Court Certifies Class Action Lawsuit by Condo Purchasers Against Developer

An Ottawa condominium unit owner has commenced a class action lawsuit against a condominium developer, claiming that the developer breached the disclosure obligations set out in section 72 of the Condominium Act, 1998 when it turned out that the forced air heating system for each unit was a rental, instead of being included in the unit being purchased.

The developer's disclosure statement originally contained a specifications sheet that listed a forced air heating/cooling system as being included in the unit being purchased. A later version of the disclosure statement did not include the forced air heating/cooling system in the specifications list and the developer's standard agreement of purchase and sale was amended to include a statement that "*The purchaser acknowledges that the water heater and HVAC system in the dwelling unit may be a rental unit*". The later version of the disclosure statement was provided only to those purchasers who entered into their agreements of purchase and sale after the amendments to the developer's standard forms were made.

Purchasers became aware that the heating system was a rental some time later when they met with the developer's representatives to make colour/finishes/upgrades selections and at that point signed an acknowledgement that the heating system was a rental. The rental cost for the heating system was approximately $85 per month per unit.

Also included in the lawsuit, was a separate claim on behalf of 61 purchasers whose agreements of purchase and sale stated that a storage locker was included in the purchase price, but were not provided with a storage locker.

Essentially the plaintiff claimed that the failure to include the heating system as part of the unit and the failure to deliver the storage lockers was a material change from what had been disclosed in the developer's disclosure statement which was delivered to the purchasers when they entered into their agreements of purchase and sale.

Before a class action lawsuit can proceed, it must be certified by the Court. For an action to be certified the Court must be satisfied that there is an identifiable class of persons with claims that establish a valid cause of action and raise common issues, and that class proceedings would be a fair, efficient and manageable method of advancing the claim and thus the preferable way to resolve these common issues.

In this case, the Ontario Superior Court of Justice agreed that it was appropriate to certify the class action. After noting that the individual claims of each unit owner was approximately $2700 for the heating system and $2500 to $5000 for the storage lockers, the Court concluded that it was preferable to have one trial rather than multiple individual trials. In addition, as it is not likely that all of the unit owners would have commenced their own separate law suits, proceeding by way of a class action lawsuit would provide access to justice for a large number of individuals.

Getting the class action certified by the Court is just the first hurdle for the unit owners. They still need to prove their claims, which the developer is defending.