contends that the granting of leave on the second issue on appeal – whether the fraudulent misrepresentation claim can be adjudicated as a common issue – opens the door to reconsideration of Justice Smith's certification of the negligent misrepresentation claim as a common issue. In Theberge's submission, both of these claims involve individual issues such as reliance and, as such, cannot be heard as common issues. Theberge accordingly argues that the scope of the appeal is not limited to the questions for which leave was explicitly granted.

[14] We do not accept these arguments. Theberge sought leave to appeal on virtually every aspect of Justice Smith's decision, including his determination that this was a case suitable for a

class proceeding. The panel which heard the leave application confined the questions on appeal to four issues, not including the preferability issue.

[15] As a matter of current practice, leave panels do not give reasons. We cannot assume, however, that our colleagues overlooked the implications of granting leave with respect to one issue but not another. We therefore cannot consider arguments that amount to collateral attacks on the leave decision. Likewise, Justice Smith's decision to frame the common issues on the premise of the purchasers' knowledge of alleged misrepresentations is not under appeal. In our view, this framing device is an innovative approach arising from the particular facts of this case and in no way offends the *CPA*. But whether or not we would have adopted a similar approach is beside the point. This appeal is limited to the questions in respect of which leave was granted. Theberge's full frontal attack on viability of any class action based on misrepresentations cannot succeed.

[16] Second, the limited nature of the appeal means that our focus is on how best to move the case forward as a class action. Notwithstanding its arguments to the contrary, Theberge did not obtain leave on any issue that would challenge the overall validity of the certification order. Even if we were to find KHM Lawyers should not continue as class counsel, this would not be fatal to the certification order as a whole. It would simply mean that new class counsel would have to be appointed. Similarly, were we to conclude that Justice Smith erred in certifying three of six common issues, this would merely limit the scope of the common issues hearing.

[17] Access to justice is the very reason why class proceedings exist. They empower claimants who might otherwise not have the means or motivation to bring a claim to court. The class members in this case persuaded Justice Smith that their case is suitable for trial as a class action. Our role is not to revisit whether class members can have their collective day in court. It is rather how best to ensure that the process now underway is consistent with the legal principles applicable to class proceedings.

[18] As recently noted by the Court of Appeal, there have been fewer than 20 common issues trials in the 25 years since class actions became available in Ontario, and fewer still individual issues trials.[3] The Court observed that: "If class actions are to deliver on their promise of access to justice it is perhaps time to test some of the assumptions made about the "manageability" of the individual issues stage of a class action".[4] This means taking a broader view of potential common issues and emphasizing access to justice in the preferability analysis. It also means encouraging class action case management judges to engage actively with counsel to narrow and set the ordering of issues, to control unnecessary discovery and other costs and, overall, to take steps to achieve the most efficient, affordable, proportionate result.

[19] It is through this lens that we approach the review of the elements of the motion judge's decision that are the subject matter of this appeal.

The standard of review

[20] In *AIC Limited v. Fischer*, the Supreme Court of Canada confirmed that a decision by a certification judge is entitled to substantial deference.[5] This deference does not however extend to "errors in principle which are directly relevant to the conclusion reached".[6] This is particularly important in an interlocutory appeal such as this one. We must give weight to the ability of the case management judge to deal with a class action on an ongoing basis, and refrain from intervening with their approach to the case unless it departs from legal principles.

Breach of the *Condominium Act* as a common issue

[21] The second common issue identified by Justice Smith was as follows:

> 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

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[3] *Fantl v. Transamerica Life Canada*, 2016 ONCA 633 (CanLII), at para. 44.
[4] *Fantl, supra*, at para. 44.
[5] *AIC Limited v. Fischer*, 2013 SCC 69 (CanLII), [2013] 3 S.C.R. 949, at para. 65, citing the Ontario Court of Appeal's decision in *Markson v. MBNA Canada Bank*, 2007 ONCA 334, 85 O.R. (3d) 321, at para. 33.
[6] *AIC, supra*, at para. 65; see also *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at para. 23, leave to appeal refused, [2008] 1 S.C.R. xiv; and *Markson, supra*, at para. 33.

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?

[22] The motion judge defined the subclass as class members whose agreement of purchase and sale included a storage locker as part of the base price.

[23] Theberge contends that, in certifying this common issue, the motion judge erred because:

(i) a breach of the *Condominium Act* with respect to the storage units was not pleaded in the Statement of Claim or argued at the certification hearing; and

(ii) a breach of section 133(2) of the *Act* gives rise to a misrepresentation claim unsuitable for determination on a common basis.

Was a breach of the *Condominium Act* with respect to storage units pleaded and argued?

[24] We have some doubt as to whether Theberge was granted leave to appeal on this issue. The first question on appeal, and the only question that touches on the *Condominium Act*, is whether the motion judge erred in determining that a common issue was whether Theberge breached ss. 72-74 and s. 133(2) of the *Act*. The determination of whether a question is common to class members is made under s. 5(1)(c) of the *CPA*. Arguments based on the sufficiency of pleadings fall under s. 5(1)(a), which requires the plaintiff to plead valid causes of action.

[25] In any event, we do not accept Theberge's submissions on this point.

[26] Theberge says that Heyde did not allege any misrepresentation about storage units in her statement of claim or a breach of the *Condominium Act* with respect to the storage units.[7] This is inaccurate. In fact, Heyde alleges that:

a. According to the Agreement of Purchase and Sale ("APS") she signed in October 2011, the base price of her condominium unit included a storage unit;[8]

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[7] All references to the statement of claim are to the Third Amended Statement of Claim dated June 17, 2016.

b. The unit delivered to her at close of sale in December 2014 did not have a storage unit;[9]

c. The information provided to Heyde by Theberge prior to closing contained material misrepresentations, including the representation about the storage unit, and these misrepresentations were not corrected prior to close of sale.[10]

d. Heyde relied on such representations in entering into the APS and completing the final closing with respect to her condominium unit.[11]

e. Theberge's misrepresentations are a breach of section 133 of the *Condominium Act*, which provides that a declarant shall not, in information that it is required to give to purchasers, provide material information that is 'false, deceptive or misleading".[12]

[27] Theberge's alleged misrepresentation regarding storage lockers, and its resulting breach of the *Condominium Act*, is therefore clearly pleaded.

[28] There are however contradictory allegations in the statement of claim. Although she alleges that the APS said there would be a storage unit included with her unit, Heyde also acknowledges that the disclosure statement provided to her along with the APS said there would be no storage unit provided.[13] She moreover alleges, in paragraphs 46 to 54 of the statement of claim, that the misrepresentations that give rise to the *Condominium Act* claim were made in the disclosure statement and declaration provided in October 2011. She does not clearly allege that the misrepresentation in the APS is the basis for part of her claim under the *Act*.

[29] Despite these contradictory allegations, we cannot conclude that Justice Smith made an error in principle on this issue. Section 133 of the *Condominium Act* allows a purchaser to

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[8] Paragraph 17, 20(a) and 28(a) of the statement of claim,
[9] Paragraphs11 and 30(a) of the statement of claim.
[10] Paragraphs 30 of the statement of claim.
[11] Paragraph 29 of the statement of claim.
[12] Paragraphs 47 and 52 of the statement of claim.
[13] Paragraph 48(a) of the statement of claim.

recover damages if materially false or misleading information is provided, whether in a disclosure statement or in other information that it is required to give to purchasers. In this case, the misleading information was provided in the APS itself. Given her allegations elsewhere that the APS contained a material misrepresentation with respect to the inclusion of a storage unit, Heyde's failure to refer to the APS specifically in the section of the statement of claim dealing with the *Act* appears to be a drafting oversight that could easily be addressed through an amendment to the statement of claim.

[30] The genesis of the problem here is the inconsistency between Theberge's representations in the documents it provided to purchasers. Paragraph 1(b) of the APS states that the base price for the unit is "inclusive of a Storage Unit". Section 2.2 of the accompanying Disclosure Statement says "There will be no storage units". It seems more than a little self-serving for Theberge to argue that it cannot sued for a misrepresentation in one document given to purchasers because the misrepresentation was contradicted in another document given to purchasers.

[31] It will of course be open to Theberge, at the common issues hearing, to argue that class members cannot claim under section 133(2) of the *Condominium Act* because the information about the storage units in the disclosure statement was correct even if the information in the APS was not, or because a claim under the *Act* cannot be based on a misrepresentation in the APS. Justice Smith recognized that Theberge could raise common defences at the hearing. Given the misrepresentation alleged in the statement of claim, however, we cannot conclude that the motion judge erred in allowing the *Condominium Act* claim with respect to the storage units to proceed.

[32] Theberge also contends that Heyde did not present any argument on a breach of the *Condominium Act* with respect to storage lockers at the certification hearing. As a result, it says that it did not have an opportunity to address this issue, and it was unfair of the motion judge to certify a breach of the *Act* as a common issue.

[33] The record does not support this argument. In her factum at the certification motion, the plaintiff argued that the pleadings with respect to a breach of the *Act* were sufficient, and

proposed that Theberge's failure to comply with statutory disclosure requirements as a common issue. [14] She stated that the rationale for liability under the *Act* is similar to that for liability for negligent misrepresentation. In her submissions on negligent misrepresentation, Heyde argued that Theberge is liable because, among other things, it failed to provide storage lockers. The defendant likewise addressed the *Condominium Act* claim in its factum, contending both that liability under the *Act* had not been properly pleaded and that the claim had no reasonable prospect of success on the merits.[15] Theberge also argued in its factum that a claim under the Act was unsuitable as a common issue.[16]

[34] Given the written submissions by both parties at the motion before Justice Smith, Theberge cannot reasonably contend that could have been taken by surprise by the motion judge's identification of a common issue with respect to the *Act*.

Is a breach of s. 133(2) an unsuitable basis for a common issue?

[35] Theberge argues that a misrepresentation claim under s. 133(2) of the *Condominium Act* is unsuitable for determination on a common basis, because class members will have to prove individual reliance. He makes this same argument with respect to all common issues that involve misrepresentations, even though the common issue on the negligent misrepresentation claim is not before this court on the appeal.

[36] Here is how Justice Smith approached common issues generally:

> 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

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[14] Paragraphs 98 to 101 and 111 of the plaintiff's factum on certification.
[15] Paragraphs 165 to 170 of the defendant's factum on certification.
[16] Paragraphs 251 to 253 of the defendant's factum on certification.

> the APS after March of 2013; however, the definition has always remained in the Disclosure Statement at Schedule "D" which defined a standard unit as including forced air heating.
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> 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.
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> 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.
>
> 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. (Emphasis added.)[17]

[37] Having concluded that the survival of class members' claim at closing is a common issue, Justice Smith took the purchasers' constructive knowledge into account in framing the common issues. The full question for resolution at the common issues hearing with respect to the *Condominium Act* claim is therefore as follows:

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[17] Paragraphs 75 to 78 of Justice Smith's reasons.

> Where all of the proposed class members either knew or ought to have known, either by signing the Acknowledgement 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:
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> (...)
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> (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?

[38] This formulation at once removes the need for any inquiry into individual issues and advances the resolution of a question common to all class members. This is what makes this case different than the situation in *Abdool v. Anaheim Management Ltd*, where the Court of Appeal upheld a refusal to certify a claim by purchasers of condominium units.[18] At the end of the common issues trial, the court may conclude that class members' knowledge of Theberge's misrepresentations prior to closing debars any liability under the *Condominium Act*. If so, any individual issues relevant to the *Condominium Act* claim will be moot. If not, all parties will have benefitted from resolution of a critical common issue. They will then have to devise a way forward to resolve any remaining individual issues. This is not unusual in the context of class proceedings.

[39] Theberge argues that Justice Smith erred in inferring that class members relied on the misrepresentations at issue when they agreed to purchase the units. Inferring reliance may not be appropriate in a class action where the defendant is alleged to have made multiple and differing representations.[19] As the British Columbia Court of Appeal has observed, however, a plaintiff's

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[18] *Abdool v. Anaheim Management Ltd.*, 1995 CarswellOnt 129, 21 O.R. (3d) 453.
[19] *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42, 2010 CaswerllOnt 79, at para. 155.

reliance may be inferred "where the misrepresentation in question is one which was calculated or which would naturally tend to induce the plaintiff to act upon it".[20]

[40] This case falls within the second category. In his decision, Justice Smith inferred that it was reasonable for purchasers of a condominium unit to rely on written representations in the Disclosure Statement and the specifications for a standard unit contained therein. Given the nature of the representations, this was not an error in principle.

[41] The language of section 74(1) of the *Condominium Act* also suggests that an inference of reliance is appropriate. It states that a developer must deliver a revised disclosure statement if there is a material change. A material change is a change that:

> a reasonable purchaser, on an objective basis, would have regarded as sufficiently important to the decision to purchase the unit … that it is likely that the purchaser would not have entered into the agreement of purchase or would have exercised the right to rescind if the disclosure statement had contained the change. [Emphasis added.]

[42] As a result, it is the reliance of a reasonable purchaser, as opposed to any given class member, that is relevant to a claim for misrepresentation under the *Act*. This further supports the inference drawn by Justice Smith.

[43] Theberge's broader argument on this issue is that all misrepresentation claims are fundamentally unsuitable for certification because individual issues preclude meaningful adjudication on a common basis.[21] The caselaw does not support this blanket proposition. There are some cases where courts have declined to certify actions as class proceedings because

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[20] *Kripps v. Touche Ross & Co.*, [1997] 6 W.W.R. 421, [1997] B.C.J. No. 968 (B.C.C.A.) (application for leave dismissed, [1997] S.C.C.A. No. 380), at para. 103; see also as authority for an inference of reliance generally *Queen v. Cognos Inc.*, [1993] 1 SCR 87.

[21] *McKenna v. Gammon Gold*, 2011 ONSC 1591 (ONSC) (at para. 160), var'd by 2011 ONSC 3782 (Div Ct); *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901 at paras. 117, 120, 127-29.

individual issues such as reliance would overwhelm any common issues.[22] In these cases there was an array of verbal and written representations made to various class members. In other cases, courts have concluded that, notwithstanding individual issues, a common issues trial will move the litigation forward for all class members.[23] Here, the evidence at certification established that common representations were made in documents provided to all class members. As a result, Justice Smith determined that the misrepresentations gave rise to common issues. He did not err in principle in doing so.

[44] Finally, we emphasize again the limited scope of this appeal. Neither Justice Smith's decision to frame the common issues on the assumption of class members' knowledge nor his decision that the claim as a whole is suitable as a class proceeding is before us. Had Theberge convinced the leave panel that individual issues would overwhelm all misrepresentation claims, leave would have been granted to appeal the determination of preferability as well as the certification of all such common issues. Instead, the leave panel apparently concluded that Justice Smith's overall framing of the common issues, his decision to certify negligent misrepresentation as a common issue, and his decision under s. 5(1)(d) were not subject to review.

[45] We accordingly decline to interfere with Justice Smith's determination that Theberge's potential liability under the *Condominium Act* could be determined as a common issue.

Liability for fraudulent misrepresentation as a common issue

[46] Again assuming that class members were aware of Theberge's misrepresentations prior to closing, the fourth issue certified as a common issue by Justice Smith was:

> Is the Defendant Theberge Developments 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

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[22] *Gammon Gold, supra*; *Kinross, supra*; and *Nadolny v. Peel (Region)*, 2009 CarswellOnt 5901 (ONSC); Singer v. Schering Plough.
[23] See, for example, *Fantl, supra.*

and for failing to provide a storage locker as stated in the APS, to each subclass member? If so, does this claim survive closing?

[47] Theberge contends, among other things, that the common issue as framed is not consistent with the allegations in the statement of claim.

[48] In the statement of claim, Heyde alleges that Theberge is liable for breach of contract and negligent misrepresentation based on its representations in the disclosure statement and the APS about the inclusion of a heating system and storage locker. As already discussed, she alleges that Theberge breached the *Condominium Act*, first by making "false, deceptive or misleading" statements in documents provided to induce class members to purchase the units, and then by failing to amend the statements prior to closing. Heyde alleges that Theberge was "negligent or reckless" in failing to comply with the *Act*.[24] She does not however allege that this conduct was fraudulent.

[49] Fraudulent misrepresentation is squarely raised only in the context of the acknowledgement that Heyde and other class members were asked to sign before closing. This acknowledgement contained a statement that the purchaser of the condominium unit had been informed and accepted that the components of a hot water heating system would have to be rented and that they agreed to pay the monthly rental fee for these components. Heyde alleges that Theberge "negligently or fraudulently represented to her that the documents provided for execution related to upgrades and finishes for the unit" and that, through this representation, Theberge "knowingly, willfully, intentionally and fraudulently misrepresented material facts" to her and so caused her loss and damage.[25]

[50] In his review of the causes of action under s. 5(1)(a), Justice Smith stated, correctly, that Heyde alleges that Theberge fraudulently misrepresented the contents of the acknowledgement. In finding that fraudulent misrepresentation was properly pleaded, however, he concluded as follows:

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[24] Paragraph 53 of the statement of claim.
[25] Paragraphs 34 and 38 of the statement of claim.

> The specifications attached to the Disclosure Statement stating that a forced air heating system were 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.[26]

[51] On this basis, Justice Smith went on to certify a common issue with respect to fraudulent misrepresentations allegedly made in the disclosure statement and APS.

[52] With all due respect, this was an error in principle. A common issue cannot be based on a theory of legal liability not advanced by the plaintiff.[27] The allegation of fraudulent misrepresentation was not made with respect to the disclosure statement and the APS, but rather with respect to the acknowledgement. Any misrepresentation about the contents of the acknowledgement could not possibly have induced class members to sign an APS, because the APS had already been signed many months earlier.

[53] Heyde argues that pleadings should not be subject to rigorous examination at the certification stage and that, absent any non-compensable prejudice to Theberge, we should follow the Court of Appeal's lead in *Hodge v. Neinstein* and permit her to amend her claim to allege fraudulent misrepresentations in the disclosure statement and APS.[28]

[54] The situation in *Hodge v. Neinstein* was different. In that case, the plaintiff provided the Court of Appeal with a proposed amended statement of claim. Heyde has not done likewise here. She is instead arguing that she could have moved to amend at the certification motion, had Theberge at that time challenged the sufficiency of the allegations with respect to fraudulent

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[26] Paragraph 49 of Justice Smith's reasons.
[27] *Labatt Brewing Co. v. NHL Enterprises Canada L.P.*, 2011 ONCA 511, at paras4-6.
[28] *Hodge v. Neinstein*, 2017 ONCA 494, at paras. 104-05 and Rule 26.01 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

misrepresentation. But Theberge had no reason to do so, because he could not have predicted that the motion judge would certify a common issue that was not anchored in the pleadings.

[55] In these circumstances, we would allow the appeal on this issue and strike the claim in fraudulent misrepresentation as a common issue. Given our conclusions on the pleadings issue, we need not consider Theberge's arguments about the suitability of a common issue based on a claim of fraudulent misrepresentation.

Legal effect of the Acknowledgement as a common issue

[56] The last common issue identified by Justice Smith related to the acknowledgement signed by Heyde:

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

[57] Theberge raises three arguments about this common issue.

[58] First, Theberge argues that no determination with respect to the acknowledgement can be made on a common basis, because what purchasers were told and what they understood about it may have varied. This may or may not be true, but it is irrelevant to the determination of the common issue as framed. The question focusses solely on the legal impact of the absence of any fresh consideration. It can be resolved without any evidence as to the subjective understanding of any individual class member.

[59] Second, Theberge argues that Heyde did not allege any lack of consideration in the statement of claim nor did she propose this as a common issue. We do not think that this gives rise to a reviewable error. Consideration is a required element of every contract. Heyde does not allege that she received any fresh consideration in return for signature of the acknowledgement. This permits her to argue that any undertaking she gave in this document is unenforceable. She does not need to plead legal principles, and the defendant should not have been surprised that the motion judge was alive to this issue.

[60] Finally, Theberge contends that the acknowledgement was not signed by all class members. A determination on the legal enforceability of the acknowledgement would therefore not advance the action forward for all class members and, as such, cannot be a common issue absent the creation of an additional sub-class.[29]

[61] Based on the uncontradicted evidence on the motion, there were at least five class members who did not sign the acknowledgement. The motion judge's finding that all purchasers signed it therefore appears to be in error. This puts into issue the appropriateness of a common issue premised on an identity of interest that does not exist.

[62] In *Western Canadian Shopping Centres Inc. v. Dutton*, Chief Justice McLachlin, as she then was, observed that the identification of common issues has been a "source of confusion" in the courts.[30] She held that:

> The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus 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 or that the resolution of the common issues would be determinative of each class member's claim. However, the class members' claims must share a substantial common ingredient to justify a class action. (...)
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> [W]ith regard to the common 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. A class action should not be allowed if class members have conflicting interests.

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[29] *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City of)*, 2015 ONCA 572, at para. 48; *Hollick v. Toronto (City of)*, [2001] 2 S.C.R. 158, at para. 18.
[30] *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, at paras. 39 and 40.

[63] As this passage suggests, care should be taken to avoid losing sight of the purpose of the *CPA* in considering potential common issues. Class members' claims might all have a substantial common ingredient, such that certification of the proceeding as a whole avoids duplication of efforts across many individual claims. This does not mean, however, that every class member must be identically situated, or that the adjudication of any common issue affects them in exactly the same way.

[64] In our view, even class members who did not sign an acknowledgment have a vested interest in obtaining a ruling on its enforceability. If the acknowledgement is enforceable, this may put an end to the claims of most class members and so make it uneconomical to continue the litigation as a class action. If the acknowledgement is unenforceable, all class members can benefit from the continued prosecution of their claims on a collective basis. As a result, framing the enforceability of the acknowledgement as a common issue is arguably consistent with the overall purposes of the *CPA* and accordingly with the approach advocated by Supreme Court in *Western Canadian Shopping Centres*.

[65] We are therefore not entirely convinced that the motion judge erred in identifying it as a common issue. In any event, any lack of commonality can be addressed through the creation of a second subclass consisting of all class members who signed an acknowledgement, and a variation of the sixth common issue so that it applies only to this sub-class.

[66] We accordingly allow this element of this appeal for this limited purpose.

Relevance of the real estate lawyers' advice in a common issues hearing

[67] At the certification hearing, Theberge challenged Heyde's appointment as the representative plaintiff and the appointment of KMH Lawyers as class counsel. Heyde, a lawyer, had articled at the firm several years earlier. She had also retained KMH Lawyers to advise her prior to closing the purchase of her condominium unit. Theberge said that it intended to issue a third party claim against the law firm and, as a result, it would be in a conflict of interest with the class.

[68] Justice Smith rejected these arguments. He noted that Heyde now works for the federal government and has no connection to KMH. There was furthermore no evidence that she would not fairly and adequately represent the interests of the class. As a result, the motion judge concluded that Heyde's experience as an articling student at KMH years ago was not a sufficient reason to disqualify her as a representative plaintiff.

[69] With respect to the appointment of class counsel, Justice Smith was not persuaded that KMH Lawyers has any conflict of interest with Heyde or other class members. He found that:

> A determination of the common issues that have been certified do not depend on the advice given by any lawyer to any 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.[31]

[70] Justice Smith further observed that a class member who consulted a lawyer before closing would have all been told that they had limited options:

> 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 fundamental breach or be a sufficiently material breach to have allowed the

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[31] Paragraph 100 of Justice Smith's reasons.

> 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.[32]

[71] On his motion to this court, Theberge was given leave to appeal on the following question:

> Did the motion judge err in finding that the real estate lawyers' advice would not be relevant in considering the issues in the action?

[72] Despite the narrow scope of this question, Theberge argues that, if this ground of appeal succeeds, the entire class action must fail. It relies on the same line of argument advanced in respect of the common issues involving misrepresentation claims, that is, that the advice received by individual class members may have varied, and this again makes the claims fundamentally unsuitable for determination on a common basis.

[73] The problem with this argument is that it ignores the motion judge's formulation of the common issues, which presupposes that every class member knew about Theberge's misrepresentations before they closed the purchase of their condominium units. As a result, it does not matter what actual knowledge class members had, what knowledge their lawyers had, or whether they gave their clients any advice about their legal options. These factual inquiries may be relevant to the disposition of individual claims after the common issues trial. Until then, however, they are irrelevant.

[74] Theberge also contends, as it did at certification, that its proposed third party action will inevitably put class members in conflict with class counsel. He cites *Arabi v. Toronto Dominion Bank* for the proposition that a lawyer who acts in real estate transaction cannot act as class counsel if the transaction subsequently give rise to class proceedings.[33]

[75] *Arabi* involved proposed class proceedings against eight financial institutions for alleged breach of contract in calculation of penalties for prepayment of residential mortgages. The

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[32] Reasons of Justice Smith, at para. 85.
[33] *Arabi v. Toronto Dominion Bank,* 2006 CaswellOnt 3204 (ONSC) at

lawyer who sought to act as class counsel, Mr. Farah, had represented the borrowers when they took out their mortgage loans. His advice to them at the time was relevant to their understanding of contractual terms and their decision to proceed. He later actively recruited these clients as representative plaintiffs and gathered information and documents in support of the claims. The class proceedings were effectively his idea. Justice E. Macdonald concluded that Mr. Farah's role displayed "a significant conflict of interest".[34]

[76] The facts in *Arabi* are readily distinguishable from the facts in this case. Justice Smith did not find that this action was initiated at the behest of KMH Lawyers. There was no evidence that their advice has any bearing on the determination of the common issues. As a result, there is currently no conflict of interest that prevents them from acting as class counsel, or that somehow taints the entire proceeding.

[77] Although Theberge could seek to start a third party action against class counsel, it would be within the scope of the motion judge's case management powers to prevent any procedural step being taken in such an action pending adjudication of the common issues. This would not involve striking the third party claim and therefore would not offend the Court of Appeal's reasoning in *478649 Ontario Ltd. v. Corcoran*.[35]

[78] We therefore dismiss the appeal on this ground.

Conclusions and Costs

[79] The certification order as a whole is upheld but amended as follows:

(a) the fourth common issue, liability for fraudulent misrepresentation, is struck;

(b) a second subclass is approved for purchasers who:

(i) are members of the main class; and

(ii) signed an Acknowledgement prior to close of sale.

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[34] *Arabi, supra,* at para. 19.
[35] 1994 CarswellOnt 577, 20 O.R. (3d) 28.

(c) The sixth common issue is varied as follows: Does the signing of the "Acknowledgement" by members of the second subclass have any legael effect, as Theberge did not give any consideration in return for their signing?

[80] Both parties seek costs. Heyde argues that Theberge's conduct on the appeal amounts to an abuse of process, and on this basis seeks substantial indemnity. Theberge seeks partial indemnity costs. The panel that granted leave fixed costs of $5000 to be disposed of as directed by this court.

[81] Although Theberge was successful in obtaining leave and in obtaining an amendment of the certification order, the plaintiff carried the day on most issues both on the motion for leave and on the merits of this appeal. As well, we agree with Heyde that Theberge improperly sought to expand the scope of the appeal. While we do not think that this conduct amounted to an abuse of process, it unquestionably drove up the costs involved for both parties. We therefore conclude that the plaintiff is entitled to reasonable costs.

[82] The partial indemnity costs sought by the plaintiff are significantly higher than those of the defendant. She seeks $24,608.96. Theberge's partial indemnity costs, excluding the $5000 fixed by the leave panel, are $10,901.52. This includes $2400 more in disbursements, mostly photocopying charges, than those claimed by the plaintiff.

[83] Taking into account the factors already mentioned, we fix costs on the appeal at $15,000 inclusive of fees, disbursements and HST, and direct Theberge to pay this amount to the plaintiff. We decline to order payment of costs on the motion for leave, given the parties' divided success.

BY THE COURT

M. Charbonneau, J.

F.L. Myers J.

S. Gomery, J.

CITATION: Heyde v. Theberge Developments Ltd., 2018 ONSC 4257
COURT FILE NO.: 17-2325
DATE: 2018/07/20

ONTARIO

SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Charbonneau, Myers, and Gomery, JJ.

BETWEEN:

Sabrina Heyde

Plaintiff/Respondent

– and –

Theberge Developments Ltd. and Joey Theberge

Defendants/Appellants

REASONS FOR JUDGMENT

BY THE COURT

Date of Reasons for Judgment: May 10, 2018
Date of Release: July 20, 2018

This is Exhibit "H" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Divisional Court File No.: 17-2325
Court File No.: 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

THE HONOURABLE JUSTICE CHARBONNEAU)	FRIDAY THE 20th
THE HONOURABLE JUSTICE MYERS)	DAY OF JULY, 2018
THE HONOURABLE JUSTICE GOMERY)	

BETWEEN:

SABRINA HEYDE.

Plaintiff (Respondent)

- and -

THEBERGE DEVELOPMENTS LIMITED AND JOEY THEBERGE

Defendants (Appellant)

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

O R D E R

THIS APPEAL, made by the Defendant/Appellant Theberge Developments Limited from the Order of the Honourable Justice R. Smith dated March 9, 2017, was heard on May 10, 2018 at the Courthouse, 161 Elgin Street, Ottawa, Ontario, K2P 2K1.

ON READING the Notice of Appeal, Appeal Books, Exhibit Books, Compendia, Factums, and Briefs of Authorities of the parties, filed, and on hearing the submissions of counsel for the parties,

1. **THIS COURT ORDERS** that the appeal be and is hereby allowed in part, and the order of Justice R. Smith dated March 9, 2017 be and is hereby amended.

2. **THIS COURT FURTHER ORDERS** that the fourth common issue, liability for fraudulent misrepresentation, is struck.

3. **THIS COURT FURTHER ORDERS** that a second Subclass is approved for purchasers who:

(a) are members of the Class; and

(b) signed an Acknowledgement prior to close of sale.

4. **THIS COURT FURTHER ORDERS** that the sixth common issue is varied as follows: Does the signing of the "Acknowledgement" by members of the second subclass have any legal effect, as Theberge did not give any consideration in return for their signing?

5. **THIS COURT FURTHER ORDERS** that the costs of the appeal be and are hereby fixed in the amount of $15,000, inclusive of fees, disbursements, and HST payable by the Appellant.

Registrar

ENTERED AT OTTAWA
INSCRIT A OTTAWA
ON/LE FEV FEB 06 2019
DOCUMENT # 0411
IN BOOK NO. 73-13
AU REGISTRE NO. 73-13

Divisional Court File No.: 17-2325
Court File No. 15-64526CP

SABRINA HEYDE
Plaintiff (Respondent)

- and -

THEBERGE DEVELOPMENTS LIMITED et al.
Defendants (Appellant)

ONTARIO
SUPERIOR COURT OF JUSTICE
DIVISIONAL COURT

Proceeding commenced at Ottawa
Proceeding Under the *Class Proceedings Act, 1992*

O R D E R

SPITERI & URSULAK LLP
1010-141 Laurier Avenue West
Ottawa, Ontario
K1P 5J3

Norman Mizobuchi (LSUC # 54366M)
Box # 367

Tel: 613.563.1010
Fax: 613.563.1011

Lawyers for the Defendants (Appellant) Theberge Developments Limited and Joey Theberge

This is Exhibit "I" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

SABRINA HEYDE
Plaintiff
(Respondent)

-and

THEBERGE DEVELOPMENTS LIMITED and JOEY THEBERGE
Defendants
(Appellant)

Court of Appeal File No. M49525
Court File No. 15-64526CP

COURT OF APPEAL FOR ONTARIO
BEFORE: SIMMONS J. A. JURIANSZ J.A. MILLER J.A.
DATE 11-APR-2019
DISPOSITION OF MOTION

Leave to ~~the~~ appeal denied. Costs fixed to the respondent fixed at $1500.00

SA-

J.K.

COURT OF APPEAL FOR ONTARIO
Proceeding commenced at **OTTAWA**

MOTION RECORD
VOLUME I
(Leave to Appeal)

ORDERS and REASONS

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K1P 5J3

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Fax: (613) 563-1011

Norman Mizobuchi
LSO No. 54366M

Lawyers for the Defendant/Appellant
Theberge Developments Limited

This is Exhibit "J" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No. 17-72825

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

THEBERGE DEVELOPMENTS LIMITED

Plaintiff

-and-

KELLY SANTINI LLP, ANDRÉ MUNROE, RELIANCE COMFORT LIMITED PARTNERSHIP, ZW PROJECT MANAGEMENT INC., KELLY MANTHORP HEAPHY PROFESSIONAL CORPORATION, AND JOHN DOE 1-100

Defendants

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a Statement of Defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the Plaintiff's lawyers or, where the Plaintiff do not have a lawyer, serve it on the Plaintiff, and file it, with proof of service, in this court office, WITHIN TWENTY DAYS after this Statement of Claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your Statement of Defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a Statement of Defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your Statement of Defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

IF YOU PAY THE PLAINTIFF'S CLAIM, and $500.00 for costs, within the time for serving and filing your statement of defence, you may move to have this proceeding dismissed by the court. If you believe the amount claimed for costs is excessive, you may pay the plaintiff's claim and $500.00 for costs and have the costs assessed by the court.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: JUN 0 2 2017

Issued by _____
Local Registrar

Address of court office:
161 Elgin St.
Ottawa, Ontario
K2P 2K1

TO **KELLY SANTINI LLP**
2401-160 Elgin Street
Ottawa, Ontario K2P 2P7

AND TO **ANDRÉ MUNROE**
2401-160 Elgin Street
Ottawa, Ontario K2P 2P7

AND TO **RELIANCE COMFORT LIMITED PARTNERSHIP**
44 East Beaver Creek
Richmond Hill, Ontario L4B 1G6

AND TO **ZW PROJECT MANAGEMENT INC.**
150 Richmond Road
Ottawa, Ontario K1Z 6W2

AND TO **KELLY MANTHORP HEAPHY PROFESSIONAL CORPORATION**
2323 Riverside Drive, Suite B0001
Ottawa, Ontario K1H 1A1

AND TO **JOHN DOE 1-100**

.

CLAIM

1. The Plaintiff Theberge Developments Limited ("**Theberge**") claims against the Defendants:

a) contribution, indemnity, or other relief over in respect of any damages and/or amounts for which Theberge may be found liable in the Ontario Superior Court of Justice action bearing Court File No. 15-64526CP (the "**Related Action**");

b) costs of the Related Action, plus applicable taxes thereon;

c) costs of this action, plus applicable taxes thereon;

d) pre-judgment and post-judgment interest in accordance with the *Courts of Justice Act,* R.S.O. 1990, C.43, as amended; and

e) such further and other relief as this Honourable Court may deem just.

THE PARTIES

2. The Plaintiff Theberge is a corporation pursuant to the laws of Ontario and is engaged in building and marketing of residences in Ottawa and surrounding areas.

3. The Defendant Kelly Santini LLP is a limited liability partnership established and existing under the laws of Ontario. It carries on business as barristers and solicitors. At all material times, Kelly Santini LLP was the solicitors for Theberge on the Alta Vista Ridge development. The Defendant André Munroe is a partner of Kelly Santini LLP, and is licensed to practice law in the Province of Ontario. The Defendants Kelly Santini LLP and André Munroe are hereinafter collectively referred to as "**Kelly Santini**".

4. The Defendant ZW Project Management Inc. ("**ZWPMI**") is a corporation pursuant to the laws of Ontario and is engaged in providing project management services for all phases of a development.

5. The Defendant Reliance Comfort Limited Partnership ("**Reliance**") is a limited liability partnership established and existing under the laws of Ontario. Reliance provides heating, cooling, and water heater solutions for homeowners in Canada. It sells, rents, maintains, and services heating, ventilation and air conditioning equipment ("**HVAC**"), furnaces, water heaters, air conditioners, and other HVAC products.

6. The Defendants Kelly Manthorp Heaphy Professional Corporation and John Doe 1-100 are the law firms and lawyers who provided independent legal advice to the plaintiff Sabrina Heyde in the Related Action (the "**plaintiff**") and the Class, as defined in the Related Action, in connection with the purchase of Alta Vista Ridge units. The Defendants Kelly Manthorp Heaphy Professional Corporation and John Doe 1-100 are hereinafter collectively referred to as the "**Purchasers' Lawyers**".

THE RELATED ACTION

7. This action and the Related Action concern the condominium units in the Alta Vista Ridge development that were developed and sold by Theberge. Alta Vista Ridge is comprised of stacked townhouses known as the Terrace Towns and low-rise apartment buildings known as the Urban Flats.

8. In the Third Amended Statement of Claim, the plaintiff alleges, on her behalf and on behalf of the Class, that 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 alleges that sub-Class members' agreements of purchase and sale ("**APS**") included a storage unit, which was not provided to them by Theberge. The plaintiff further pleads that Theberge acted "unlawfully" in presenting the document in which purchasers acknowledged the rental fee for the forced air heating system (the "**Acknowledgment**"). The plaintiff claims damages for breach of contract, breach of the *Condominium Act, 1998*, and negligent and fraudulent misrepresentations, relating to the purchase of condominium units. The full particulars of the plaintiff's claim are set out in the Third Amended Statement of Claim.

9. Theberge denies all allegations made in the Related Action. For the purpose of this statement of claim only, Theberge repeats and relies on the pleadings in the Related Action.

10. On or about March 9, 2017, Justice Smith certified the Related Action as a class proceeding with the following common issues:

> Where all of the 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 and a storage locker, 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 Developments did not give any consideration in return for their signing?

KELLY SANTINI

11. In advance of the Alta Vista Ridge development, Theberge retained Kelly Santini as the solicitors for the Alta Vista Ridge development. These solicitors were retained because of their expertise in condominium law. Theberge looked to its lawyers for all necessary legal services and advice in respect of the Alta Vista Ridge development.

12. Kelly Santini acted for Theberge on all aspects of the Alta Vista Ridge development. Kelly Santini drafted, prepared, and updated all documents related to the Alta Vista Ridge development, including the APSs, the disclosure statements, and the definition of a standard unit. Kelly Santini sent these documents directly to Theberge's sales agents, and others, for marketing to and execution by purchasers. Kelly Santini communicated directly with the purchasers and the Purchasers' Lawyers, which included alleged fraudulent and negligent misrepresentations. Kelly Santini agreed to take care of the issues arising out of the Alta Vista Ridge development, and continued to act for Theberge after the closing of the Alta Vista Ridge units, including in disputes with purchasers on issues raised in the Related Action without additional fees.

13. Theberge relied in good faith upon Kelly Santini, and its expertise in condominium law, to ensure that all documents, disclosure statements, agreements, and schedules that were

prepared, reviewed, updated, and/or registered by that firm, complied with all requirements of the *Condominium Act, 1998*, S.O. 1998, c. 19 (the "**Act**"); and that all correspondence to purchasers' and the Purchasers' Lawyers provided full, accurate, and timely disclosure of material information as required by the Act.

14. Kelly Santini was a party to an express or implied contract with Theberge and was under a duty to represent Theberge's interests with due care and skill, without negligence, in the utmost good faith and with a view to the best interests of Theberge. In addition, Kelly Santini owed fiduciary duties to Theberge, including but not limited to:

a) a duty to serve Theberge competently, conscientiously and diligently;

b) a duty to advise Theberge honestly and candidly;

c) a duty not to act in a conflict of interest; and

d) a duty to act honestly and in good faith with a view to the best interests of Theberge.

15. Kelly Santini provided legal services to Theberge in respect of the condominium development, including

a) Preparing all condominium documents including the APSs, disclosure statements, schedules, and definition of a standard unit;

b) Negotiating, preparing, and providing legal advice concerning the purchasers;

c) Providing disclosure statements and material information to purchasers as required by the Act;

d) Organizing the condominium corporations, registering the by-laws, and arranging and attending the turnover meeting in compliance with the Act; and

e) Preparing all of the pertinent closing documents and completing the unit sale transactions.

16. Kelly Santini was negligent and breached its contractual and fiduciary duties to Theberge by providing legal services and advice below the standard of care, including by preparing and delivering condominium documents containing the alleged misrepresentations and failing to correct condominium documents containing the alleged misrepresentations in a timely manner. Kelly Santini was also liable to the plaintiff and Class in tort or otherwise by virtue of its interaction with the purchasers, including alleged negligent and fraudulent misrepresentations.

17. Theberge pleads that if the plaintiff or the Class have suffered any damages, which is not admitted, but expressly denied, then such damages were caused or contributed to by the conduct, fault, omissions, neglect, negligence, negligent or fraudulent misrepresentations, or breaches of duty of Kelly Santini to the Class and/or Theberge.

18. Further, or in the alternative, Theberge pleads that Kelly Santini was its agent in the Alta Vista Ridge development, and Theberge is entitled to be indemnified by Kelly Santini for any loss arising out of the service rendered by Kelly Santini as agent of Theberge, including in the preparation and delivery of the condominium documents containing alleged misrepresentations and in communications with the Class.

19. Further or in the alternative, Theberge pleads that by virtue of the express and/or implied terms of their agreement with Theberge, Kelly Santini is required to indemnify and hold

harmless Theberge in respect of any and all claims, including the plaintiff's and Class members' claim, arising out of the Alta Vista Ridge development. Further, or in the alternative, Theberge is entitled to contribution or indemnity from Kelly Santini under law or equity.

20. Theberge claims contribution and indemnity from Kelly Santini for any amounts for which it may be found to be responsible in the Related Action.

ZWPMI

21. Theberge also retained ZWPMI as project manager for the Alta Vista Ridge development as a result of discussions with ZWPMI, including express representations by ZWPMI as to its experience, skills and capabilities in condominium development. The agreement between Theberge and ZWPMI requires that ZWPMI indemnify and hold harmless Theberge from and against all claims, demands, losses, costs, damages, actions, suits or proceedings whether in respect of losses suffered or in respect of claims by third parties that arise out of, or are attributable in respect to, their involvement in the Alta Vista Ridge development by its negligent acts or omissions or failure of ZWPMI to fulfill a term or condition.

22. ZWPMI managed all aspects of the Alta Vista Ridge development including negotiations and implementation of the forced air heating system by Reliance and the storage units.

23. At all material times, Theberge relied upon ZWPMI to exhibit the requisite skills of an experienced and capable construction project manager. Theberge relied on the expertise of ZWPMI for the design of the project, project management, construction inspection, the approval of the Alta Vista Ridge development and all other obligations set out in the agreement between ZWPMI and Theberge.

24. Theberge pleads that if the Class is entitled to any of the damages as outlined in the Related Action, which is not admitted, but specifically denied, such losses or damages were caused wholly, or were contributed to, by the conduct, fault, omissions, neglect, negligence, or breaches of duty of ZWPMI, or the failure of ZWPMI to exercise reasonable care, skill or diligence in the performance or rendering of any work or service required to be performed or rendered by ZWPMI, the particulars of which include the following:

a) It performed its required duties without requisite skill, and was either negligent or reckless in the course of carrying out its duties;

b) It did not take into appropriate consideration the potential for Theberge's liability in implementing the forced air heating system program with Reliance and storage units; and

c) Such further and other grounds as counsel may advise.

25. In the circumstances, to the extent that project management relating to the Alta Vista Ridge development resulted in liability to Theberge, or was done negligently or inaccurately, resulting in damages to Theberge, those damages were in fact caused by or contributed to by the breaches of duty by ZWPMI.

26. Theberge claims contribution and indemnity from ZWPMI for any amounts for which it may be found to be responsible in the Related Action.

RELIANCE

27. In or about late 2012 or early 2013, Reliance approached Theberge regarding a heating system comprised of a hot water tank and air handler/fan coil. In or about March 2013, the

parties entered into a standard form agreement drafted by Reliance. Pursuant to the agreement, Reliance directed Theberge to, *inter alia*, "require each Purchaser of a Home to accept a rental arrangement, to assume Builder's obligations with respect to the Equipment in accordance with RHC's then standard terms and conditions and at RHC's then standard rental rates applicable to the Project and to acknowledge RHC's title to and ownership of such Equipment."

28. Reliance directed and instructed Theberge to, and Theberge did, have the purchasers execute the Acknowledgment. Reliance communicated directly with the purchasers and the Purchasers' Lawyers, which included alleged fraudulent and negligent misrepresentations. Reliance entered into rental agreements with each purchaser for the forced air heating system and charged rental fees at its sole discretion.

29. Reliance was negligent and breached its duties to Theberge. Reliance was also liable to the plaintiff and Class in tort or otherwise by virtue of its interaction with the purchasers, including the alleged negligent and fraudulent misrepresentations.

30. Theberge pleads that if the plaintiff or Class has suffered any damages, which is not admitted, but expressly denied, then such damages were caused or contributed to by the conduct, fault, omissions, neglect, negligence, negligent or fraudulent misrepresentations, or breaches of duty of Reliance to the Class and/or Theberge.

31. Further, or in the alternative, Theberge did not deal with purchasers regarding the forced air heating system and the Acknowledgment on its own account, but expressly as an agent for and on behalf of its principal Reliance, and is entitled to be indemnified by Reliance for any loss arising out of the service rendered by Theberge as agent of Reliance.

32. Further or in the alternative, Theberge pleads that by virtue of the express and/or implied terms of its agreement with Theberge, Reliance is required to indemnify and hold harmless Theberge in respect of any and all claims, including the plaintiff's and Class members' claim, arising out of that Alta Vista Ridge development. Further, or in the alternative, Theberge is entitled to contribution or indemnity from Reliance under law or equity.

33. Theberge, at all material times in its dealings with Reliance:

a) complied with the contract;

b) reported to Reliance;

c) acted under the direction and control of Reliance;

d) received and followed all instructions and directions from Reliance and those for whom it is in law responsible;

e) complied with Reliance's policies, programs, and procedures as required by the contract, including its rental implementation program;

f) refrained from undertaking any action on behalf of Reliance that would be in conflict with any of Reliance's policies, programs, and procedures as required by the contract;

g) acted in a professional, faithful, diligent, efficient, and honest manner using its best skill and judgment in accordance with the terms of the contract and all applicable laws;

h) notified Reliance of conditions, concerns, challenges, and potential liabilities; and

i) acted as Reliance's agent.

34. Theberge claims contribution and indemnity from Reliance for any amounts for which it may be found to be responsible in the Related Action.

PURCHASERS' LAWYERS

35. Theberge required and directed each purchaser to obtain independent legal advice in connection with the purchase of an Alta Vista Ridge unit, including in the review of all condominium documents and prior to executing the APS and any other condominium related documents.

36. Each of the purchasers who purchased an Alta Vista Ridge unit did so after obtaining independent legal advice from one of the Purchasers' Lawyers.

37. The Purchasers' Lawyers each owed a duty of care and fiduciary duties to each of their respective clients at all material times, to provide legal advice in relation to the Alta Vista Ridge unit, which met the standard of care.

38. The Purchasers' Lawyers each were in a contractual relationship with their respective clients at all material times, to provide legal advice in relation to the Alta Vista Ridge unit which met the standard of care.

39. Theberge denies that it owed or breached any obligations to the Class members, and/or that the Class members relied on Theberge in purchasing the Alta Vista Ridge unit.

40. If, however, the plaintiff and/or the Class members are found to have suffered any damages as a result of any breaches by Theberge, which is expressly denied, Theberge pleads that such damages were caused or contributed to by the negligence, breach of contract and/or

breach of fiduciary duties of the Purchasers' Lawyers, who advised the Class members in respect of the purchase of the Alta Vista Ridge unit, and upon whose advise the Class members relied, on the grounds that:

a) Each of the Purchasers' Lawyers owed fiduciary duties and duties of care to their respective clients in providing advice as to the Alta Vista Ridge unit, including the duty to meet the standard of care, which each of the Purchasers' Lawyers breached by providing legal advice below the standard of care; and

b) Each of the Purchasers' Lawyers owed contractual duties to their respective clients, having been retained for the purpose of providing advice with respect to the purchase of the Alta Vista Ridge unit, which each of the Purchasers' Lawyers breached by providing legal advice below the standard of care.

41. The Class members relied upon the advice and information provided to them by their respective Purchasers' Lawyers in all aspects of the purchase of the Alta Vista Ridge unit including the decision to purchase a unit and close the transaction.

42. To the extent that there is any finding in the main action that the Class members suffered damages as a result of purchasing their Alta Vista Ridge unit, their respective Purchasers' Lawyers are responsible for such damages.

43. Theberge claims contribution and indemnity from the Purchasers' Lawyers for any amounts for which it may be found to be responsible in the Related Action.

44. Theberge reserves its right to amend its statement of claim to make further allegations upon reviewing the productions and discovery in the Related Action and in these proceedings.

45. Theberge pleads and relies upon the *Negligence Act*, R.S.O. 1990, c. N.1., as amended, and the *Condominium Act, 1998,* S.O. 1998, c. 19, as amended.

46. Theberge proposes that the trial of this action be in the City of Ottawa.

June 2, 2017

SPITERI & URSULAK LLP
1010 - 141 Laurier Avenue West
Ottawa, Ontario
K1P 5J3

Norman Mizobuchi
(LSUC# 54366M)

Tel: (613) 563-1010
Fax: (613) 563-1011

Lawyers for the Plaintiff

THEBERGE DEVELOPMENTS LIMITED
Plaintiff

-AND-

KELLY SANTINI LLP ET AL.
Defendants

Court File No. 17-D528

ONTARIO SUPERIOR COURT OF JUSTICE
Proceeding commenced at **OTTAWA**

STATEMENT OF CLAIM

SPITERI & URSULAK LLP
1010-141 Laurier Avenue West
Ottawa, Ontario, K1P 5J3

Norman Mizobuchi (LSUC # 54366M)
Box # 367

Tel: 613.563.1010
Fax: 613.563.1011

Lawyers for the Plaintiff
Theberge Developments Limited

Box 367

This is Exhibit "K" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	_____DAY, THE 13th
	)	
JUSTICE ROBERT SMITH	)	DAY OF SEPTEMBER, 2019

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

ORDER

THIS CASE CONFERENCE for an Order approving the litigation plan and notice of certification, and disclosing of personal information of Class Members to Class Counsel was convened by telephone on September 10, 2019 at the Courthouse, 161 Elgin Street, Ottawa, Ontario K2P 2K1.

ON HEARING the submissions of counsel for the Plaintiff and counsel for the Defendant,

1. **THIS COURT ORDERS** that Theberge Developments shall provide to KMH Lawyers the following information within its possession or control:

   The names, Alta Vista Ridge condominium addresses, and e-mail addresses for the Class Members as defined in paragraph 3 of the Order of Justice R. Smith dated March 9, 2017.

2. **THIS COURT ORDERS** that the litigation plan, which is attached as Schedule "A" to this Order, is hereby approved.

3. **THIS COURT ORDERS** that the Notice of Certification, which is attached as Schedule "B" to this Order, is hereby approved.

4. **THIS COURT ORDERS** that the written election to opt out ("the Opt Out form), which is attached as Schedule "C" to this Order, is hereby approved.

5. **THIS COURT ORDERS** that the Notice of Certification shall be disseminated in accordance with the notice program described in paragraphs 12 and 13 of the Litigation Plan attached as Schedule "A".

6. **THIS COURT ORDERS** that a Class Member may only opt out of the class proceeding by sending the Opt Out form or letter to the same effect to KMH Lawyers within 90 days after delivery of the Notice of Claim of Action.

7. **THIS COURT ORDERS** that KMH Lawyers shall report to the Court and to the Defendant the names of all persons who opted out of the proceeding no later than 30 days after the expiry of the 90 day opt out period.

8. **THIS COURT ORDERS** that the incurred fees and disbursement associated with the Notice of Certification and the receipt of opt outs shall initially be borne by the Plaintiff subject to final determination as to liability for payments of such fees and disbursements as may be ordered by the trial judge

(Signature of Judge)

ENTERED AT OTTAWA
INSCRIT A OTTAWA
ON/LE SEP 25 2019
DOCUMENT # 0411
IN BOOK NO. 73-13
AU REGISTRE NO. 73-13

SCHEDULE A

LITIGATION PLAN

OVERVIEW

1. This action was certified as a class proceeding by Order of Justice Smith dated March 9, 2017.

2. Sabrina Heyde was appointed as the Representative Plaintiff of this class proceeding.

3. The Order of Justice Smith dated March 9, 2017 was amended by Order of Justices Charbonneau, Myers, and Gomery of the Superior Court of Justice Divisional Court dated July 20, 2018.

4. The Court of Appeal refused a motion for leave to appeal.

THE COMPOSITION OF THE CLASS AND THE SUBCLASS

5. The Class is defined as:

    a. All persons who were either, an original purchaser or who received a transfer or assignment of an 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 or about February 15, 2015) stating that "The purchaser acknowledges that the water heater and HVAC System in the dwelling may be a rental unit…"

6. The first Subclass is defined as those purchasers who were:

    a. members of the 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.

7. The second Subclass is defined as all purchasers who:

    a. members of the Class as defined above; and

    b. signed an Acknowledgement prior to close of sale.

CLASS COUNSEL

8. The Plaintiff has retained KMH Lawyers ("KMH Lawyers" or "Class Counsel") as Class Counsel for this class action. KMH Lawyers has the requisite knowledge, skill, experience and personnel to continue this action to resolution.

NOTICE OF CERTIFICATION OF THE ACTION AS A CLASS PROCEEDING AND THE OPT-OUT PROCEDURE

9. Notice of certification is intended to inform class members of what has happened, of the effect on their individual rights, and what steps they can take and the consequences of doing so. Notice of certification therefore generally contains the following:

    a. A description of the class that has been certified;

    b. A description of the nature of the claims asserted by the Plaintiff for which the action has been certified;

    c. Explanation of the significance of the certification to the action for Class Members;

    d. An explanation of Class Members' right to "opt-out" or exclude themselves from the litigation *i.e.* to pursue individual claims, and the significance of doing so; and

    e. Contact information for Class Counsel to allow Class Members to appropriately direct their inquiries.

10. The Plaintiff proposes that a notice of the certification of the action be circulated to advise Class Members, among other things, that:

    a. The Court has certified the action as a class proceeding;

    b. The claims being advanced by the Plaintiff are generally that Theberge Developments failed to provide a storage locker and HVAC in accordance with the agreements of purchase and sale.

    c. Persons falling within the definition of the Classes will be bound by the determination of the common issues unless they opt out;

    d. A person may only opt out of the class proceeding by sending a written election to opt out to KMH Lawyers within 90 days after delivery of the notice;

    e. No person may opt out of the class proceeding after 90 days of delivery of the notice, such opt out notice to be received or post making prior to expiry of the 90 day notice period for opt out;

    f. Further notice will be provided following judgment on the common issues; and

g. If the common issues are resolved in favour of the Class Members, claimants may be required to register, file a claim and prove additional facts in order to obtain compensation.

11. No personal or private contact information of Class and Subclass members will be provided to KMH Lawyers by Theberge Developments, Condominium Corporation No. 958, or Condominium Corporation No. 941 without an Order of the Court regarding the same.

12. Pursuant to the certification order, notice of certification, in a form to be approved by the Court, will be disseminated to Class Members in the following manner:

    a. E-mailed to addresses to be provided by Theberge Developments; and

    b. Mailed to residential addresses to be provided by Theberge Developments.

13. The notice of certification shall be:

    a. Provided by Class Counsel to any person who requests it; and

    b. Posted by KMH Lawyers on its website.

14. The Plaintiff will pay the cost of disseminating the notice in the above manner. The Plaintiff reserves her right to seek the recovery of these costs, in whole or in part, from the Defendant by Order of the judge presiding at the trial of the common issues.

15. The Plaintiff proposes that opt out notices be directed to Class Counsel who will report to the Court and to the Defendant the names and addresses of the persons who opt-out no later than 30 days after the expiry of the 90 day opt out period.

REPORTING AND COMMUNICATION

16. Current information on the status of the action is posted and will be updated regularly on Class Counsel's website at www.kmhlawyers.ca under a link for "Alta Vista Ridge Class Action." Copies of some of the publicly filed court documents, court decisions, notices, documentation and other information relating to the action will be accessible from the website.

17. The website also provides direct dial contact information for a member of Class Counsel's staff who can provide further information should a Class Member request or require it.

COLLECTION OF RELEVANT DOCUMENTS FROM MEMBERS OF THE CLASS AND SUBCLASS

18. On behalf of the class and subclasses, the Defendant or its counsel have in their possession copies of the agreements of purchase and sale of the original purchasers as well as all documents signed by respective purchasers prior to closing. In its certification motion materials and cross-examinations, the Defendant has provided evidence of the relevant agreements of purchase and sale and disclosure statements. As part of the discovery process, the Defendant will be obliged to produce these files. Should any other relevant agreements of purchase and sale and disclosure statements be found during the discovery process the Defendant will be obliged to produce those files.

19. On behalf of the class and subclasses, the Plaintiff, Defendant or their counsel have in their possession copies of other documents from the class members that are relevant to this class proceeding. As part of the discovery process, the parties are obliged to produce these documents. Alternatively, the parties may admit in its pleadings or otherwise these documents are substantially similar for the purpose of this litigation.

20. As part of the discovery process, if relevant to a certified common issue, the Defendant should produce all documentation within its possession or control related to Ecologix (the manufacturer of the air handler) as well as Reliance Home Comfort. If the documents are not available, the Plaintiff will bring a Rule 30.10 motion.

DOCUMENT MANAGEMENT

21. The parties will arrange to have their documents and productions produced by hard copy, with photocopies produced to opposing counsel (tabbed and bound) by no later than November 7, 2019. The parties may request electronic copies of productions.

22. Regarding the costs of productions, under Rule 30.04(7), the parties are entitled to be reimbursed for the reasonable costs associated with producing discovery documents (subject to claiming the same in the costs order at the end of trial). This requirement balances the Defendant's production obligations against the proportionality principle and costs of over-productions. If coverage counsel is appointed, the discovery plan may be revisited with consent of the parties.

LITIGATION SCHEDULE

23. What follows is a litigation schedule for the remaining steps in the action:

    a. The Plaintiff may amend the Statement of Claim in accordance with the proposed amendments offered by the Defendant by June 10, 2019;

    b. Service of the Statement of Defence by 45 days after delivery of the amended Statement of Claim;

c. Delivery of Reply, if necessary, by 15 days after delivery of the Statement of Defence;

d. Exchange of Affidavits of Documents and productions no later than 90 days after the close of pleadings;

e. Examinations for Discovery within 60 after exchange of Affidavits of Documents;

f. A pre-trial is to be scheduled by April 2020;

g. Common issues trial to be heard in 2021.

24. For any procedural issues, a telephone case conference may be scheduled with Justice Smith.

25. An in-person case conference shall be scheduled in the fall of 2019.

MEDIATION

26. The parties participated in mediation before Bryan A. Carroll on January 21, 2019. The parties may conduct a further mediation if they agree to do so.

MANNER OF PROOF AT TRIAL

27. At trial, the Plaintiff expects to rely on the following to prove the facts underlying the claim:

a. Admissions made in the pleadings;

b. Admissions made in discovery;

c. Admissions made through Notices to Admit;

d. Admissions contained in documents to be proven through Notices to Admit Documents;

e. Witnesses such as the Plaintiff and other class members; and

f. Expert evidence, if necessary.

SCHEDULING OF THE COMMON ISSUES TRIAL

28. The trial shall be held in 2021.

ISSUES TO BE RESOLVED AT THE TRIAL OF THE COMMON ISSUES

29. Pursuant to the Certification Order, the common issues of this class proceeding shall be as follows:

> Where all of the proposed class members either knew or ought to have known, either by signing the Acknowledgement or by taking interim occupancy of their unit, that a forced air heating system as specified in the Disclosure Statement and a storage locker, was not included with the purchase of their unit and they proceeded with 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 Theberge Developments liable for damages for the tort of negligent misrepresentation for failing to provide a forced air heating system for each class members' 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 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?

e. Does signing of the "Acknowledgement" by members of the second subclass have any legal effect, as Theberge did not give any consideration in return for their signing?

30. Certification of damages as a common issue were sought but specifically not certified (other than punitive damages). The parties may agree that damages may be determined at the common issues trial and move to have the same certified as a common issue. Alternatively, the Plaintiff may seek to have damages addressed following the common issues trial.

NOTICE OF THE RESOLUTION OF THE COMMON ISSUES

31. Assuming that the common issues are resolved in favour of the Plaintiff, the Court will be asked:

a. to settle the form and content of the Notice of Resolution of the common issues;

b. To prescribe the information required from Class Members and/or Subclass Members in order to make an individual claim based on the judgment on the common issues, if necessary;

c. To declare the facts it will be necessary for Class Members and/or Subclass Members to establish to succeed in individual claims, if any; and

d. To set a date by which Class Members and/or Subclass Members will be required to file an individual claim.

32. The Plaintiff proposes that the notice of judgment on the common issues include the following information:

a. A description of the Class, the first Subclass, and the second Subclass;

b. A description of the common issues and the nature of the claims asserted;

c. That the Plaintiffs were successful on the common issues;

d. The nature of any class-wide remedies granted in the judgment on the common issues, and what steps, if any, it is necessary for Class Members and/or Subclass Members to claim the benefit of those remedies;

e. What steps a Class Member must take to assert a claim and what facts a Class Member must prove to succeed on such a claim;

f. That no person will be entitled to any compensation unless he/she/it complies with the instructions contained therein;

g. How to obtain further information; and

h. That their claims in relation to the matters raised in the pleadings will be deemed to have been finally adjudicated whether or not they participate in the individual stage of the proceeding.

33. The Plaintiffs will ask the Court to order that the notice of resolution of the common issues be distributed substantially in accordance with the procedure set out in paragraph 11 above.

DAMAGES

34. In the event that damages need to be determined on an individual basis (as opposed to as part of the common issues trial), damages will be assessed individually by a referee.

Alternatively, the Plaintiff may seek to pursue an aggregate assessment of damages pursuant to section 24 of the *Class Proceedings Act*, following the common issues trial.

CLAIMS PROCESS APPOINTMENTS

35. The Plaintiff may ask the Court to appoint one or more referees with such rights, powers and duties as the Court directs, to conduct hearings with respect to any individual issues that remain outstanding in order for individual Class Members or Subclass members to obtain relief, pursuant to Rules 54 and 55 of the *Rules of Civil Procedure*. The references will be conducted in accordance with the directions of the trial judge in the order appointing the referee.

CLAIMS ASSESSMENTS

36. The Court will be asked to set a deadline (the "Claims Deadline") by which Class Members and/or Subclass Members must file their claims with the Court.

37. Any person who does not file a claim in accordance with the orders of the Court before the Claims Deadline will not be eligible to assert an individual claim in accordance with the process described below.

38. The evidence necessary to succeed on an individual claim will substantially depend on the extent of the Plaintiff's success on the common issues. The process proposed for determining such claims is outlined below, subject to the input of the Defendant and the direction of the Court.

39. Class Members and/or Subclass Members will be required to give notice of their intention to proceed with a claim at common law within 90 days by providing a statement of the facts (limited to those facts relating solely to the individual issues specified by the Court) on which they rely.

FURTHER ORDERS CONCERNING THIS PLAN

40. This Plan may be amended from time-to-time by directions given at case conferences or by further order of the Court.

EFFECT OF THIS PLAN

41. This Plan, as it may be revised by order of the Court from time to time, shall be binding on all Class Members and Subclass Members whether or not they make a claim under the Plan.

SCHEDULE B

TO ALL ORIGINAL PURCHASERS OF ALTA VISTA RIDGE ON BLACKCOMB PRIVATE IN OTTAWA

READ THIS NOTICE CAREFULLY AS IT MAY AFFECT YOUR RIGHTS

NOTICE OF CLASS ACTION CERTIFICATION

An action alleging that Theberge Developments breached its obligations to certain original purchasers and current owners of condominiums at Alta Vista Ridge is pending before the Ontario Superior Court of Justice. The action *Heyde* v. *Theberge Developments Limited*, File No. 15-64526CP was certified as a class action on March 9, 2017. Sabrina Heyde of Ottawa, Ontario, is the representative plaintiff.

The Class Members are 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 ... "

The first Subclass is defined as those purchasers who were:

a) Members of the 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.

The second Subclass is defined as all purchasers who:

a) Members of the Class as defined above; and

b) Signed an Acknowledgement prior to close of sale.

WHAT IS THE LAWSUIT ABOUT?

The allegation is that Theberge Developments, the developer of Alta Vista Ridge misrepresented what would be provided with each condominium unit and, in particular, whether a forced air system and storage locker were included in the purchase price. The class action seeks general and punitive damages from Theberge Developments based on breach of contract, tort and breach of the *Condominium Act*.

YOUR RIGHT TO CHOOSE WHETHER OR NOT TO BE PART OF THE LAWSUIT

If you fall within the class definition described above, you do not need to do anything. You are automatically included in the class unless you opt out of this proceeding. If you want to be excluded from the class, you must send the completed and signed Opt Out Form or a letter indicating your desire to opt-out, including your name, signature and contact information, by mail, courier, fax, or e-mail, to the law firm KMH Lawyers ("KMH") at the address specified below:

Miriam Vale Peters, KMH Lawyers
B0001-2323 Riverside Drive
Ottawa, Ontario
K1H 8L5
E-mail: mvp@kmhlawyers.ca
Fax: 613-523-2924

The deadline for opting out is **January 10, 2020.**

If your written request to opt out is not received by that date, you will remain a Class Member in the lawsuit, may cooperate in the proceeding as required and comply with the terms of the Court approved retainer.

FINANCIAL CONSEQUENCES OF THE CLASS PROCEEDINGS TO YOU

We are seeking, on your behalf, damages to compensate you for the alleged breaches of Theberge Developments with respect to your condominium.

The representative plaintiff has agreed with her lawyer that the legal costs in these proceedings will only be payable in the event of success in the Class Action. The firm of KMH Lawyers will receive 33.3% of any damages recovered pursuant to a Retainer Agreement signed by the Representative Plaintiff which will be subject to approval by the Court. No fees are payable by any Class Member unless a recovery is made from the Defendant.

Any Judgment, whether favourable or not, will bind all Class Members who do not opt out of this proceeding. This means that, unless you opt out, you cannot start your own action for the same claim.

Each Class Member who has not opted out may participate in the proceedings by providing information, documentation and other details of their losses as required by the Representative Plaintiff or the Court.

If you choose not to participate in this proceeding and opt out as a member of the Class before **January 10, 2020,** you will have agreed that you are not part of this lawsuit and will receive absolutely no compensation for any damages that may be awarded in this lawsuit. You will, however, retain any right you may have to bring your own lawsuit.

FINANCIAL ARRANGEMENTS

The Class Members will not be responsible for any legal costs of the class action or have other financial obligations as a result of the lawsuit.

In this case, the Representative Plaintiff has received financial support from the Class Proceedings Fund (the "Fund"), which is a body created by statute and designed to allow access to the courts through class actions in Ontario. The Fund has agreed to reimburse the Representative Plaintiff for some disbursements incurred in pursuing this action. The Fund will also be responsible for costs that may be awarded against the Representative Plaintiff in this case. In exchange, the Fund will be entitled to recover from any court award or settlement in favour of the class the amount of its funded disbursements (except amounts repaid by the Representative Plaintiff or ordered paid by the Defendant). The Fund is also entitled to 10% of any amounts that may be payable to class members.

ADDITIONAL INFORMATION

A complete copy of the statement of claim, statement of defence and certification order is available by contacting KMH at the address below or by visiting their website at www.kmhlawyers.ca.

If you wish to participate personally in the lawsuit, you may apply to the Court for permission to do so. Requests for information should be directed to Miriam Vale Peters of KMH in one of the following ways, marked re: Theberge Class Action

phone: 613-733-3000 ext. 107
fax: 613-523-2924
e-mail: mvp@kmhlawyers.ca
mail: B0001-2323 Riverside Drive, Ottawa, ON K1H 8L5

Please do not call the Province of Ontario or the Court about this action. Class member inquiries should be directed to class counsel.

THIS NOTICE HAS BEEN APPROVED BY THE ONTARIO SUPERIOR COURT OF JUSTICE

SCHEDULE C

Court File No.: 15-64526CP

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

SABRINA HEYDE

Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED

Defendants

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

OPT OUT FORM

By completing this Opt-Out form, you are deciding to remove yourself from this lawsuit and are confirming that you do not wish to participate in the class action and that you will be excluded from any settlement or damages that may be awarded by the Court.

This form must be fully completed and must be received no later than January 10, 2020. Opt-Out Forms not fully completed and received after January 10, 2020 will not be accepted.

Your full name: _____(required)

Your address: _____(optional)

The address of your condominium unit: _____(optional)

Your telephone number: _____(optional)

Your e-mail address: _____(optional)

DECLARATION

I declare that I wish to opt out of this lawsuit.

I understand that by submitting this Opt-Out Form, I will be excluded from the class action and will not be bound by its outcome. As a result, I will not receive any portion of any damages that may be awarded by the Court, or any settlement that may be reached in the lawsuit, but I will retain any right I may have to bring my own lawsuit.

_____ _____

Signature Date

Return the Opt Out form to:

c/o KMH Lawyers
ATTENTION: Miriam Vale Peters
B0001-2323 Riverside Drive
Ottawa, Ontario
K1H 8L5
E-mail: mvp@kmhlawyers.ca
Fax: 613-523-2924

SABRINA HEYDE
Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED
Defendant

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

ORDER

KMH LAWYERS
2323 Riverside Drive
Suite B0001
Ottawa ON K1H 8L5

Miriam Vale Peters
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mvp@kmhlawyers.ca
Tel: 613-733-3209
Sara-Louise Drury
LSO# 69605P
sld@kmhlawyers.ca

Tel: 613-733-3000
Fax: 613-523-2924

Lawyers for the Plaintiff
Sabrina Heyde

Box 173

This is Exhibit "L" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

kelly manthorp heaphy *

barristers, solicitors, notaries

Contract for Legal Services and Fees

May 7, 2015

Sabrina Heyde
314A Everest Private
Ottawa, ON
K1G 4E3

Part 1: Our Services

Legal services covered by this contract

We agree to act for you in your dispute against Theberge Developments Limited ("Theberge Homes") regarding the hot water tank rental, air handler, locker and unexpected changes to your home's floor plan, once we receive a signed and dated copy of this contract. We will represent you for the entire legal process, including going to trial if necessary.

We will try to *settle* your case to obtain a favorable *settlement* for you. A settlement is an agreement between the parties to a lawsuit which sets out how they will resolve the claim.

Legal Services not Covered by this Contract

We have not agreed to give you legal advice or perform legal services for you relating to any other matter.

Class Action

This is a class action. A class action is a lawsuit brought by one or more representative plaintiffs on behalf of a larger group of persons ("class members"). A class action is a means for having similar claims resolved in a single proceeding. The result of the single proceeding is binding on all class members and opposing parties. The class members will be other purchasers who entered into an Agreement of Purchase and Sale with Theberge Homes to purchase a condominium unit in the condominium project located at Everest Private and Blackcomb Private.

Representative Plaintiff

Class members require at least one representative plaintiff who can fairly and adequately represent the interests of the class. The representative plaintiff is responsible for producing a plan for the

*a division of kelly manthorp heaphy professional corporation
2323 riverside drive, suite B0001, ottawa, ontario K1H 8L5
phone: (613) 733-3000 fax: (613) 523-2924
miriam vale peters e-mail: mvp@kellymanthorp.com

proceeding and notifying the class members of the proceeding. The representative plaintiff must not have an interest in conflict with the interests of other class members.

The representative plaintiff acts on behalf of the class members throughout the proceeding. For example, the representative plaintiff instructs counsel and is subject to examinations for discovery. By signing this contract, you confirm that you meet the requirements of a representative plaintiff and agree to act as the representative plaintiff for the class members.

Cost Consequences

As the representative plaintiff, you understand and agree that you will be solely responsible for paying any costs awarded against you and the class members.

Meeting your expectations

Money

You hope to get a fair and reasonable amount of money to compensate you for the hot water tank rental, air handler and unexpected changes to your home's floor plan.

When we have the information we need, we will tell you how much money we think you could reasonably hope to get in your dispute against Theberge Homes. We will also tell you if our opinion changes as your case progresses.

Time

The amount of time your file will take will depend on such factors as when we receive the documents we need.

Your role as a client

You understand the importance of giving us all the facts and of being totally honest with us. We can only do our best job if we have your trust and are fully informed.

In particular, we ask you to give us all information you have, or have access to, which could help us in working on your settlement. If necessary, we will ask you to give us written authorization to obtain this information.

Part 2: Our Fees, Expenses, and Billing Arrangements

Percentage based on work done

A contingency agreement means that you will pay our legal fees based on the amount you recover.

Our percentage fee will be less if your claim is settled than if it goes to trial. If it is settled, the fee will depend on the stage at which the lawsuit is settled. Our percentage fee will be:

1. **30% of the settlement money**
   If we settle your claim at least 90 days before trial

2. **33 1/3% of the trial judgment**
   If we settle your claim less than 90 days before trial or at trial

For example, if your case goes to trial and the court awards you $100,000 for damages, our fee would be 33 1/3% of $100,000 or $33,330, plus legal expenses (also known as disbursements), which are described in further detail below.

There is one case where our percentage fee will no longer apply. You may want to go to trial even though we recommend that you settle. If you decide to go to trial despite our advice, you agree to pay our legal expenses and an hourly fee based on the actual time spent on this matter and the hourly rates described in *Part 3* below.

You understand that there are options for retaining a lawyer other than by way of a contingency fee agreement, including retaining a lawyer by way of an hourly-rate retainer. You also understand that hourly rate may vary among lawyers and that you can speak to other lawyers to compare rates.

All of the usual protections and controls on retainers between lawyers and clients as defined by the Law Society of Upper Canada and the common law apply to this contingency fee retainer agreement.

Costs

If we successfully settle your claim or win at trial, we will seek a sum of money called *costs* from the Defendant to help cover some of our legal fees and expenses. Although it is impossible to foresee exactly how much our legal fees and expenses will be, we estimate that if the matter went to trial and we were successful, our fees could be anywhere from $50,000 to $150,000. It could be more, and if it is, we would let you know.

If we win an award from the court for costs payable by the Defendant to you, we may choose to receive the costs as our fee instead of accepting a percentage fee from you. You understand that the amount of costs may be higher or lower than a percentage fee would be. If we choose to receive costs paid by the Defendant instead of a percentage fee, you would then receive 100% of the court judgment awarded to you on your claim, less any expenses.

As mentioned above in *Part 1*, if we are unsuccessful in settling your claim or we lose at trial, you will be responsible for paying any costs awarded against you to the Defendant. The class members will not be responsible for paying the costs against you.

Distribution of Costs Award to Class Members

If the class action is successful, our fees will be deducted from the award as a lump sum. The balance of the award will be divided amongst the class members under the supervision of the court on a proportionate basis determined by the loss incurred by each of the class members.

Legal expenses (also known as disbursements)

In addition to our fees for legal services, you agree to pay all expenses, even if we cannot settle your claim or lose at trial.

Minor expenses

We will charge you for the minor ongoing expenses that we have to pay. Some of these expenses are long distance telephone calls; photocopying costs; costs to deliver documents to court or the other lawyers; faxes; and court filing fees (which the court charges to keep an official record of court documents).

We will require a deposit (also known as a retainer) in order to cover legal expenses prior to commencing work on your matter. We will ask that all class members contribute an amount to the deposit. The amount required from the class members will depend on how many class members join the action. If/when the deposit is depleted, you will be responsible for paying the ongoing legal expenses.

We will regularly bill you for minor expenses and we will detail all expenses in our bills. Please pay our bills within 30 days. After 30 days we will begin charging interest at 5%.

Major Expenses

We may have to hire other people such as court reporters, expert witnesses and accountants to help us with your lawsuit. If we need to hire these people, we will first discuss the matter with you.

We usually ask you to pay these major expenses in advance, or we will have the bill sent directly to you to pay. Again, please pay these bills within 30 days. After 30 days, we will begin charging interest at 5%.

For this matter, we will require that our disbursements are paid on a monthly basis. We require a $2,500 retainer that will only be applied toward disbursements. When the disbursement retainer is depleted, we will request replenishment.

HST

In addition to our legal fees and expenses, you agree to pay any Harmonized Sales Tax (HST) (13%) that we must charge you.

Billing Arrangements

You agree that any money from a settlement or judgment, including costs, will be paid directly to us in trust. We will then deduct our fee, any HST and any unpaid expenses, and give you the balance.

Part 3: Dealing with Each Other

Ending the relationship

By you

You are free to end our services before our services are completed by writing us a letter or note. If you do, you agree to pay our expenses and an hourly fee based on the actual time spent up to the date of ending those services. This does not include a situation where you have agreed to discontinue the lawsuit. In that case, you are not responsible for my legal fees.

If you end our relationship, our hourly fee will be based on the following rates:

My rate	**$300** per hour
Articling student	**$100** per hour
Law Clerk's rate	**$150** per hour

(Collectively the "Rates")

Our hourly fee will depend on which lawyer or assistant helps with the work. I will be the main lawyer responsible for your case, but some work may need to be done by a junior lawyer or articling student. There are also many services, such as gathering information and preparing routine documents that our law clerk is well qualified to perform. A law clerk works under the supervision of a lawyer, but may not give legal advice. Our law clerk can serve you at a lower cost than one of our lawyers can.

Billable legal services include but are not limited to the following activities:

a. telephone calls and messages;

b. drafting and reviewing e-mail communications;

c. drafting and reviewing letters;

d. all communications with the opposing party's lawyer or any others involved in your case;

e. all meetings with you, the opposing party's lawyer and anyone else involved in your case;

f. drafting and revising documents;

g. filing, reviewing and organizing;

h. dictating communications;

i. instructing staff;

j. communications from staff to you;

k. photocopying;

l. faxing;

m. advising you;

n. researching the law;

o. negotiations; and

p. any other activity related to your file.

Our firm's fees may also change from time to time, and you will still be responsible for paying our bill for legal services in full in the event of such change.

In addition, all members of the Firm bill for their time at six minute intervals. Therefore, if a member of the Firm spends 1 – 6 minutes working on your file then you will be billed for 1/10 of an hour, if a member of the Firm spends 7 -12 minutes working on your file you will be billed for 2/10 of an hour, and so on.

By us

We are free to withdraw our services at any time if we have a good reason. For example, we would withdraw our services if a client:

(1) Did not cooperate with us in any reasonable request;
(2) Asked us to do something unethical or illegal;
(3) Did not pay our bills on time without making other arrangements for payment.

Again, you agree to pay our expenses and an hourly fee for our legal services up until the time we stopped acting for you.

We would also have to withdraw our services if we learned of a *conflict of interest* that would make it unethical for us to continue to act for you. A conflict of interest occurs when what is best for one of our clients somehow is not best for or hurts another of our clients. If we have to withdraw our services for you because of a conflict of interest, you would have to pay our expenses up until the time we stopped acting for you.

Confidentiality

As your lawyers, we have to share relevant information about your case with the Defendant's lawyers and the court. But unless we need to share this information as part of our work, all information you give us will be kept confidential between us.

No guarantees of success

We will try our best in acting for you and give you our best legal advice. However, you understand that we cannot guarantee the successful outcome of your lawsuit.

Part 4: Signing this retainer agreement

This retainer agreement contains the whole agreement between us about our relationship with each other and our legal fees and expenses. It will not be changed unless you and we both agree and sign any changes. It will legally bind anyone such as heirs or legal representatives who replace either you or us, but it does not legally bind other lawyers who might act for you if you decide to end our relationship.

If you are satisfied with this contract, please sign and date both copies and return one of them to us.

Keep one copy for your records. If there is anything you do not agree with, or if there is anything you would like to discuss before signing, please write or call us.

Miriam Vale Peters — **Date** May 8, 2015

I have read this retainer agreement carefully and I agree with it.

Sabrina Heyde — **Date** May 9, 2015

This is Exhibit "M" referred to in the Affidavit of Matthew Miklaucic sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

BRENDA DESJARDINS

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

Brenda Joy Desjardins, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers
Expires December 27, 2022

KMH | LAWYERS

Billings Bridge Plaza
B0001 - 2323 Riverside Drive, Ottawa, Ontario K1H 8L5
☎ 613-733-3000 🖷 613-523-2924
www.kmhlawyers.ca

March 12, 2018

Miriam Vale Peters
(613) 733-3209
mvp@kmhlawyers.ca

Contract for Legal Services and Fees

Sabrina Heyde
314A Everest Private
Ottawa, ON
K1G 4E3

Part 1: Our Services

Legal services covered by this contract

This is an updated retainer agreement meant to replace our retainer agreement dated May 9, 2015. During our conversation on January 26, 2018, you expressed concern that this new arrangement might be in conflict with your duty to act in the best interests of the class. I understand and acknowledge your concern, and state that any fee arrangement will be approved by a judge at the appropriate time. While this retainer revises our previous fee structure, we both understand that a judge will have to determine whether it is appropriate.

We agree to act for you in your dispute against Theberge Developments Limited ("Theberge Homes") regarding the hot water tank rental, air handler, locker and unexpected changes to your home's floor plan, once we receive a signed and dated copy of this contract. We will represent you for the entire legal process, including going to trial if necessary.

We will try to *settle* your case to obtain a favorable *settlement* for you. A settlement is an agreement between the parties to a lawsuit which sets out how they will resolve the claim.

Legal Services not Covered by this Contract

We have not agreed to give you legal advice or perform legal services for you relating to any other matter.

Class Action

This is a class action. A class action is a lawsuit brought by one or more representative plaintiffs on behalf of a larger group of persons ("class members"). A class action is a means for having similar claims resolved in a single proceeding. The result of the single proceeding is binding on all class members and opposing parties. The class members will be other purchasers who entered into an

Agreement of Purchase and Sale with Theberge Homes to purchase a condominium unit in the condominium project located at Everest Private and Blackcomb Private.

Representative Plaintiff

Class members require at least one representative plaintiff who can fairly and adequately represent the interests of the class. The representative plaintiff is responsible for producing a plan for the proceeding and notifying the class members of the proceeding. The representative plaintiff must not have an interest in conflict with the interests of other class members.

The representative plaintiff acts on behalf of the class members throughout the proceeding. For example, the representative plaintiff instructs counsel and is subject to examinations for discovery. By signing this contract, you confirm that you meet the requirements of a representative plaintiff and agree to act as the representative plaintiff for the class members.

Cost Consequences

As the representative plaintiff, you understand and agree that you will be solely responsible for paying any costs awarded against you and the class members.

Meeting your expectations

Money

You hope to get a fair and reasonable amount of money to compensate you for the hot water tank rental, air handler and unexpected changes to your home's floor plan.

When we have the information we need, we will tell you how much money we think you could reasonably hope to get in your dispute against Theberge Homes. We will also tell you if our opinion changes as your case progresses.

Time

The amount of time your file will take will depend on such factors as when we receive the documents we need.

Your role as a client

You understand the importance of giving us all the facts and of being totally honest with us. We can only do our best job if we have your trust and are fully informed.

In particular, we ask you to give us all information you have, or have access to, which could help us in working on your settlement. If necessary, we will ask you to give us written authorization to obtain this information.

Part 2: Our Fees, Expenses, and Billing Arrangements

Percentage based on work done

A contingency agreement means that you will pay our legal fees based on the amount you recover.

Our percentage fee will be less if your claim is settled than if it goes to trial. If it is settled, the fee will depend on the stage at which the lawsuit is settled. Our percentage fee will be:

1. **30% of the settlement money**
   If we settle your claim at least 90 days before trial

2. **33 1/3% of the trial judgment**
   If we settle your claim less than 90 days before trial or at trial

For example, if your case goes to trial and the court awards you $100,000 for damages, our fee would be 33 1/3% of $100,000 or $33,330, plus legal expenses (also known as disbursements), which are described in further detail below.

There is one case where our percentage fee will no longer apply. You may want to go to trial even though we recommend that you settle. If you decide to go to trial despite our advice, you agree to pay our legal expenses and an hourly fee based on the actual time spent on this matter and the hourly rates described in *Part 3* below.

You understand that there are options for retaining a lawyer other than by way of a contingency fee agreement, including retaining a lawyer by way of an hourly-rate retainer. You also understand that hourly rate may vary among lawyers and that you can speak to other lawyers to compare rates.

All of the usual protections and controls on retainers between lawyers and clients as defined by the Law Society of Upper Canada and the common law apply to this contingency fee retainer agreement.

Costs

If we successfully settle your claim or win at trial, we will seek a sum of money called *costs* from the Defendant to help cover some of our legal fees and expenses. Although it is impossible to foresee exactly how much our legal fees and expenses will be, we estimate that if the matter went to trial and we were successful, our fees could be anywhere from $50,000 to $150,000. It could be more, and if it is, we would let you know.

As mentioned above in *Part 1*, if we are unsuccessful in settling your claim or we lose at trial, you will be responsible for paying any costs awarded against you to the Defendant. The class members will not be responsible for paying the costs against you.

Award or Settlement under $200,000

If the Court orders that the Defendant shall pay costs to you, and the damages awarded are less than $200,000 we may choose to receive the costs award as our fee instead of accepting the percentage fee as set out in Part 2 of this agreement. You understand that the amount of costs may be higher or

lower than a percentage fee would be. If we choose to receive costs paid by the Defendant instead of a percentage fee, the class would then receive 100% of the damages awarded less any disbursements.

Award or Settlement over $200,000

If the Court orders that the Defendant shall pay costs to you, and the damages awarded exceed $200,000, we shall be paid the costs award and the percentage fee as set out in Part 2 of this agreement. For example, if the damages awarded are $1 million, and the costs award is $500,000, I would be paid $333,000 (33.3%) plus $500,000 for the costs award plus disbursements. In the case of a settlement in this example, I would be paid $300,000 (30%) plus $500,000 for the costs award plus disbursements.

Distribution of Costs Award to Class Members

If the class action is successful, our fees will be deducted from the award as a lump sum. The balance of the award will be divided amongst the class members under the supervision of the court on a proportionate basis determined by the loss incurred by each of the class members.

Legal expenses (also known as disbursements)

In addition to our fees for legal services, you agree to pay all expenses, even if we cannot settle your claim or lose at trial.

Minor expenses

We will charge you for the minor ongoing expenses that we have to pay. Some of these expenses are long distance telephone calls; photocopying costs; costs to deliver documents to court or the other lawyers; faxes; and court filing fees (which the court charges to keep an official record of court documents).

We will require a deposit (also known as a retainer) in order to cover legal expenses prior to commencing work on your matter. We will ask that all class members contribute an amount to the deposit. The amount required from the class members will depend on how many class members join the action. If/when the deposit is depleted, you will be responsible for paying the ongoing legal expenses.

We will regularly bill you for minor expenses and we will detail all expenses in our bills. Please pay our bills within 30 days. After 30 days we will begin charging interest at 5%.

Major Expenses

We may have to hire other people such as court reporters, expert witnesses and accountants to help us with your lawsuit. If we need to hire these people, we will first discuss the matter with you.

We usually ask you to pay these major expenses in advance, or we will have the bill sent directly to you to pay. Again, please pay these bills within 30 days. After 30 days, we will begin charging interest at 5%.

For this matter, we will require that our disbursements are paid on a monthly basis. We require a $2,500 retainer that will only be applied toward disbursements. When the disbursement retainer is depleted, we will request replenishment.

HST

In addition to our legal fees and expenses, you agree to pay any Harmonized Sales Tax (HST) (13%) that we must charge you.

Billing Arrangements

You agree that any money from a settlement or judgment, including costs, will be paid directly to us in trust. We will then deduct our fee, any HST and any unpaid expenses, and give you the balance.

Part 3: Dealing with Each Other

Ending the relationship

By you

You are free to end our services before our services are completed by writing us a letter or note. If you do, you agree to pay our expenses and an hourly fee based on the actual time spent up to the date of ending those services. This does not include a situation where you have agreed to discontinue the lawsuit. In that case, you are not responsible for my legal fees.

If you end our relationship, our hourly fee will be based on the following rates:

My rate	**$300** per hour
Articling student	**$100** per hour
Law Clerk's rate	**$150** per hour

(Collectively the "Rates")

Our hourly fee will depend on which lawyer or assistant helps with the work. I will be the main lawyer responsible for your case, but some work may need to be done by a junior lawyer or articling student. There are also many services, such as gathering information and preparing routine documents that our law clerk is well qualified to perform. A law clerk works under the supervision of a lawyer, but may not give legal advice. Our law clerk can serve you at a lower cost than one of our lawyers can.

Billable legal services include but are not limited to the following activities:

a. telephone calls and messages;

b. drafting and reviewing e-mail communications;

c. drafting and reviewing letters;

d. all communications with the opposing party's lawyer or any others involved in your case;

e. all meetings with you, the opposing party's lawyer and anyone else involved in your case;

f. drafting and revising documents;

g. filing, reviewing and organizing;

h. dictating communications;

i. instructing staff;

j. communications from staff to you;

k. photocopying;

l. faxing;

m. advising you;

n. researching the law;

o. negotiations; and

p. any other activity related to your file.

Our firm's fees may also change from time to time, and you will still be responsible for paying our bill for legal services in full in the event of such change.

In addition, all members of the Firm bill for their time at six minute intervals. Therefore, if a member of the Firm spends 1 – 6 minutes working on your file then you will be billed for 1/10 of an hour, if a member of the Firm spends 7 -12 minutes working on your file you will be billed for 2/10 of an hour, and so on.

By us

We are free to withdraw our services at any time if we have a good reason. For example, we would withdraw our services if a client:

(1) Did not cooperate with us in any reasonable request;
(2) Asked us to do something unethical or illegal;
(3) Did not pay our bills on time without making other arrangements for payment.

Again, you agree to pay our expenses and an hourly fee for our legal services up until the time we stopped acting for you.

We would also have to withdraw our services if we learned of a *conflict of interest* that would make it unethical for us to continue to act for you. A conflict of interest occurs when what is best for one of our clients somehow is not best for or hurts another of our clients. If we have to withdraw our services for you because of a conflict of interest, you would have to pay our expenses up until the time we stopped acting for you.

Confidentiality

As your lawyers, we have to share relevant information about your case with the Defendant's lawyers and the court. But unless we need to share this information as part of our work, all information you give us will be kept confidential between us.

No guarantees of success

We will try our best in acting for you and give you our best legal advice. However, you understand that we cannot guarantee the successful outcome of your lawsuit.

Part 4: Signing this retainer agreement

This retainer agreement contains the whole agreement between us about our relationship with each other and our legal fees and expenses. It will not be changed unless you and we both agree and sign any changes. It will legally bind anyone such as heirs or legal representatives who replace either you or us, but it does not legally bind other lawyers who might act for you if you decide to end our relationship.

If you are satisfied with this contract, please sign and date both copies and return one of them to us.

Keep one copy for your records. If there is anything you do not agree with, or if there is anything you would like to discuss before signing, please write or call us.

Miriam Vale Peters — **March 19, 2018**

I have read this retainer agreement carefully and I agree with it.

Sabrina Heyde — **March 16, 2018**

TAB 4

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDING ACT, 1992*

AFFIDAVIT #1 OF BRENDA DESJARDINS
(Sworn: June 24, 2021)

I, Brenda Desjardins, of the City of Ottawa, in the Province of Ontario, MAKE OATH AND SAY:

1. I am a law clerk at KMH Lawyers ("KMH" or "Class Counsel"). KMH is counsel to the Plaintiff in the above-captioned action. As a law clerk, I have the knowledge set out herein. Where that knowledge is based on information obtained from others, I have so indicated, and I believe that information to be true.

2. By Order dated April 23, 2021 (Exhibit "A" the Affidavit of Matthew Miklaucic (Mr. Miklaucic's Affidavit")), this Honourable Court, among other things, approved a Notice of Class Action Settlement Approval Hearing.

3. On June 21, 2021, I e-mailed the Notice of Class Action Settlement Approval Hearing to all 114 members of the class, which also includes the members of the First Subclass. Attached and marked as **Exhibit "A"** to this my Affidavit is a true copy of the e-mail.

4. Also, on or about June 17, 2021, I caused to be published on Class Counsel's website (https://www.kmhlawyers.ca/notice-of-class-action-heyde-v-theberge-developments-limited/) the Notice of Class Action Settlement Approval Hearing along with the Settlement Agreement dated June 1, 2021 (Exhibit "A" to Ms. Heyde's Affidavit).

5. Attached and marked as **Exhibit "B"** to this my Affidavit is a true copy of the draft Order sent to Mr. Mizobuchi on June 24, 2021.

6. I make this Affidavit for no improper purpose.

SWORN by Brenda Desjardins at the City of Ottawa, in the Province of Ontario, before me on June 24, 2021.

Commissioner for Taking Affidavits
(or as may be)

Isabelle El-Chidiac, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers.
Expires October 26, 2021.

BRENDA DESJARDINS

This is Exhibit "A" referred to in the Affidavit of Brenda Desjardins sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

ISABELLE EL-CHIDIAC

Isabelle El-Chidiac, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers.
Expires October 26, 2021.

Brenda Desjardins

From: Brenda Desjardins
Sent: June 21, 2021 10:53 AM
To: Miriam Vale Peters
Subject: Heyde v. Theberge - Class Action Settlement
Attachments: Notice of Proposed Class Action Settlement Approval Hearing.pdf; Settlement Agreement.pdf

Follow Up Flag: Follow up
Flag Status: Flagged

Good morning Class Members,

A settlement agreement has been signed between Ms. Heyde and Theberge Developments. Please see attached or visit https://www.kmhlawyers.ca/notice-of-class-action-heyde-v-theberge-developments-limited/

Regards,

Brenda Desjardins
Litigation Law Clerk
KMH | LAWYERS
Suite B0001-2323 Riverside Drive
Ottawa, Ontario K1H 8L5
Tel: (613) 733-3000 x116
Fax: (613) 523-2924
bdesjardins@kmhlawyers.ca
www.kmhlawyers.ca

This is Exhibit "B" referred to in the Affidavit of Brenda Desjardins sworn June 24, 2021.

Commissioner for Taking Affidavits (or as may be)

ISABELLE EL-CHIDIAC

Isabelle El-Chidiac, a Commissioner, etc.,
Province of Ontario, for KMH Lawyers.
Expires October 26, 2021.

Court File No.: 15-64526-CP

ONTARIO
SUPERIOR COURT OF JUSTICE

THE HONOURABLE	)	WEDNESDAY, THE
	)	
JUSTICE ROBERT SMITH	)	28th DAY OF JULY, 2021
	)	

B E T W E E N :

SABRINA HEYDE

Plaintiff

and

THEBERGE DEVELOPMENTS LIMITED

Defendant

PROCEEDING UNDER THE *CLASS PROCEEDINGS ACT, 1992*

ORDER
(SETTLEMENT APPROVAL)

THIS MOTION made by the Plaintiff for an Order approving the settlement agreement entered into with Theberge Developments Limited (the "Settling Defendant") and dismissing this action as against the Settling Defendant was heard this day by judicial videoconference at 161 Elgin Street, Ottawa, Ontario.

AND ON READING the materials filed, including the settlement agreement dated June 1, 2021, attached to this Order as Schedule "A" (the "Settlement Agreement"), and on hearing the submissions of counsel for the Plaintiffs and the Settling Defendant;

AND ON BEING ADVISED that the deadline for objecting to the Settlement Agreement has passed and there were no objections to the Settlement Agreement;

AND ON BEING ADVISED that the deadline for opting out of the Action has passed, and we have received 5 opt outs that were validly and timely exercised;

AND ON BEING ADVISED that the Plaintiffs and the Settling Defendants consent/take no position to this Order:

1. **THIS COURT ORDERS** that for the purposes of this Order, the definitions set out in the Settlement Agreement apply to and are incorporated into this Order.

2. **THIS COURT ORDERS** that in the event of a conflict between this Order and the Settlement Agreement, this Order shall prevail.

3. **THIS COURT ORDERS** that this Order, including the Settlement Agreement, is binding upon the Settling Defendants in accordance with the terms thereof, and upon each member of the Settlement Class that did not validly opt out of this Action, including those Persons who are minors or mentally incapable, and the requirements of Rules 7.04(1) and 7.08(4) of the *Rules of Civil Procedure*, RRO 1990, Reg 194 are dispensed with in respect of the Action.

4. **THIS COURT ORDERS** that the Settlement Agreement is fair, reasonable and in the best interests of the Settlement Class.

5. **THIS COURT ORDERS** that the Settlement Agreement is hereby approved pursuant to s. 29 of the *Class Proceedings Act, 1992* and shall be implemented and enforced in accordance with its terms.

6. **THIS COURT ORDERS** that, upon the Effective Date, each member of the Settlement Class who has not validly opted-out of this Action shall be deemed to have consented to the dismissal as against the Releasees of any Other Actions they have commenced, without costs and with prejudice.

7. **THIS COURT ORDERS** that, upon the Effective Date, each Other Action commenced in Ontario by any member of the Settlement Class shall be and is hereby dismissed against the Releasees, without costs and with prejudice.

8. **THIS COURT ORDERS** that, upon the Effective Date, each Releasor has released and shall be conclusively deemed to have forever and absolutely released the Releasees from the Released Claims.

9. **THIS COURT ORDERS** that, upon the Effective Date, each Releasor shall not now or hereafter institute, continue, maintain, intervene in or assert, either directly or indirectly, whether in Canada or elsewhere, on their own behalf or on behalf of any class or any other Person, any proceeding, cause of action, claim or demand against any Releasee, or any other Person who may claim contribution or indemnity or other claims over relief from any Releasee, in respect of any Released Claim, except if the Action is not certified or authorized, the continuation of the claims asserted in the Action on an individual basis.

10. **THIS COURT ORDERS** that, upon the Effective Date, each member of the Settlement Class who is resident in any province or territory where the release of one tortfeasor is a release of all tortfeasors covenants and undertakes not to make any claim in any way nor to threaten, commence, participate in or continue any proceeding in any jurisdiction against the Releasees in respect of or in relation to the Released Claims.

11. **THIS COURT ORDERS** that all claims for contribution, indemnity or other claims over, whether asserted, unasserted, or asserted in a representative capacity, inclusive of interest, taxes and costs, relating to the Released Claims, which were or could have been brought in the Action or any Other Actions, are barred, prohibited and enjoined in accordance with the terms of this Order (unless such claim is made in respect of a claim by a Person who has validly opted out of the Action).

12. **THIS COURT ORDERS** that for purposes of administration and enforcement of the Settlement Agreement and this Order, this Court will retain an ongoing supervisory role and the Settling Defendant(s) acknowledge and attorn to the jurisdiction of this Court solely for the purpose of implementing, administering and enforcing the Settlement Agreement and this Order, and subject to the terms and conditions set out in the Settlement Agreement and this Order.

13. **THIS COURT ORDERS** that on notice to the Court but without further order of the Court, the parties to the Settlement Agreement may agree to reasonable extensions of time to carry out any of the provisions of the Settlement Agreement.

14. **THIS COURT ORDERS** that, other than that which has been provided in the Settlement Agreement, no Releasee shall have any responsibility or liability whatsoever relating to the administration of the Settlement Agreement.

15. **THIS COURT ORDERS** that, in the event that the Settlement Agreement is terminated in accordance with its terms or otherwise fails to take effect for any reason, this Order shall be declared null and void and of no force or effect without the need for any further order of this Court but with notice to the Class.

16. **THIS COURT ORDERS** that, upon the Effective Date, the Action is hereby dismissed as against all Settling Defendants without costs and with prejudice.

The Honourable Justice Robert Smith

SABRINA HEYDE
Plaintiff

-and-

THEBERGE DEVELOPMENTS LIMITED
Defendant

Court File No. 15-64526CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
OTTAWA

MOTION RECORD OF THE PLAINTIFF

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