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## Class action suits expected to multiply

Four class actions now wending their way through the judicial system may be the tip of the iceberg for a whole new method of suing builders and developers of new home and condominium projects.

Toronto lawyer Steven Stieber, who represents a defendant in one of the cases, predicts that there will be "a lot more class actions coming in residential subdivision projects in the future."

Under the 1992 Class Proceedings Act, one or more plaintiffs can start a legal action on behalf of themselves and others with similar interests.

The representative plaintiffs then apply to the court for certification of the court case as a class proceeding.

In order to qualify for the benefits of a class proceeding, the representative plaintiffs have to have a common claim with the other members of the group or class, and they have to fairly and adequately represent the interests of the others. The court must be satisfied that a class proceeding would be the preferable procedure for the resolution of the common issues, rather than having a host of separate trials on essentially the same facts.

Three class actions were started earlier this year against the developer of the King West Village condominium project on Sudbury St. in downtown Toronto. (Sudbury St. connects the south end of Dovercourt Rd. with King St. W.)

Each court action involves a plaintiff or couple of plaintiffs who purchased a condominium unit - one in the north condominium complex, one in the south complex, and one in the lofts.

**Ultimately, the cost of the litigation risk will have to be built into the prices of all new homes.**

A standard clause in the agreement of purchase and sale set out the extra costs that would be added to the purchase price.

Among the extras that the purchasers were responsible for were sewer connection charges and realty taxes "including local improvement charges, if any."

When King West Village Lofts received approval for the project from the City of Toronto, it was required to pay for the costs of reconstruction of Sudbury St. The City did not actually spend the money related to the reconstruction and no "local improvement charge" was ever added to the tax bill. But the developer charged the money to the purchasers anyway.

It is estimated that some 279 purchasers paid \$423,000 by way of a pro-rated share of the "local improvement charges" on closing. The charges of between \$1,000 and \$2,000 were added to the unit costs on the closing statements of adjustments. Some purchasers refused to pay anything at closing, and 135 of them - who had their agreements reviewed by a lawyer at the time of signing - had all of the extras capped at \$1,500. Those purchasers contributed \$68,000 to the street reconstruction charges.

The representative plaintiffs are claiming a refund of the money the developer "voluntarily" paid to the City for reconstruction of Sudbury St. They claim breach of contract, misrepresentation and unjust enrichment.

The case came before Justice Peter Cumming in Toronto last month when the plaintiffs applied to have their cases certified as class proceedings.

King West Village claimed that the purchasers had lost any rights they may have had when the deals closed (their rights are said to have "merged" on closing), and that any claims for misrepresentation had to be dealt with in separate trials.

On July 16, Justice Cumming handed down his decision in favour of certifying the claims of the three plaintiffs as class actions. This method, he said, would be more efficient and provide better access to justice than having large numbers of plaintiffs descend on Small Claims Court with identical claims.

The three class actions have yet to be tried.

A similar class-action claim was certified in Newmarket more than three years ago, and is still going on.

Stieber, who acts for the municipality involved in the case, says he expects the case will eventually go right to trial because of the real liability issues involved.

Ribcor Holdings Inc. built the Victorian Village subdivision in the Village of Port Perry in the Township of Scugog. One subdivision of 85 homes was developed in 1987 and 1988. A further 10 houses were completed in 1993. For each home, the Township of Scugog issued building, occupancy and other permits and licences for construction and occupancy.

Diane Bunn is the plaintiff, representing the interests of the original and subsequent purchasers. She claims breach of contract and negligence, and alleges that Ribcor failed to construct the homes in a workmanlike manner. Bunn alleges material defects in the homes, and says they were uninhabitable and did not comply with the Ontario Building Code.

Her claim against the Township of Scugog is that it negligently performed its supervisory duties. Back in March, 1998, Bunn applied for certification of her case as a class action, and at the same time Ribcor counterclaimed for libel and slander.

In May, 1998, Justice Jack Jenkins allowed the application for certification and put the counterclaim on hold until the trial was concluded. The Bunn claim, said Jenkins, met the various tests for certification as a class action: There were several similar causes of action; there was an identifiable class of two or more persons; their claims raised common issues; and the class proceeding was the preferable procedure for resolution of the common claims. The alternative, he said, was several actions based on similar facts.

The certification of the Bunn action took place more than three years ago. Unfortunately for everyone concerned, the wheels of justice often move slowly - when they move at all. Hopefully, the case will reach trial - and appeal, if one is in the cards - before the children and grandchildren of the parties and their lawyers have to see the case through to the bitter end.

Class actions are said to promote better and more efficient access to justice. In exchange for as much as one-third of the proceeds, the lawyers spend their own money on the out-of-pocket expenses before trial and assume the risk of losing the case and their fees. When they win, however, the stakes are huge: the lawyers in the Walkerton class action took home some \$6 million in fees.

On the other hand, an explosion of class actions is making Ontario a more litigious society like the United States. Certainly builders and developers will be increasingly gun-shy of such proceedings and will have to carefully plan their developments to avoid the possibility of getting involved in any litigation.

Ultimately, the cost of the litigation risk will have to be built into the prices of all new homes.

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