

AMENDED THIS 661715 PURSUANT TO
MODIFIÉ CE 661715 CONFORMÉMENT À

RULE/LA RÉGLE 26.02

THE ORDER OF Justice Belababa
L'ORDONNANCE DU

DATED / FAIT LE February 17, 2015

Court File No. CV-12-448301-00CP

REGISTRAR
SUPERIOR COURT OF JUSTICE

GREFFIER
COUR SUPÉRIEURE DE JUSTICE

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN

WASEEM EMAM and LYNN ELLWOOD

Plaintiffs

and

BAY GRENVILLE PROPERTIES LIMITED, LANTERRA DEVELOPMENTS LTD,
TORO ALUMINUM RAILINGS INC. and H & R DEVELOPMENTS INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

FRESH STATEMENT OF CLAIM
(Notice of Action issued March 7, 2012)

DEFINITIONS

1. The following definitions apply for the purposes of this statement of claim:
 - (a) “**Balcony**” and “**Balconies**” mean the outdoor exclusive use common elements for the **Units**;
 - (b) “**Bay Grenville**” means Bay Grenville Properties Limited;
 - (c) “**Builders**” means **Bay Grenville, Lanterra, and H&R**;
 - (d) “**CJA**” means the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended;
 - (e) “**Class**” and “**Class Members**” means those persons, excluding the defendants and their senior officers and directors, who owned, rented, and/or ordinarily

resided in a residential condominium unit at the premises municipally known as 37 Grosvenor Street (North Tower) and 38 Grenville Street (South Tower) in the City of Toronto during the period commencing on April 1, 2010 to and including August 31, 2012;

- (f) “**Class Period**” means the period commencing on and including April 1, 2010 to and including August 31, 2012.
- (g) “*Condominium Act*” means the *Condominium Act, 1998*, S.O. 1998, c. 19.
- (h) “**Condominium Corporation**” means Toronto Standard Condominium Corporation No. 2037;
- (i) “*CPA*” means the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as amended;
- (j) “**Falling Glass**” means **Glass Panelling** which was installed in balcony guards on **Balconies** at **Murano Towers** that shattered during the **Class Period**;
- (k) “**Glass Panelling**” means the tempered glass which was installed on **Balconies** at **Murano Towers**;
- (l) “**H&R**” means H&R Developments;
- (m) “**Lanterra**” means Lanterra Developments Ltd.;
- (n) “**Lynn**” means Lynn Ellwood;
- (o) “**Murano Towers**” means the condominium development located at 37 Grosvenor Street (**North Tower**) and 38 Grenville Street (**South Tower**) in the City of Toronto, Ontario;
- (p) “*New Home Warranties Plan Act*” means the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended;
- (q) “**North Tower**” means the condominium located at 37 Grosvenor Street in the City of Toronto, Ontario, in the **Murano Towers**;
- (r) “**Ontario Building Code**” means the *Building Code Act, 1992*, S.O. 1992, c. 23 and O. Reg. 350/06;
- (s) “**South Tower**” means the condominium located at 38 Grenville Street in the City of Toronto, Ontario, in the **Murano Towers**;

- (t) **“Toro”** means Toro Aluminum Railings Inc.;
- (u) **“Unit”** or **“Units”** means a condominium unit or an apartment, including its **Balcony at Murano Towers**; and
- (v) **“Wasseem”** means Wasseem Emam.

RELIEF SOUGHT

2. Wasseem and Lynn claim on their own behalf, and on behalf of other Class Members:

- (a) an order certifying this action as a class proceeding and appointing them as the representative plaintiffs for the Class;
- (b) a declaration that the Builders were negligent in monitoring the design, installation and supply of the Glass Panelling and are liable in damages to the Class;
- (c) a declaration that Toro was negligent in the installation and supply of the Glass Panelling and is liable in damages to the Class;
- (d) a declaration that Bay Grenville was in breach of contract and that the Builders are liable in damages to Class Members who purchased Units from Bay Grenville for that breach of contract;
- (e) a declaration that Bay Grenville and Lanterra form one economic unit or one common enterprise and that each is therefore vicariously liable for the others' acts and omissions;
- (f) general damages in the amount of \$15,000,000.00, or such other sum as this Honourable Court finds appropriate;
- (g) special damages and the costs of administering the plan of distribution of the recovery of this action, in the amount of \$4,000,000.00, or such other sum as this Honourable Court finds appropriate;
- (h) such further and other special damages as may be incurred from the date hereof until trial, or final disposition of this action, particulars of which will ultimately be furnished to the defendants;

- (i) an order directing reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;
- (j) prejudgment and postjudgment interest, compounded, or pursuant to ss. 128 and 129 of the *CJA*;
- (k) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus the costs of distribution of an award under ss. 24 or 25 of the *CPA*, including the costs of notice associated with the distribution and the fees payable to a person administering the distribution pursuant to s. 26(9) of the *CPA*; and
- (l) such further and other relief as to this Honourable Court seems just.

OVERVIEW OF THIS ACTION

3. Murano Towers is a real estate development in the City of Toronto which consists of the North Tower and the South Tower which are joined by a two storey podium.
4. The North Tower is a 45 storey high-rise building. The South Tower is 37 storey high-rise building.
5. Collectively, Murano Towers is made up of approximately 731 condominium Units, 475 parking units, 668 bicycle storage units, seven commercial units, a pool, gym facilities and an outdoor terrace, among other things.
6. In or around April 2010, Glass Panelling installed on the North Tower shattered and fell onto the street below. By September 22, 2011, at least 10 more incidents of Falling Glass emanated from the North Tower and at least 4 other such incidents emanated from the South Tower.

7. As a result of the Falling Glass, employees of one or more of the defendants entered the plaintiffs and other Class Members' Units and locked the doors to the Balconies, thereby preventing the Class Members from accessing their Balconies. The plaintiffs and other Class Members have thereby suffered from the loss of use of their Balconies, loss of enjoyment of their Units, disruption of privacy, delay in the resale of their Units, diminution in the value of their Units, and diminution of their rental income. Their access to common areas has also been limited due to the scaffolding erected to remedy the Falling Glass.

PARTIES

The Plaintiffs

8. Wasseem is the owner of Unit 2501 in the South Tower which he purchased on April 1, 2010. At all material times he was the owner of this Unit.
9. Lynn has been a tenant of Unit 4501 in the South Tower since August 1, 2011.

The Defendants

10. Bay Grenville is a corporation incorporated under the laws of Ontario with head office located in the City of Toronto. It carries on the business of, *inter alia*, developing residential and commercial real estate. At all material times, Bay Grenville was the owner and developer of Murano Towers. Bay Grenville is vicariously liable for the acts and omissions of its employees, agents, and servants.

11. On November 9, 2009, Bay Grenville registered a Declaration and Description, thereby naming itself the “declarant” within the meaning of the *Condominium Act*. At all material times, Bay Grenville marketed and sold the Units in the Murano Towers.
12. Lanterra is a corporation incorporated under the laws of Ontario with head office located in the City of Toronto. Lanterra carries on the business of, *inter alia*, developing and constructing residential and commercial real estate. At all material times, Lanterra was the developer and/or promoter of Murano Towers.
13. At all material times, Lanterra also acted as the general contractor for the development of Murano Towers. It selected the trade contractors and supervised and controlled their access to, and construction of, the Balconies. Lanterra is vicariously liable for the acts and omissions of its employees, agents and servants.
14. H&R is a general partnership under the laws of Ontario and located in the City of Toronto. H&R is in the business of constructing commercial and residential buildings. At all material times, H&R assisted in the development and/or construction of Murano Towers, including the Balconies. H&R is vicariously liable for the acts and omissions of its employees, agents and servants.
15. Toro is a corporation incorporated under the laws of Ontario and located in the community of Concord, Ontario.
16. Toro is in the business of supplying and installing balcony guard railings in condominiums, including the balcony guard railings and Glass Panelling at Murano

Towers. Toro is vicariously liable for the acts and omissions of its employees, agents and servants.

17. At all material times, Toro was the trade contractor hired by one or all of the Builders and supplied and installed the Glass Panelling and guard railings on the Balconies at Murano Towers.

FACTS SUPPORTING CLASS MEMBERS' CLAIMS AGAINST THE DEFENDANTS

18. In or around 2004, Bay Grenville, Lanterra, and/or H&R proposed to build a condominium project on or around 38 Grenville and 37 Grosvenor Streets in the City of Toronto.
19. The Builders began excavation for the construction of Murano Towers on or around October 2005.
20. On or around that time, Bay Grenville, Lanterra and/or H&R began to promote and market the sale of Units in Murano Towers to the general public. In doing so, the names of these three defendants were placed on marketing materials.
21. At some point in time during the construction of Murano Towers, Bay Grenville , Lanterra and/or H&R entered into an agreement with Toro in which Toro agreed to furnish materials and perform the work with respect to the construction of the Balconies.

22. Toro subsequently purchased the Glass Panelling to be used in the construction of the Balconies from a company in China and carried out the installation of the Glass Panelling on the Balconies.
23. Toro also supplied and installed the balcony guard railings and glass panelling in the Festival Tower condominium complex located at 80 John Street in Toronto, Ontario, which shattered and fell to the street below in May 2011 and thereafter.
24. In or around April 2010, Glass Panelling installed on the North Tower shattered and fell onto the street below.
25. By September 22, 2011, there were ten more incidents of Falling Glass from the North Tower and at least four other incidents of Falling Glass from the South Tower.
26. On or around August 2011, employees of one or more of the defendants entered Units and sealed the sliding doors to the balconies at Murano Towers such that they could not be opened from the inside of the Units. Notices were posted on the Balcony doors of every Unit prohibiting the opening of the Balcony doors or use of the Balcony.
27. On or around August 2011, employees of one or more of the defendants removed each piece of Glass Panelling from every balcony in Murano Towers.
28. On or around August 2011, residents at Murano Towers were also advised that they could not access the swimming pool or common outdoor areas for a period of approximately 2 months due to the Falling Glass.

29. As a result of the Falling Glass and the subsequent removal of the Glass Panelling from the balconies, Wasseem, Lynn, and all other members of the Classes have not been able to access their balconies thereby suffering from a loss of enjoyment of their Units. They were also unable to access some of the common areas for a period of time.

FACTS REGARDING THE BUILDERS

30. Bay Grenville and Lanterra were operated as one economic unit or single group enterprise as follows:
- (a) Each of Bay Grenville and Lanterra is a parent or subsidiary of the other or is an affiliate of the other;
 - (b) Each of the two companies is the agent of the other;
 - (c) Both companies have common directors and officers;
 - (d) Both companies have common offices and employees;
 - (e) The acts and omissions set out in the claim were done by Lanterra and Bay Grenville in pursuit of their common enterprise;
 - (f) Lanterra and Bay Grenville carry on business jointly and are operated as one economic unit or one economic enterprise; and
 - (g) Both companies held themselves out to consumers as operating as one economic unit.
31. While one company entered into contracts with trade contractors and purchasers of Units, both Bay Grenville and Lanterra are collectively liable to the plaintiffs and other Class Members because of their operation as one economic unit or a single group enterprise. Each company is vicariously liable for the acts of omissions of the other.

32. As one economic unit or single group enterprise, each of Bay Grenville and Lanterra acted as the agent for the other.

FACTS REGARDING THE PLAINTIFFS' INDIVIDUAL CIRCUMSTANCES

33. Wasseem purchased his Unit on April 1, 2010, from a previous owner who had purchased the Unit directly from Bay Grenville.
34. Once he took possession, Wasseem rented out his Unit to a tenant.
35. On or about August 2011, employees of Lanterra entered the Unit, removed the Glass Panelling from the Balcony, and sealed the Balcony doors such that they could not be opened from the inside.
36. As a result of the loss of use of the Balcony, Wasseem lowered the rent charged to his tenant and has not raised it at any point since then.

CAUSES OF ACTION

Breach of Contract

37. Class Members who purchased Units directly from Bay Grenville entered into Agreements of Purchase and Sale (the "Contracts").
38. The Contracts contained the following terms:

- (a) That the Units and the common areas in the Murano Towers would be completed in the manner specified in the plans and specifications for the Murano Towers filed with the City of Toronto and contained in the Description; and
 - (b) That the Units and the common areas in the Murano Towers would be completed in a good and workmanlike manner in accordance with the Ontario Building Code and good construction practice.
39. Section 13 of the *New Homes Warranties Plan Act* is incorporated into the terms of the Contract. As a result, Bay Grenville warranted to the Class Members who purchased Units directly from Bay Grenville that the Units and the common elements in the Murano Towers were:
- (a) constructed in a workmanlike manner and free from defects in material;
 - (b) fit for habitation;
 - (c) constructed in accordance with the Ontario Building Code; and
 - (d) free from structural defects.
40. All Class Members who purchased Units from Bay Grenville entered into contracts with Bay Grenville on similar terms.
41. Lanterra and H&R also warranted that they were developers or builders of the Murano Towers by placing their marks, “Lanterra” and “H&R”, on the marketing material; by displaying them at the presentation centre; by placing them on the web site for the Murano Towers development; by having Lanterra executives and H&R partners act as spokespersons in media announcements; and by stating the project was a Lanterra or a H&R project.

42. Lanterra and H&R knew that purchasers would associate the names Lanterra and H&R with the construction of the Murano Towers and intended that prospective purchasers do so. Lanterra and H&R's representations that they were the developers or builders therefore constitute collateral contracts whereby Lanterra and H&R agreed to be bound by all of the terms of the Contracts, to the same extent as Bay Grenville.
43. All Class Members who purchased Units from Bay Grenville were induced by Lanterra and H&R's marks and representations, as described at paragraph 42, to enter into the Contract.
44. The Glass Panelling, and/or the balcony railing guards of the Murano Towers, were designed, supplied, constructed and/or installed in an improper and defective manner by the Builders and/or Toro.
45. The Glass Panelling is a construction deficiency which existed in the Murano Towers at the time of the purchase of the Units from Bay Grenville.
46. This construction deficiency has led to incidents of Falling Glass as particularized above.
47. This deficiency constitutes a breach of contract by Bay Grenville, Lanterra and H&R in that the Units were not constructed within the terms of the Contract.
48. The deficiency also constitutes a breach by Bay Grenville, Lanterra and H&R of the statutory warranty under the *New Homes Warranties Plan Act*.

49. Wasseem pleads on behalf of each Class Member who purchased Units directly from Bay Grenville that as a result of these breaches of contract and statutory warranties, Bay Grenville, Lanterra and H&R are liable to them in damages.

Negligence of the Builders

50. The Builders owed a duty of care to the plaintiffs and other Class Members to carefully monitor the construction of the Balconies and to protect against incidents of Falling Glass.
51. The circumstances of the Builders being in the business of developing and constructing condominiums for sale to the plaintiffs and other Class Members are such that they were under an obligation to be mindful of the plaintiffs and other Class Members when constructing Murano Towers.
52. The Builders knew that if the Balconies were not constructed in a manner whereby the Glass Panelling was secure, it was likely that Falling Glass would cause damage to the Class Members' property, restrict their access to the Balconies and common areas, decrease their enjoyment of the Units, delay in the resale of the Units, diminish the value of the Units, and decrease rental income generated from the rent of Units.
53. There was a sufficient degree of proximity between the plaintiffs and other Class Members and the Builders to establish a duty of care because:
- (a) The Builders entered into a contract or a collateral contract with purchasers of Units;

- (b) It was reasonable for the plaintiffs and other Class Members to expect that the Builders had implemented adequate safeguards to ensure that the Balconies were constructed in a manner that they would be fit for habitation;
- (c) The nature of the Builders' business, the construction and development of residential and commercial real estate, had a direct causal connection to the incidents of Falling Glass;
- (d) The plaintiffs and other Class Members were vulnerable to any failure on the part of the Builders to ensure the safety and quality of the Balconies, as they had no way of ensuring sufficient inspection and supervision of the materials were taken, and no way of protecting themselves if sufficient measures were not taken; and
- (e) Lanterra and H&R warranted that they were builders.

54. The Builders breached their duty of care to the plaintiffs and to the Class Members, as particularized below:

- (a) they failed to complete the construction in accordance with the Ontario Building Code;
- (b) they failed to complete the construction in a good and workmanlike manner in accordance with good construction practice;
- (c) they failed to complete the construction in accordance with the plans and specifications for the Murano Towers filed with the City of Toronto and contained in the Description;
- (d) they employed inferior or defective materials used in the construction;
- (e) they improperly or carelessly installed the materials used in the construction;
- (f) they failed to properly supervise and inspect work done by contractors, sub-trades, and employees;
- (g) they failed to properly inspect the construction work on an on-going basis and ensure that the construction of Murano Towers was done in accordance with the Ontario Building Code, good construction practice and the plans and specifications for the Murano Towers filed with the City of Toronto and contained in the Description;

- (h) they failed to provide adequate specifications to Toro for the composite of glass to be used as Glass Panelling;
- (i) they failed to require adequate quality controls and testing of the glass received from China before installing the Glass Panelling; and
- (j) they failed to specify that Toro use laminated glass instead of tempered glass.

Negligence of Toro

55. Toro owed a duty of care to the plaintiffs and other Class Members to carefully supply and install the Glass Panelling and balcony guard railings such that there would be no incidents of Falling Glass.
56. The circumstances of Toro being in the business of supplying and installing balcony guard railings in condominiums are such that they were under an obligation to be mindful of the plaintiffs and other Class Members when supplying and installing the guard railings and Glass Panelling on the Balconies.
57. Toro knew that if the installed Glass Panelling was of inadequate composite, or if the Balconies were not constructed in a manner whereby the Glass Panelling was secure, it was likely that Falling Glass would cause damage to the Class Members' property, restrict their access to the Balconies and common areas, decrease their enjoyment of the Units, delay in the resale of the Units, diminish the value of the Units, and decrease rental income generated from the rent of Units.
58. There was a sufficient degree of proximity between the plaintiffs and other Class Members and Toro to establish a duty of care because:

- (a) It was reasonable for the plaintiffs and other Class Members to expect that Toro had implemented adequate safeguards to ensure that the Balconies were constructed in a manner where by Glass Panelling would not shatter and fall;
- (b) The nature of Toros' business, the supply and installation of balcony guard railings in condominiums, had a direct causal connection to the incidents of Falling Glass;
- (c) The plaintiffs and other Class Members were vulnerable to any failure on the part of Toro to ensure the safety and quality of the Balconies, as they had no way of ensuring sufficient inspection and supervision of the materials were taken, and no way of protecting themselves if sufficient measures were not taken.

59. Toro breached its duty of care to the plaintiffs and to the Class Members, as particularized below:

- (a) they failed to complete the construction in accordance with the Ontario Building Code;
- (b) they failed to complete the construction in a good and workmanlike manner in accordance with good construction practice;
- (c) they failed to complete the construction in accordance with the plans and specifications for the Murano Towers filed with the City of Toronto and contained in the Description;
- (d) they employed inferior or defective materials used in the construction;
- (e) they improperly or carelessly installed the materials used in the construction;
- (f) they failed to properly supervise and inspect work done by contractors, sub-trades, and employees;
- (g) they failed to properly inspect the construction work on an on-going basis and ensure that the construction of Murano Towers was done in accordance with the Ontario Building Code, good construction practice and the plans and specifications for the Murano Towers filed with the City of Toronto and contained in the Description;
- (h) they failed to inspect the Glass Panelling and test it for defects prior to installing it; and

- (i) they failed to determine whether the company who manufactured the glass used in the Glass Panelling had adequate quality control measures to ensure consistency in the composite of the Glass Panelling.

DAMAGES

60. The plaintiffs plead that by virtue of the defendants' breach of contract and negligence outlined above, the defendants are jointly and severally liable in damages to them and to all Class Members for:

- (a) the loss of access to the Balconies;
- (b) the loss of access to the pool and outdoor terrace areas;
- (c) the loss of enjoyment of their Units; and
- (d) the disruption of their privacy due to one or more of the defendants' employees entering Units in order to access the Balconies.

61. The defendants are also liable in damages to the Wasseem and all Class Members who owned their Units for:

- (a) the diminution in the value of their Units;
- (b) the delayed resale of Units; and
- (c) the diminution in rental income.

THE RELEVANT STATUTES

62. The plaintiffs plead and rely on the *CJA*, *CPA*, the *Condominium Act*, the Ontario Building Code, the *New Homes Warranties Act*, and the *Negligence Act*, R.S.O. 1990.

THE PLACE OF TRIAL

63. The plaintiff proposes that this action be tried at the City of Toronto.

Date: February 9, 2015

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