

AMENDED THIS Jan. 26, 2012 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT A
 RULE/LA RÉGLE 26.02

THE ORDER OF Justice Horkins
L'ORDONNANCE DU Aug. 18, 2011
DATED / FAIT LE in. Brenton

REGISTRAR _____ GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE

Court File No.: CV-08-00355006-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

**TORONTO COMMUNITY HOUSING CORPORATION,
HOUSING SERVICES INCORPORATED and
FIRST ONTARIO REALTY CORPORATION LIMITED and**

Plaintiffs

- and -

**THYSSENKRUPP ELEVATOR (CANADA) LIMITED,
THYSSENKRUPP NORTHERN ELEVATOR CORPORATION,
THYSSEN ELEVATOR LIMITED all from time to time carrying on business under
the names "ThyssenKrupp Northern Elevator" and "ThyssenKrupp Elevator"**

Defendants

Proceeding under the *Class Proceedings Act, 1992*

**AMENDED
FRESH AMENDED STATEMENT OF CLAIM**

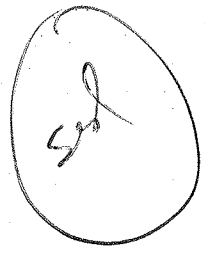
TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiffs.
The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the rules of court, serve it on the plaintiffs' lawyer or, where the plaintiffs do not have a lawyer, serve it on the plaintiffs, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the rules of court. This will entitle you to ten more days within which to serve and file your statement of defence.



IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

Date: May 16, 2008

Issued by "A. Amisimo"
Local registrar

Address of court office:

10th Floor
393 University Avenue
Toronto, ON
M5G 1E6

TO: ThyssenKrupp Elevator (Canada) Limited
410 Passmore Avenue, Unit 1
Toronto, ON
M1V 5L1

AND TO: ThyssenKrupp Elevator Limited
410 Passmore Avenue, Unit 1
Toronto, ON
M1V 5L1

AND TO: ThyssenKrupp Northern Elevator Corporation
270 Finchdene Square
Toronto, ON
M1X 1A5

CLAIM

1. The Plaintiffs claim:

- (a) an Order pursuant to the *Class Proceedings Act*, 1992, S.O. 1992, c.6, certifying this proceeding as a class proceeding and appointing the Plaintiffs as representative plaintiffs on behalf of the Class as defined herein;
- (b) compensatory damages in the amount of \$30 million for the replacement of sheave jammers as ordered by the Technical Standards and Safety Association in Director's Safety Order number 207/06 (July 27, 2006), and in revision 1 of that order (December 5, 2006) (collectively the "TSSA Safety Orders");
- (c) in addition or alternatively:
 - (i) an Order requiring the Defendants or any of them, to reimburse to the Class all costs incurred by the Class in replacing the sheave jammers in elevators owned by the Class as required by the TSSA Safety Orders; and/or
 - (ii) a mandatory Order requiring the Defendants or any of them, to replace the sheave jammers in elevators owned by the members of the Class (at the Defendants' expense), where the replacement is required by the TSSA Safety Orders.
- (d) pre-judgment and post-judgment interest, in accordance with the *Courts of Justice Act*, R.S.O. 1990, c. C-43, as amended;

- (e) its costs of this action inclusive of GST; and
- (f) such further and other relief as this Honourable Court finds just.

The Parties

2. The Plaintiff Toronto Community Housing Corporation ("TCHC") is a corporation incorporated under the *Business Corporations Act*, R.S.O. 1990, c. B.16 (the "OBCA"). It operates on a not-for-profit basis.

3. TCHC is the largest social housing provider in Canada and provides subsidized and market based housing services to more than 160,000 individuals living in approximately 57,000 housing units across the City of Toronto. More than 90% of the tenants receiving housing services from TCHC are recipients of rental subsidies to assist with their housing expenses.

4. The Plaintiff Housing Services Incorporated ("HSI") is a corporation incorporated under the OBCA. It is a wholly owned subsidiary of TCHC. It is a major provider of construction and maintenance solutions to property managers and owners in the multi-residential social housing market.

5. The Plaintiff First Ontario Realty Corporation Limited ("First Ontario") is a corporation incorporated under the OBCA. First Ontario operates a real estate development business in the Province of Ontario.

5.6. The Plaintiffs bring this action on their own behalf and on behalf of all persons in Ontario who:

owned or owns an elevating device that ~~is or was~~ fitted with a traction motor brake, known as a sheave jammer or sheave brake, designed, manufactured, sold, or installed by any of the Defendants, or any of them, and requires replacement or that was replaced, as required by the TSSA Safety Orders TSSA Director's Order 207/06 with an alternative form of emergency ACO and UCM protection and incurred remediation expenses as a result.

6.7. The Defendants are corporations incorporated pursuant to the laws of Canada, and are engaged in the design, manufacture, sale, installation, and servicing of elevators. The former legal name of the Defendant ThyssenKrupp Northern Elevator Corporation is Northern Elevator Limited.

Overview of Claim

7.8. The Defendants designed, manufactured, sold and installed elevator traction motors with an emergency traction motor brake known as a sheave jammer or sheave brake ("sheave jammer"). The sheave jammers designed, manufactured, sold and installed by the Defendants are defective, leading to a risk of serious personal injury.

8.9. The regulatory authority in Ontario responsible for ensuring the public safety with respect to elevating devices is the Technical Standards and Safety Association (the "TSSA"). The TSSA has ordered that all owners of elevating devices in Ontario containing the Defendants' sheave jammers must replace the defective sheave jammers with alternate emergency braking devices.

9.10. The cost of replacing one defective sheave jammer with an alternate emergency braking device is approximately \$10,000 to \$15,000.

10.11. There are approximately 2,000 elevating devices in Ontario that are subject to the TSSA Safety Orders.

11.12. At all material times, TCHC, First Ontario and the class members, are or were the owners of buildings containing elevating devices with sheave jammers manufactured by the Defendants (and subject to the TSSA Safety Orders) and have incurred or will incur tens of millions of dollars in replacement expenses. The Plaintiffs state that the Defendants, and not they and the class members, are obliged at law to bear the cost of eliminating the risk that the Defendants' defective product poses to the public of Ontario.

Elevator Safety in Ontario

12.13. Elevator safety in Ontario is governed by the *Technical Standards and Safety Act, 2000*, S.O. 2000, c. 16 (the "*Act*") as well as the regulations made pursuant to that Act.

13.14. Prior to the enactment of the *Act*, elevator safety was governed by the *Elevating Devices Act*, R.S.O. 1990, c. E-8.

14.15. The administration of the *Act* is delegated to the TSSA which has the power to appoint directors, who in turn have the power to make safety orders for the protection of the public.

The B44 Code

15.16. The "Elevating Devices Code Adoption Document" is incorporated by reference into the *Act's* regulations and requires elevating devices in Ontario to comply with the

"B44 Safety Code for Elevators" (the "Code"). The Code is published by the Canadian Standards Association.

16.17. At all relevant times since 1990, the Code has required elevators to be fitted with a device providing "Ascending Car Overspeed Protection" to protect against elevator cars ascending at excessive speeds, which could result in a collision at the top of the elevator shaft, or in some other potentially injurious consequence for the elevator car occupants.

17.18. Depending on the date they were installed, some elevators are also required by the Code to have "Car Uncontrolled Low Speed Protection" and "Unintended Car Movement Protection." The former addresses the problem of an elevator continuing at a low speed without fully stopping; the latter addresses the problem of an elevator rolling slowly from a stationary position.

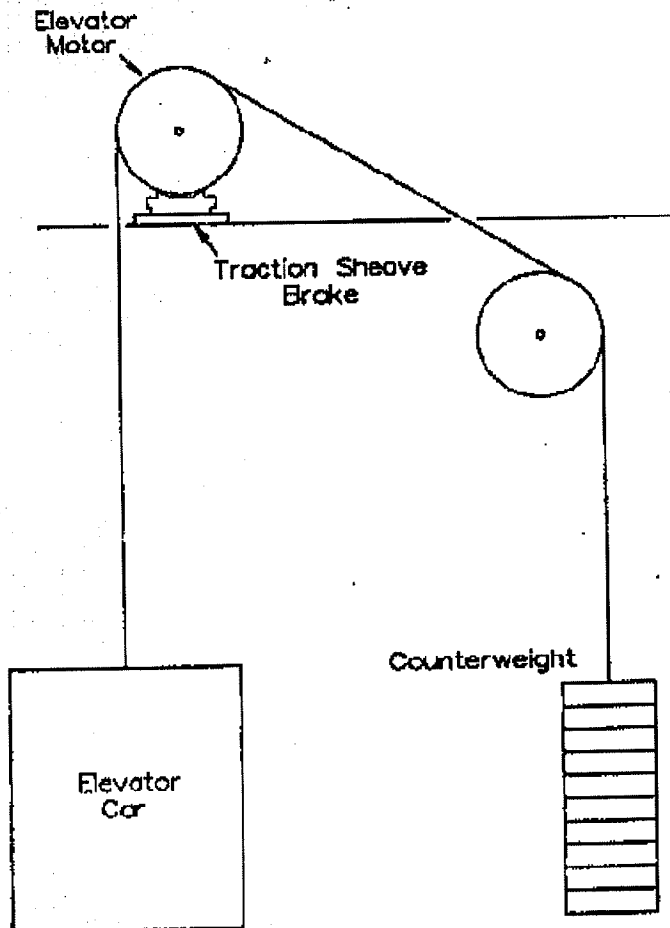
18.19. Devices designed to provide these three kinds of protection against unintended elevator movement (collectively the "Safety Devices") are required by the Code and by the TSSA because they are important to the safety of elevator car occupants.

Sheave Jammers

19.20. The Defendants designed, manufactured, sold, and installed Safety Devices known as sheave jammers on elevators throughout Ontario to satisfy the mandatory safety requirements of the Code.

20.21. The sheave jammer was intended to operate as a brake on the wheel (the "sheave") through which the elevator cable runs. Upon activation, the device would

“jam” the “sheave,” which in turn would freeze any movement in the elevator cable, and consequently the elevator car would stop. This figure illustrates the placement of a sheave jammer (identified as the Traction Sheave Brake) in an elevator mechanism:



21.22. The sheave jammer is a form of emergency brake. When a sheave jammer does not work properly, the safety of the occupants of an elevator car is at risk.

2004 Notification of Failures in the Defendants' Sheave Jammers

22.23. In 2004 the TSSA became aware of incidents in which sheave jammers designed, manufactured, sold, and installed by the Defendants failed to prevent

“Ascending Car Overspeed.” In at least one case, the elevator crashed into the top of the building.

23-24. The TSSA raised concerns with the Defendants over these failures. In conjunction with the TSSA, the Defendants then conducted spot audits of various elevators with the Defendants’ sheave jammers, and found the sheave jammers to have a failure rate of approximately 50%. This failure rate poses an unacceptable danger to public safety.

24-25. Initially, the Defendants took the position that the solution to the sheave jammer failures was to increase maintenance and cleaning. The cleaning and maintenance program proposed by the Defendants was inadequate, and did not significantly decrease the rate of failure of the sheave jammers.

The Defendants Recommend Replacement

25-26. The Defendants eventually determined that its sheave jammers could not be relied upon to satisfy their important safety and emergency role required by the Code. They advised the TSSA by letter dated May 17, 2006 that, in their view as the “original equipment manufacturer,” the sheave jammers they had designed, manufactured and sold should be replaced or retrofitted as soon as possible. Moreover, the Defendants stated that they could “only sanction a retrofit kit as passed and accepted by [their] Engineers”.

Director’s Replacement Order

26-27. Consequently, the TSSA Director issued a safety order on July 27, 2006 requiring that “All elevating devices that incorporate a ThyssenKrupp Northern Elevator

Traction Sheave Brake, known as the "Sheave Jammer," (manufactured by ThyssenKrupp Northern Elevator) **shall be replaced or retrofitted** by August 1, 2007 (emphasis in original). This order compels all Class members to replace or retrofit the Defendants' defective sheave jammers, failing which the elevators must be removed from service.

27:28. The TSSA Director later revised the order on December 5, 2006 to clarify that retrofitting was no longer an option. All the Defendants' sheave jammers had to be replaced by August 1, 2007 "with a device capable of meeting the requirements [for Ascending Car Overspeed Protection and Unintended Car Movement Protection as mandated by the Code]. Given logistical difficulties associated with replacing over 2000 of the Defendants' sheave jammers, the TSSA later administratively allowed individual property owners to apply for an extension beyond the August 1, 2007 date. Nevertheless, in Ontario all owners of elevating devices containing sheave jammers manufactured by the Defendants are obliged to replace the sheave jammers.

28:29. The sheave jammers designed, manufactured, sold and installed by the Defendants were and are dangerous, defective, unfit for their intended purpose, and pose a significant risk to public safety. The Defendants admit and acknowledge this in their letter to the TSSA dated May 17, 2006 which resulted in the TSSA Safety Orders.

The Defendants' Negligence

29:30. The Defendants were under a duty of care to the Plaintiffs and the other members of the class to design, manufacture, sell and install Safety Devices and, in

particular, sheave jammers that were not dangerous and defective, and/or unfit for their intended purpose.

31. The Defendants breached their duty of care to the members of the class and were negligent in the design, manufacture, sale and installation of the sheave jammers.

32. Intended to be an important safety device in the operation of elevators, as admitted by the Defendants and confirmed by the TSSA in the TSSA Safety Orders, the sheave jammers, as designed and manufactured by the Defendants, in fact cannot be relied upon to function properly and protect against unintended car movement. This falls short of the required standard of care to design and manufacture sheave jammers that can be relied upon to perform their intended safety function.

33. At all material times when the Defendants were selling and/or installing sheave jammers, or otherwise placing sheave jammers into the stream of Canadian commerce, the Defendants knew or ought to have known that the sheave jammers could not be relied upon to perform their intended safety function. This falls short of the required standard of care to sell and/or install sheave jammers that can be relied upon to perform their intended safety function.

34. As a result of the Defendants' negligence, and on the recommendation of the Defendants themselves, the TSSA ordered the class members to replace the sheave jammers. The Defendants' negligence caused damages to the class members.

The Plaintiffs' Damages and the Class' Damages

~~31.35.~~ The TCHC and HSI Plaintiffs were required to replace one hundred and sixty seven (167) of the Defendants' sheave jammers in various elevators located on their properties. The total cost to ~~the TCHC and HSI Plaintiffs~~ of replacing all the Defendants' defective sheave jammers was approximately \$2,000,000.

36. First Ontario was required to replace two (2) of the Defendants' sheave jammers in elevators located in one of its properties. The total cost to First Ontario of replacing the Defendants' defective sheave jammers was \$18,540 plus applicable taxes.

~~32.37.~~ Similarly, each member of the proposed class has or will be forced to incur an expense in the range of \$10,000 to \$15,000 per elevator in replacing sheave jammers, as they have been ordered by the TSSA to replace the sheave jammers or to shut down operation of their elevators.

~~37.38.~~ The Plaintiffs and the other members of the Class have been damaged, accordingly. This was a direct consequence of the Defendants' negligent design, manufacture, sale, and/or installation of the defective sheave jammers, which purported to satisfy the safety requirements of the Code but in fact did not. The Defendants are liable to the Plaintiffs for the cost of replacing the sheave jammers.

Breach of Contract

~~34.39.~~ In addition to manufacturing elevators, the Defendants also maintain and repair elevators pursuant to maintenance contracts entered into between the Defendants and the many of the class members ("maintenance contract class members"). Under the maintenance contracts, the Defendants are paid a fixed monthly fee.

35.40. Pursuant to the maintenance contracts, for the monthly fee paid by the maintenance contract class members, the Defendants are contractually obliged, *inter alia*, to repair or replace electrical and mechanical parts as and when required, to keep the elevators operating in the same manner to which they was originally designed, to change defective or worn parts, and to replace any defective component that the Defendants have installed.

36.41. The Defendants have breached their contractual obligations to the maintenance contract class members by failing to replace the sheave jammers under the terms of their maintenance contracts without additional charge. As a result, the maintenance contract class members have suffered damages in the amounts charged by the Defendants for the replacement of the defective sheave jammers.

42. To the extent the maintenance contract class members have already incurred costs regarding the replacement of sheave jammers, such costs constitute damages for breach of contract and the Plaintiffs seeks reimbursement on behalf of the maintenance contract class members. To the extent maintenance contract class members have not yet replaced the sheave jammers, the Defendants are obliged to complete the replacement required pursuant to the TSAA Safety Orders without any additional cost or charge.

43. First Ontario was party to a standard form maintenance contract with the Defendants at all relevant times. The maintenance contract between First Ontario and the Defendants required the Defendants to maintain and replace the sheave jammers for no additional charge to the Plaintiffs. However, the Defendants refused to maintain

or replace the defective sheave jammers under the terms of the maintenance contract between the parties.

37.44. The Defendants' proposal to replace the defective sheave jammers in First Ontario's elevators for an additional fee, in breach of the maintenance contract, was not competitive with other elevator contractors. First Ontario paid another elevator contractor \$18,540 plus applicable taxes for this work.

38.45. At all relevant times, either TCHC, HSI, or both, were parties to a maintenance contract with one or more of the Defendants for certain of TCHC's elevator sites. Under the terms of the maintenance contract, for the contract price paid by the Plaintiffs, the Defendants were required to replace the defective sheave jammers in the Plaintiffs' elevators at the stipulated elevator sites at no additional charge to the Plaintiffs.

39.46. The Defendants replaced the defective sheave jammers in the TCHC and HSI Plaintiffs's elevators and, in breach of the maintenance contract, charged the Plaintiffs approximately \$1,400,000 for this work. The Plaintiffs have suffered damages in breach of contract accordingly.

47. The Plaintiffs have suffered damages in breach of contract accordingly.

40.48. The Plaintiffs propose that this action be tried at Toronto.

May 16, 2008

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Solicitors for the Plaintiffs

**TORONTO COMMUNITY HOUSING CORPORATION, HOUSING
SERVICES INCORPORATED and FIRST ONTARIO REALTY
CORPORATION LIMITED and**

Plaintiffs

v.

**THYSSENKRUPP ELEVATOR (CANADA) LIMITED,
THYSSENKRUPP NORTHERN ELEVATOR
CORPORATION, ET AL.**

Defendants

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**AMENDED
FRESH AMENDED STATEMENT OF CLAIM**

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