WHAT BUILDERS SHOULD KNOW IN A CHALLENGING REAL ESTATE MARKET
--How to Minimize Liability Exposure to Class Action Lawsuits or Third Party Claims

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1. REAL ESTATE CLASS ACTIONS ARE MORE COMMON THAN YOU THINK

Examples:

a. ***Ward-Price v. Mariner's Haven Inc.*** (2001), 57 O.R. (3d) 410 (OCA); certified in [2002] O.J. 4260, 36 CPC (5th) 189 SCJ

- triable issue involved the obligation to pay interest on the purchaser's deposit during the period of interim occupancy (based on the former *Condominium Act*, R.S.O. 1980 c.84 s.53 and R.R.O. 1980 Reg. 121 s. 33)
- the interest which notionally accrued on the deposit was subject to a statutory trust even though the deposit had been replaced by the prescribed security
- developer declared bankruptcy
- claim was against officers, directors and mortgagee on basis of knowing receipt of trust monies or knowing assistance in a breach of trust
- see also the ***Windisman v. Toronto College Park Ltd.*** case which is similar

b. ***Cheung v. Kings Land Developments Inc.*** (2001), 55 O.R. (3d) 747; leave to appeal refused

- 137 purchasers in a failed condominium project were joined in a class action seeking return of deposits totalling $11,000,000.00. Plaintiffs alleged the monies were improperly used for project expenses in breach of contract and breach of trust. The defendants wanted certification to streamline the proceedings, but many claimants opted out.

c. ***Bunn v. Ribcor Holdings Inc. and the Corporation of the Township of Scugog***, [1998] O.J. No. 1790

- The claim against Ribcor was for breach of contract and negligence alleging that the houses had material defects and failed to comply with the Building Code. There was also a claim against the Township alleging that it was negligent with respect to its supervisory duties regarding subdivisions. Direct purchasers and subsequent owners were included in the class.

- The plaintiffs also sought punitive damages from Ribcor.

d. ***Vitelli v. Villa Giardino Homes Ltd.***, [2001] O.J. No. 2971

- Class action certified on claims that condominium builder misrepresented the floor area of the units. The purchasers, who were elderly citizens, claimed that the builder had changed its building design without notice to them and the change resulted in a 14 to 16% reduction in space.

- The plaintiffs alleged misrepresentation, breach of fiduciary duty and breach of contract.

- The action was also brought against the builder, its officers and directors, and the building architects.

e. ***Despault v. King West Village Lofts***, [2001] O.J. No. 2933

- The court certified a claim by purchasers of condominium units regarding allegedly improper charges imposed by the seller.

- The developer had agreed to reconstruct a street in the area where the condominium buildings were to be built in order to obtain municipal approvals. This obligation arose after the agreements of purchase and sale had been signed but before the transactions closed.

- The developer claimed reimbursement from the purchasers (approximately $1,000 - $2,000 per purchaser).

- The purchasers' class action was certified with the main issue being a determination as to whether the expenditure could be considered a "local improvement charge".

f. ***Abdool v. Anaheim Management Ltd.*** (1995), 121 D.L.R. (4^{th}) 496 (Ont. Div. Ct.) and (1993), 15 O.R. (3d) 39 (Ont. Sup. Crt.)

- Claim by purchasers of condominium units intended as investment tax shelters. The project was a financial failure. A class action was brought by the plaintiffs against the developer, the real estate brokers, the

financiers, and the accountants for the project. The developer did not defend. The claim was not certified against the lawyers, accountants and bankers. (A subsequent appeal by the plaintiffs was also unsuccessful.)

g. ***Lewis v. Cantertrot Investments Ltd.*** (2006), 43 R.P.R. (4th) 196; 205

- The plaintiffs argued that as a result of the vendor's misrepresentations, they incurred higher than expected maintenance fees and decreased property values.

- This condominium case was certified even though developer alleged the damages per claimant were only in the order of $500.00.

h. ***Lau v. Bayview Landmark Inc.***, [1999] O.J. No. 4385 and [1999] O.J. No. 4060

- This was a claim to recover deposits paid by prospective purchasers of condominium units after the project was not built.

i. ***Windisman v. Toronto College Park Ltd.*** (1996), 28 O.R. (3d) 29 (Ont.Gen.Div.)

- This is another case against the developers of a condominium claiming repayment of interest.

- Purchasers were paid interest on their deposits for residential units, but were not paid any interest on deposits for parking and storage units.

- The class claimed the unpaid interest for the parking and storage units as well as claiming that interest should have been calculated at a higher compounding rate.

- The class was ultimately awarded $2,600,000.

j. ***Crawford v. London (City)***, [2000] O.J. No. 2088

- This was an action brought by the owners and former owners of condominium units that were constructed with dangerous and/or defective wood burning fireplaces.

- Years after the units had been erected, the City ordered that the fireplaces be rendered inoperative.

- The fireplaces were later changed to gas inserts, at the expense of the individual unit owners.

- The defendants unsuccessfully argued that certification be denied on the basis that this type of representative claim could be brought under s. 14 of the *Condominium Act* (which permits the condominium corporation the right to commence an action on behalf of itself and any owners).

- The court held that since this particular claim was brought by a single unit owner, it did not come under s. 14 of the *Condominium Act* and would best be served by a class proceeding.

k. ***Haddad v. Kaitlin Group Ltd.***, [2008] O.J. No. 5127

- This was a claim for misrepresentation against the developer/vendor of subdivision lots.

- The subdivision was promoted as a golf course community with a 9-hole golf course. The golf course was never constructed and the lands were ultimately sold to a third party.

- The plaintiffs claimed that they had paid premiums for the "golf course lots". There were between 250 and 300 purchasers of lots in the subdivision.

- The class action was certified on December 15, 2008 against the developer.

- Resale purchasers had no connection to the builder's representations and were therefore excluded from the class.

2. THIRD PARTY CLAIMS FOR NEGLIGENT OR DEFICIENT CONSTRUCTION

a. One example: mould related claims. Various parties can be subject to claims:

(i) builders and contractors for construction defects

(ii) HVAC designers, installers and other subcontractors

(iii) these can be class actions if, for example, the contractor installs a defective ventilation system leading to mould infestation in schools or hospitals (e.g., ***MacDonald v. Dufferin-Peel Catholic District School Board***, [2000] O.J. No. 5014);

- This claim by students in portables allegedly contaminated by mould which made the students ill. The students claimed that the Catholic District School Board had failed to test for mould or provide proper ventilation and alleged negligence by the Board's employees.

- The Board defended and claimed against the contractors and architect who had built the structures, alleging they had been negligently built so as to facilitate mould.

- Ultimately certification was denied because the court was not satisfied that there was any wide-spread illness caused by the mould. The court also felt that the common issues could not be separated from the individual issues.

- In 2000 the province paid $40,000,000.00 to school boards to correct mould contamination in schools.

- In June 2000 the Newmarket courthouse was closed for remediation to remove mould. The inevitable class action was also unsuccessful due to lack of people affected. See ***Dumoulin v. Ontario***, [2005] O.J. No. 3961 and [2006] O.J. No. 1233.

- There was a lack of evidence that any class members, other than the representative plaintiff, had any significant damage claims as a result of the allegations and the certification was denied.

(iv) insurance companies or adjusters for acting in bad faith (if they fail to completely correct the issue)

(v) homeowner associations or condominium corporations for improper maintenance

(vi) former owners of sold homes

(vii) architects

(viii) building inspectors

(ix) real estate agents

(x) remediation contractors and engineers

b. Builders (and others, such as engineers) can only be liable to subsequent purchasers of a building for negligent design and construction resulting in defects that pose a real and substantial danger to the health and safety of the occupants.

- ***Winnipeg Condominium Corp. No. 36 v. Bird Construction Co.***, [1995] 1 S.C.R. 85 (SCC)

- ***Bunn v. Ribcor Holdings Inc. and the Corporation of the Township of Scugog***, [1998] O.J. No. 1790

3. ARBITRATION CLAUSES

A clause in an agreement of purchase and sale requiring all disputes to be dealt with in an arbitration may circumvent a class action. Note that to be effective such a clause should also require the builder to make its own claims in arbitration rather than in court.

- ***Rogers v. Kanitz*** (2002), 58 O.R. (3d) 299 and *Consumer Protection Act, 2002*, S.O. 2002 c. 30, Schedule A, s. 8 of which provides that an arbitration clause in a "consumer agreement" (not an agreement of purchase and sale) cannot preclude class actions.

- *Condominium Act, 1998*, S.O. 1998, c. C.19, s. 135 (oppression remedy section)

- But now see, amongst other cases, *Smith v. National Money Mart Co.* (2005), 204 O.A.C. 47 (OCA), where it was held that a valid arbitration clause is still subject to analysis under the rubric of whether arbitration or litigation is a "preferable procedure".

4. MINIMIZING LIABILITY

- arbitration clauses (agreement of purchase and sale or elsewhere)

- contractual limitations on types of liability and dollar amount and limitation periods (CCDC2). Owners often try to expand the builders' obligations under CCDC2

- bare trustees ("trust" agreement should preclude ability of trustee to pursue the principals/beneficiaries AND the agreement of purchase and sale should preclude claims against the principals/beneficiaries)

- appropriate insurance; including Directors and Officers

- different companies for different projects/purposes

5. TARION WARRANTY CORPORATION

Ontario New Home Warranties Plan Act:

- s. 13 warranties apply for specified periods (1 year, 2 year and major structural defect claims in years 3-7)

- s. 13(5) warranty is enforceable even without privity of contract

- s. 13(6) no contracting out

- s. 17(4) every agreement or purchase and sale is deemed to include an arbitration clause (should be relied on in opposition to proposed class actions involving new homes or condominiums)

- R.R.O. 1990, Regulation 892, article 6(8.1): mould claim liability is limited to $100,000.00

- entire Tarion process is arguably a preferable procedure to a class action

6. PRESERVE/ENHANCE SUBROGATED CLAIMS AGAINST SUBCONTRACTORS AND SUBTRADES

- How are you going to collect against the subcontractor when a major structural defect claim is made in year 7?

- e.g., in the recent cases concerning claims against the supplier of defective concrete:

    - use suppliers and subcontractors that are less likely to go bankrupt or have large insurance policies—get copies of the policies before hand

    - check the work immediately after it is done where possible

    - get indemnities from the third party subcontractors and suppliers and consider guarantees from principals

- Form of subcontract can also provide for direct liability to owner, or better still, get an appropriate letter of credit or completion bond.

- Make sure your contracts expressly require your trades and contractors to meet Tarion's construction performance guidelines and repair obligations in addition to the scope of work specified in the contract.

- Tarion's construction performance guidelines establish a **minimum** standard for new home construction with respect to work and material deficiencies. The Guidelines complement the OBC which addresses structural integrity and health and safety issues.

- Remember that you can appeal to the Builder Arbitration Forum if you disagree with Tarion's position that a deficiency is chargeable.