

CLASS ACTIONS AND REAL ESTATE

by Colin P. Stevenson of Teplitsky, Colson and Stevenson & Associates

INTRODUCTION

This article will first reference a number of class actions which involve real estate claims to illustrate that such actions are not uncommon. The question will then be addressed whether such claims can be avoided by inserting an arbitration clause or another clause expressly precluding class actions in the condominium documents or agreements of purchase and sale. Two conclusions may be drawn:

- (a) it would be legally prudent to insert such a clause, from the developer's perspective;
- (b) it may be inappropriate to do so, from the consumer's perspective.

NATURE OF CLASS PROCEEDINGS

Class actions are increasingly prevalent throughout Canada. A class action involves a claim by a representative plaintiff on their own behalf and on behalf of the class. The proceeding is not a class action (or application) until it is certified by a judge.¹ The policy objectives of the *Class Proceedings Act, 1992*, S.O. 1992 c. C.6 (CPA) are regularly referred to in certification motions. The three primary policy goals are access to justice, judicial economy and deterrence of wrongful behaviour (or modification of behaviour).

¹ For more general information on class proceedings see the author's website at classproceedings.ca.

It is essential on a certification motion for moving parties to establish that there are common issues to be tried. The common issues need not determine liability. They need only move the litigation forward in a meaningful manner.²

In general an Ontario action will be certified as a class action if:

- (a) the pleadings disclose a viable cause of action;
- (b) there is an identifiable class of two or more persons;
- (c) the claims (or defences) raise common issues;
- (d) a class action is the preferable procedure to resolve the common issues;
- (e) the class representative will fairly represent the interests of the class, has a workable method of advancing the proceeding and notifying class members and has no conflict with the other class members.³

The CPA expressly states that certification will not be refused solely because one or more of the following circumstances exist:

- (a) the relief claimed includes a claim for damages that would require individual assessment after determination of the common issues;
- (b) the relief claimed relates to separate contracts involving different class members;
- (c) different remedies are sought for different class members;
- (d) the number of class members or the identity of each class member is not known;

² See *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (Ont. C.A.) at 248 and 251. Leave to appeal to S.C.C. denied.

³ CPA, s. 5(1).

- (e) the class includes a subclass whose members have claims or defences that raise common issues not shared by all class members.⁴

EXAMPLES OF REAL ESTATE CLASS ACTIONS

(i) INTEREST PAYABLE ON THE PURCHASERS' DEPOSIT DURING INTERIM OCCUPANCY OF A RESIDENTIAL CONDOMINIUM UNIT

In *Ward-Price v. Mariner's Haven Inc.* (2001), 57 O.R. (3d) 410 (Ont. C.A.), the issue was the extent of the developer's obligation to pay interest on the purchaser's deposit during the period of interim occupancy of her residential condominium unit. The relevant legislation was s. 53 of the *Condominium Act* (R.S.O. 1980) and s. 33 of Regulation 121, which is quoted in the case report.

The developer declared bankruptcy. The claim continued against various officers and directors and the mortgagee on the basis of knowing receipt of trust monies or knowing assistance in a breach of trust. The trust in question was the statutory trust, established pursuant to s. 53(1) of the *Condominium Act* and imposed on monies received by the developer on account of the purchase price. The plaintiff's claim was for \$36,761.50 being the interest on her entire purchase price of \$340,000.00, which has been paid in full prior to taking possession of the unit. The plaintiff had not been credited with any interest on her deposit.

⁴ CPA, s. 6.

The defendant's theory was that no interest was payable and no statutory trust applied because the deposit had been replaced with the prescribed security (and the trust monies released to the developer and in turn paid to the mortgagee) prior to the purchaser taking possession. The Court of Appeal rejected the reasoning of Cumming J. who initially found in favour of the developer.⁵ The Court of Appeal emphasized that the *Condominium Act* is "consumer protection legislation" and found that the interest which notionally accrued on the deposit was subject to the statutory trust.⁶

While many may find the decision of the Court of Appeal unexpected, the point for present purposes is simply that a relatively small claim takes on extra significance when framed as a class action. The matter is now proceeding to certification.

(ii) RETURN OF DEPOSITS

In *Cheung et al. v. Kings Land Developments Inc.* (2001), 55 O.R. (3d) 747 a class action was initiated in respect of a failed commercial condominium project. An interesting component to this action was that it was commenced as a regular action about the same time as five similar actions. All six actions were ordered to be tried together with a total of about 137

⁵ Cumming J.'s decision is found at (2000), 48 O.R. (3d) 785; 32 R.P.R. 177.

⁶ 57 O.R. (3d) 420 at para. 25. Although the suggestion that the statute is pure "consumer protection" legislation is inconsistent with comments by Finlayson J.A. in *Peel Condominium Corporation 505 et al. v. Cam-Valley Homes Ltd.*, [2001] 41 R.P.R. (3d) 231 (Ont. C.A.), at p. 249 (para. 34) applying *Budinsky v. Breakers East Inc.* (1992), 10 O.R. (3d) 120 at 145 (Ont. C.A.), leave to appeal to S.C.C. denied.

purchasers named as plaintiffs. The plaintiffs claimed the return of their deposits totalling approximately \$11,000,000.00. It was alleged these monies had been improperly used for project expenses in breach of contract and in breach of trust. The *defendants* only wanted to fight on one front and therefore sought certification of the various proceedings as a class proceeding. Certification was acceptable to some plaintiffs and opposed by others. Certification was granted. As always, individuals who did not want to participate retained their ability to opt out of the class proceeding.⁷ The majority of complainants in fact opted out. The matter is now proceeding to discovery.

(iii) SUBDIVISION IMPROPERLY CONSTRUCTED

In *Bunn v. Ribcor Holdings Inc. and the Corporation of the Township of Scugog*,⁸ the respondent, Ribcor Holdings Inc. (Ribcor), built three residential subdivisions. The plaintiff alleged that Ribcor failed to construct the homes in a workmanlike manner, that the houses had material defects, were uninhabitable and did not comply with the building code. The plaintiff also alleged that the township negligently performed its regulatory duties. The class proceeding was certified. The certified class included not only direct purchasers but subsequent owners. There

⁷ Winkler J. certified another class proceeding dealing with a similar, failed project involving the same defendants and identical, standard form agreements. See *Lau v. Bayview Landmark Inc.*, [1999] O.J. No. 4060, S.C.J. See also *Windisman v. Toronto College Park Limited* (1996), 28 O.R. (3d) 29 (involving a residential subdivision).

⁸ [1998] O.J. No. 1790 (Newmarket, Jenkins J.).

have been numerous class actions involving condominium construction in British Columbia (the leaky condominium cases).⁹

(iv) CONDOMINIUM MISREPRESENTATION

In *Vitelli v. Villa Giardino Homes Ltd.*, [2001] O.J. No. 2971, Cumming J. certified as a class action a claim by purchasers of residential condominium units against various defendants, including the developer, builder and vendor of the 118 residential units which were marketed primarily to senior citizens. The primary allegation was that the defendants misrepresented the floor area of the units. The floor area of each of the units was said to be approximately 14-16% less than represented in the sales materials and the purchase and sale agreement. It is alleged that there was a breach of fiduciary duty as well as the statutory duty under what was then s. 52(5) of the *Condominium Act*, R.S.O. 1990.

The defendants maintained that the plaintiffs have failed to distinguish between “floor area” and “net living space”. The defendants also quoted a contractual provision allowing them to modify plans and specifications without notice. The defendants relied on solicitors’ affidavits expressing expert opinions to the effect that it is a common practice in the Toronto area to measure and sell new condominiums on the basis that floor area includes surrounding walls and certain other areas as opposed to floor area which is the actual living space.

⁹ For details see the British Columbia Supreme Court website at www.courts.gov.bc.ca and search for references to “leaky condominiums”.

Cumming J. found, however, that even if this correctly describes industry practice, the issue remained whether the purchase agreement and related sales materials constituted a representation or contractual term. Cumming J. stated that:

“The plaintiffs may be able to argue successfully that the esoteric intent of the condominium industry is not an answer to a contrary understanding by a reasonable person purchaser.”¹⁰

(v) LIABILITY OF SOLICITORS AND ACCOUNTANTS

In a relatively early case under the CPA, *Abdool v. Anaheim Management Ltd.* (1995), 121 D.L.R. (4th) 496 (Ont. Div. Ct.) the plaintiffs were purchasers of condominium units which were intended as tax shelters. About 150 of the original 300 purchasers initiated a claim which they then sought to certify as a class action. The action was brought against the developer, real estate broker, assignees of the financial institutions that provided the financing, as well as solicitors and accountants for the developers. The developers did not defend and the brokers did not take part in the application. Consequently, the initial decision and the Divisional Court decision related to the solicitors, accountants and assignee of the financial institution.

The claim was not certified and the appeal was dismissed. The court held that each plaintiff’s claim was substantial and pursuing such a claim as a class action was inconsistent with the CPA’s objective of advancing small claims. The courts also emphasised the lack of any possible claim against the solicitors, in conjunction with the fact that it was economically feasible

¹⁰ Cumming J. at para. 28.

for the plaintiffs to pursue their individual claims. In other words, the plaintiffs would not be denied access to the justice system in the absence of certification and the class action was not the preferable means of dealing with the issue.

This decision might, however, have been different if there had been a reasonable prospect of recovery against the developers or the real estate brokers and the claim had been focussed on those defendants. There may also be reason to doubt the correctness of this decision in light of more recent decisions, including *Carom v. Bre-X*¹¹ and the Supreme Court decisions in *Hollick v. Toronto*¹² and *Rumley v. British Columbia*.¹³

ARBITRATION CLAUSES

An arbitration clause was successfully invoked recently to oust a consumer class action in *Kanitz v. Rogers Cable Inc.*¹⁴ This action did not involve real estate but its reasoning should be applicable to such cases. Rogers delivered highspeed internet access to subscribers in accordance with a standard form agreement. The original agreement provided that:

¹¹ *Supra.*

¹² [2001] S.C.C. 68.

¹³ [2001] S.C.C. 69. Also see *Delgrosso v. Paul* (1999), 45 O.R. (3d) 605 (leave to appeal to Divisional Court refused May 18, 1999) which involved an investment in syndicated mortgages. The plaintiff's claim was certified.

¹⁴ (2002) 58 O.R. (3d) 299.

- (a) it could be amended by giving notice by mail, e-mail or by posting changes to Rogers' website; and
- (b) the subscriber's continued use meant that the subscriber accepted the terms of the amended agreement.

Unbeknownst to most subscribers, and all five plaintiffs, Rogers amended the agreement by posting notice to its website (in a far from prominent manner) to include an arbitration clause which required all disputes to be submitted to arbitration and that all subscribers opt out of any class proceedings.

The case involved the plaintiffs' complaint they were paying monthly fees for inadequate services. The plaintiffs argued that the arbitration clause was inoperative, either because of inadequate notice of the amendment or because it was unconscionable. The court held, however, both that the arbitration clause had been adequately brought to the attention of the parties and that it was not unconscionable.

The significance of *Kanitz* for present purposes is not that amendments to agreements can apparently be introduced without any practical notification to a consumer, but that a properly drafted arbitration clause can be used to avoid the rigours of the CPA.

The courts have often stated that the CPA is merely a "procedural" statute. Nordheimer J. relied on the procedural character of the CPA, among other things, to conclude

that the arbitration clause was not “sufficiently divergent from community standards of commercial morality” to be unconscionable.¹⁵

Nordheimer J. also relied on the fact that the CPA requires the court to consider (albeit on the certification motion) whether a class action is the preferable procedure for resolution of the common issues. Nordheimer J. cited *Hollick v. Toronto (City)*¹⁶, where the Chief Justice stated:

“I think it clear, too, that the court cannot ignore the availability of avenues [of redress] apart from individual actions. As noted above, the preferability requirement was intended to capture the question of whether a class proceeding would be preferable “in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on.”

Nordheimer J. stated that it was “unarguable” that arbitration was one such procedure.¹⁷

Although Nordheimer J. did not say so, he presumably considered this issue to be a factor in his refusal to exercise his discretion under s. 7(1) of the *Arbitration Act 1991* to stay the court proceeding on the basis that the arbitration agreement was invalid (or the subject matter of the dispute was not capable of being the subject of arbitration under Ontario law or the matter was properly one for summary judgment).

¹⁵ *Kanitz* at p. 317 (para. 56).

¹⁶ [2000] S.C.C. No. 68 at para. 31.

¹⁷ *Kanitz, supra*, at p. 316 (para. 53).

CAN A REAL ESTATE CLASS PROCEEDING BE AVOIDED BY INSERTING AN ARBITRATION CLAUSE IN THE AGREEMENT OF PURCHASE AND SALE?

Notwithstanding the decision of Nordheimer J. in *Kanitz*, there is still good reason to believe that the validity of a clause such as Rogers' arbitration clause is open to question.¹⁸ On the appropriate evidentiary record other members of the bench may take a different view to that of Nordheimer J. In particular, on any subsequent challenge to an arbitration clause the plaintiffs challenging the arbitration clause will undoubtedly introduce evidence from arbitrators to support the proposition that consumers, or home purchasers, cannot arbitrate claims because of the costs involved.¹⁹ This argument was advanced successfully by the plaintiffs in the U.S. District Court in *Darcy Ting et al. v. AT&T*.²⁰

There is presently a strong bias in favour of arbitration over litigation (which in the writer's submission is unwarranted). In the U.S. arbitration clauses have been very effective in

¹⁸ It is submitted by the author that the *Kanitz* decision is inconsistent with that of Cumming J. in *Huras v. Primerica Financial Services Ltd.*, [2002] O.J. No. 1474 (S.C.J.); aff'd. without reference to the issue of unconscionability in the Court of Appeal (2001), 55 O.R. (3d) 449 (C.A.).

The *Kanitz* decision was not readily open for appeal to the Court of Appeal because s. 7 of the *Arbitrations Act*, S.O. 1991, c. 17, precludes any right of appeal.

¹⁹ Class arbitrations are unlikely to be permitted except where express agreement to such a procedure is set out in the arbitration agreement.

²⁰ (United States District Court ND California) [2002] W.L. 57254 (January 15, 2002).

preventing class action suits. U.S. lenders commonly and successfully use arbitration clauses in consumer lending to avoid class actions.²¹

An arbitration clause must be balanced if it is to be enforced. Thus, it should apply equally to both parties. Unequal application was one of the problems associated with the arbitration clause which was denounced by Cumming J. in *Huras v. Primerica*.²² While that clause required Huras to arbitrate her dispute, the same requirement was not imposed on Primerica for any issue the company might have had with its employees. Furthermore, the *Huras* arbitration clause was found effectively to prevent employees from arbitrating claims because of the costs involved.²³ Finally, another relevant factor is that *Huras* involved an employment relationship rather than the consumer relationship at issue in *Kanitz*.²⁴

Therefore, if an arbitration agreement is to be successfully invoked by a builder, developer or vendor, the following factors must be considered:

²¹ See Kaplinsky and Levin, *Consumer Financial Services Arbitration: A Panacea or a Pandora's Box?*, 55 Bus. Law., 1427, 1438 (May 2000).

²² *Huras, supra*.

²³ No evidence to this effect was led in *Huras*. The court considered the point obvious. No evidence on this point was led in *Kanitz*. The court considered this a fatal defect.

²⁴ For further factors to consider in drafting an arbitration clause see W.G. Horton, *Arbitration Clauses: Points to Ponder*, The Advocates' Society Journal, December 2000, 23-25. See also Casey, *International and Domestic Commercial Arbitration*, Carswell 1999, especially c. 4.

- (a) it should be clear the parties agree to the arbitration clause (this should not be difficult in light of *Kanitz*)—to avoid any doubt, an arbitration agreement should also provide that the parties waive their right to class action proceedings;
- (b) the arbitration obligations should be reciprocal, i.e., all parties shall be required to arbitrate the dispute, not just the consumer or equivalent party;
- (c) the costs of the arbitration must not be unconscionable.

Arbitration clauses drafted with these principles in mind might have been successfully invoked to avoid the real estate class actions described above.²⁵ An alternative approach might have been to expressly preclude class proceedings without requiring arbitration. Thus, instead of the defendants bringing a motion to stay the proceeding under the *Arbitrations Act*, a motion to stay might be brought pursuant to s. 106 of the *Courts of Justice Act* or the defendants would simply oppose certification based on the contract provisions.

COLLATERAL BENEFITS OF ARBITRATION CLAUSES

An arbitration clause may not only be useful in avoiding class actions but also Small Claims Court proceedings. Just as Ontario New Home Warranty Program disputes cannot

²⁵ While the author believes arbitration clauses should not be permitted in consumer litigation or its equivalent, this is not the view of a significant portion of the federal U.S. judiciary and, at least, Nordheimer J. in Ontario. Ironically, the author is advised that the development industry opposed the widespread imposition of arbitration imposed in the new *Condominium Act, 1998* described below and negotiated to keep the litigation options set out in the new Act.

go to court,²⁶ other claims which might otherwise go to Small Claims Court may be prevented by use of an arbitration clause. At present, a disgruntled home or condominium purchaser can readily pay the Small Claims Court fee (\$50.00) and launch a claim. Such a claim may be less likely if the purchaser is required to find an arbitrator, pay the arbitrator's deposit and engage in a very unfamiliar process. Of course, these factors will be argued as additional reasons why such a clause should be declared unconscionable, notwithstanding *Kanitz*. Similarly, the developer or builder would have to arbitrate their disputes with homeowners, if a reciprocal clause is used.

CONDOMINIUM ACT, 1998, S.O. 1998 c. C.19

The new Act introduces for the first time an oppression remedy section.²⁷ This section, akin to s. 248 of the Ontario *Business Corporations Act*²⁸, allows the court to remedy oppressive or unfairly prejudicial conduct by a broad range of persons, including developers and declarants. It is likely that, with time, this section will be used to give a broader range of remedies for condominium unit purchasers and condominium corporations compared to previous remedies.²⁹

²⁶ *Ontario New Home Warranty Protection Act*, R.S.O. 1990, c. O.31, s. 17(4), imposes mandatory conciliation and arbitration and ousts the court's jurisdiction.

²⁷ S. 135.

²⁸ *Business Corporations Act*, R.S.O. 1990, c. B.16, s. 248 (O.B.C.A.).

²⁹ This is discussed briefly by the present author in an earlier article, *Condominiums-- Good Faith and Fiduciary Duties* (2001), 41 R.P.R. (3d) 270 at 286. For a contrary view see Herskowitz and Freedman, *Condominiums in Ontario: A Practical Analysis of the New Legislation*, LSUC/OBA 2001 at pp. 454-458.

There is no reason why a corporate oppression remedy cannot be sought in a class proceeding.³⁰ The same should be true of a condominium oppression remedy application. If, however, an ordinary application rather than a class application or action is adequate to resolve the issue, it is likely that certification will be denied.³¹ An arbitration clause (or at least an express clause ousting the CPA) should, however, still be useful to preclude class applications for an oppression remedy. Indeed, if the clause is a general “resort to arbitration clause” which requires arbitration for all issues and does not expressly provide the arbitrator with jurisdiction to grant the statutory oppression remedy it *may* be possible to avoid any oppression remedy whatsoever subject only to the clause being set aside as unconscionable.³²

The new Act already provides that many agreements (but not agreements of purchase and sale) are deemed to contain a clause requiring disputes to be submitted first to mediation and then, if unsuccessful, to arbitration.³³ This applies to the following:

- (a) agreements between a declarant and a condominium corporation;
- (b) agreements between two or more condominium corporations;

³⁰ *Joncas v. Spruce Falls Power & Paper Co.*, [2001] O.J. 1505 (O.C.A.).

³¹ *S.R. Gent (Canada) Inc. v. Ontario (WSIB)* (1999), 45 O.R. (3d) 106 (Ont. Sup. Ct.).

³² See the O.B.C.A. case of *Armstrong v. Northern Eyes Inc.* (2000), 48 O.R. (3d) 442 (Ont. Div. Ct.) which deals indirectly with the decision of Arbitrator Griffiths who declined to consider any oppression remedy where he was not expressly given authority to do so.

³³ S. 132 of the new act. Note Harry Herskowitz and Mark F. Freedman believe this far reaching amendment may go too far--see *Condominiums in Ontario: A Practical Analysis of the New Legislation*, *supra*, at p. 132.

- (c) agreements described in clause 98(1)(b) between a corporation and an owner concerning alterations or improvements to the common elements;
- (d) agreements between a condominium corporation and a manager;
- (e) disagreements between the declarant and the corporation with regard to the first year budget statement;
- (f) disagreements between the condominium corporation and a unit owner with respect to the declaration, by-laws or rules.

Thus, the new Act evidences an intent to use arbitration as a dispute resolution mechanism in certain specific circumstances. It can be argued that arbitration is implicitly excluded for other matters where the Act permits court applications such as an oppression remedy application.

However, these provisions authorizing court remedies are permissive and it can reasonably be argued that a contractual arbitration clause should prevail in the absence of a clause in the new Act precluding arbitration of the otherwise litigious issues. The plaintiffs will, however, also argue that the attempt to avoid the new Act's statutory provisions permitting litigation is further evidence of unconscionability in an arbitration clause. This argument is unlikely to prevail based on *Kanitz*.

A declarant may also wish to use an arbitration clause or a no class proceedings clause to circumvent possible class proceedings apart from oppression remedy applications (or

may have a preference for arbitration over court proceedings generally) in respect of matters such as:

- (a) applications to court to determine whether changes to a disclosure statement are so material as to permit a purchaser to rescind the agreement of purchase and sale;³⁴
- (b) applications for orders terminating agreements of purchase and sale on the basis that the declarant has taken all reasonable steps to register but has been unable to do so because of circumstances beyond its control (such an application would be a defensive one by the developer);³⁵
- (c) an application by a condominium corporation requiring certain records, documents and plans to be turned over and damages and costs to be paid;³⁶
- (d) an application for a compliance order after a mandatory arbitration has been unsuccessful;³⁷
- (e) an application for damages for statutory misrepresentation by the declarant.³⁸

³⁴ Pursuant to subsection 74(5). Obviously there would have to be a multiplicity of claims to even consider a class application.

³⁵ Pursuant to subsection 79(3).

³⁶ Pursuant to s. 43(8). It is again unlikely that such an application would involve a class proceeding.

³⁷ Pursuant to s. 134.

³⁸ Pursuant to subsection 133(2). See also subsection 113(3).

While many of these court applications would not normally lend themselves to class proceedings, the important consideration is whether an arbitration clause or a clause ousting the CPA will be useful to preclude even one class proceeding with its high legal costs and potentially very large damages arising from the collective nature of the claim.