



Amended pursuant to Rule 6-1(1)(a) of the *Supreme Court Civil Rules*.
Original filed August 3, 2022.

No. ABB-S-S-02704
Abbotsford Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

STEVEN HEIMBURGER

PLAINTIFFS

AND:

BIGSTEELBOX CORPORATION

DEFENDANT

Brought under the *Class Proceedings Act*, RSBC, 1996 c. 50

AMENDED NOTICE OF CIVIL CLAIM

This action has been started by the Plaintiffs for the relief set out in Part 2 below.

If you intend to respond to this action, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 in the above-named Registry of this Court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim on the Plaintiffs.

If you intend to make a counterclaim, you or your lawyer must

- (a) file a Response to Civil Claim in Form 2 and a Counterclaim in Form 3 in the above-named Registry of this Court within the time for Response to Civil Claim described below, and
- (b) serve a copy of the filed Response to Civil Claim and Counterclaim on the Plaintiffs and on any new parties named in the counterclaim.

JUDGMENT MAY BE PRONOUNCED AGAINST YOU IF YOU FAIL to file the Response to Civil Claim within the time for Response to Civil Claim described below.

Time for Response to Civil Claim

A Response to Civil Claim must be filed and served on the Plaintiffs,

- (a) if you were served with the Notice of Civil Claim anywhere in Canada, within 21 days after that service,
- (b) if you were served with the Notice of Civil Claim anywhere in the United States of America, within 35 days after that service,
- (c) if you were served with the Notice of Civil Claim anywhere else, within 49 days after that service, or
- (d) if the time for Response to Civil Claim has been set by order of the Court, within that time.

CLAIM OF THE PLAINTIFFS

Part 1: STATEMENT OF FACTS

1. The proposed representative Plaintiff, Steven Heimbürger (the “**Plaintiff**”), is a resident of Victoria, British Columbia and has an address for service at #3 – 45780 Yale Road, Chilliwack, British Columbia, V2P 2N4.
2. The Defendant, BIGSTEELBOX CORPORATION (the “**Defendant**”) is a company incorporated pursuant to the laws of the province of British Columbia and has an address for service at 301, 2706 – 30th Avenue, Vernon, British Columbia, V1T 2B6.

The Standard Form Rental Agreements

3. The Defendant carries on the business of renting steel shipping containers (the “**Storage Containers**”) to consumers and businesses for moving and storage of property in Canada.
4. At all material times, the Storage Containers were stored in various of the Defendant’s premises across Canada (“**Storage Sites**”) or, exceptionally, on customer-property. The Defendant maintains 36 Storage Sites across Canada, 17 of which are in the province of British Columbia.
5. This action pertains to Storage Containers that were rented by the Defendant to the Plaintiff and other individual consumers and that were stored at the Defendant’s Abbotsford location (the “**Abbotsford Site**”) prior to November 14, 2021 (the “**Class Members**, or the “**Class**”). The Abbotsford Site is situated at 37400 North Parallel Road, Abbotsford, BC V3G 2K1.
6. At all material times, the Abbotsford Site was situated on a flood plain. The Defendant knew, or ought to have known that the Abbotsford Site was situated on a flood plain.
7. In exchange for a monthly fee (the “**Rental Payments**”), the Defendant rented to the Plaintiff and the Class Members Storage Containers that were stored at the Abbotsford Site pursuant to identically worded agreements titled the “RESIDENTIAL MASTER AGREEMENT” (the “**Rental Agreement(s)**”).
8. The Plaintiff entered into the Rental Agreement with the Defendant on or about June 28, 2021.

Negligent Misrepresentations and/or Breach of Contract

9. At all material times, the Defendant induced the Plaintiff and the Class Members to enter into the Rental Agreements by representing to them that its Storage Containers were superior to those offered by its competitors. The Defendant made, approved, utilized or authorized multiple consistent, common and uniform representations in, among other things, its written internet advertising, website(s), labels and other marketing materials in relation to the Storage Containers as follows:

- (a) By labels affixed to the exterior of the Storage Containers, the Storage Containers were represented as being “**water tight**” [Emphasis added];
 - (b) In a marketing page on its website at the internet domain address of “bigsteelbox.com/tour-containers/”, the Defendant represented the Storage Containers’ doors as being manufactured with “HEAVY-DUTY RUBBER GASKETS”, which are “Located on both sides of the door. Creates a tight seal on the doors. No leaking, even with heavy rain or melting snow”;
 - (c) On its website, the Defendant represented that the “[Storage Containers] are actually shipping containers, so they’re made from 8-guage corten steel and built to stand up to the harshest elements. They are wind, **water** and rodent-**proof**, so your things will stay safe and dry inside all year round” [Emphasis added]; and
 - (d) In a marketing page on its website at the internet domain address of “bigsteelbox.com/abbotsford/storage/”, under the heading “WEATHER-PROOF”, the Defendant represented as follows: “Our containers are wind, **water** and rodent-**proof**. They’re made of 8-gauge steel, so they won’t bend or shift from the weight of your contents” [Emphasis added].
10. In addition, the Defendant consistently failed to state any or all of the following facts:
- (a) At all material times, the Storage Containers were *not* waterproof;
 - (b) At all material times, the Storage Containers were *not* water tight;
 - (c) At all material times, the Storage Containers were prone to leaking when exposed to heavy rain and/or flooding; and
 - (d) At all material times, the Abbotsford Site was situated on a known flood plain which meant that it faced an increased risk of flooding.
11. The representations and omissions referred to at paragraphs 8 and 9 above are collectively referred to as the “**Representations**”. The Representations were false, deceptive, misleading, and were made intentionally and/or negligently.

Exclusion of Liability and Indemnity Clauses

12. The Rental Agreements were ‘standard form’ contracts of adhesion which contained exclusion of liability and indemnity clauses in favour of the Defendant as against the Plaintiff and Class Members, as follows:

2. FEES AND CHARGES:

...

j. Customer will pay all costs (including legal fees and disbursements) incurred by BSB in enforcing any of the terms, provisions, covenants and indemnities set out in this Agreement.

8. INSURANCE:

- a. The Customer will obtain and maintain, at its own expense, adequate property insurance covering the stored contents including without limitation, during storage of the Equipment at the Site, at a BSB facility, transportation of the Equipment, and the Customer’s use of the Equipment.
- b. If Customer has purchased Vandalism Protection for specific Equipment, BSB will be responsible for any repainting required as a result of spray painting, and/or damage to the lock. Customer acknowledges the understanding that the Vandalism Protection option does not cover other damages.

c. Customer acknowledges and understands that BSB does not insure nor guarantee against loss of Customer's property, and BSB has no liability whatsoever as to claims for loss or damage to such property. Customer hereby waives, releases and indemnifies BSB from and against any and all claims whatsoever against BSB for loss of and damage to any and all property howsoever arising.

...

12. LIMITATION OF WARRANTIES:

- a. Equipment is provided on an "as is, where is" basis. As long as Customer is not in default of this Agreement, Customer will have quiet possession of the Equipment. BSB gives no warranties of any kind whatsoever with respect to the Equipment, its condition or performance, its merchantability or its fitness for any particular purpose.
- b. Customer agrees that use of Equipment shall be at Customer's own risk, and Customer unconditionally and voluntarily assumes the entire risk of any and all accidents, incidents or personal injury, including death, which Customer or any third party may suffer, however caused.
- c. BSB is not liable to the Customer or any third party, in contract tort or otherwise, for any damage, including direct, indirect, special, consequential, or incidental loss or damage arising from the breach or non-performance of any obligations under this Agreement, or from the supply, use or condition of the Equipment, or for loss or damage to Customer's property.
- d. Customer is solely responsible for determining the specific location(s) on the Site where Equipment will be placed. BSB makes no representation or warranty as to the suitability of Equipment for stacking or supporting loads of any kind. Customer is solely responsible for, and assumes all risks arising from, placing any containers, structures, materials or any other objects on top of Equipment.

13. WAIVER, RELEASE FROM CLAIMS:

- a. The Customer hereby waives, releases and forever discharges BSB, inclusive of its employees, contractors, agents or others for whom it is responsible at law) from and against any and all actions or claims which the Customer or his heirs or successors or assignees may now have or at any time in the future have against BSB for any loss, damage, expense or injury, including death, that the Customer may suffer as a result of the services provided by BSB and/or the use, storage of property in, or transport of Equipment and property contained therein or anything related thereto, including, without limitation, property damage, theft, delay, damage to goods, negligence, gross negligence, willful misconduct, breach of this Agreement or any other contract, non-compliance with licensing, or breach of any statutory or other duty of care on the part of BSB and/or the Customer and specifically:

- i. waive, release and discharge BSB from any duty of care it may have pursuant to the Occupiers Liability Act, RSBC 1996, c 337 or equivalent legislation in the Province in which the Equipment is located and any claim for loss or damage the Lessee may have thereunder; and*
- ii. limit the liability of BSB for any claim of the Customer for loss, damage or expense pursuant to the Warehouse Receipt Act, RSBC 1996, c 481, or equivalent legislation in the Province in which the Equipment is located, to the value of monies paid by Customer pursuant to this Agreement up to a maximum of \$1,000.00 CAD.*

14. INDEMNITY:

- a. Subject only to upfront purchase of Vandalism Protection, Customer agrees to indemnify and save BSB harmless against any loss, damage, cost, and expense BSB may suffer or incur as a result of any damage to or loss of the Equipment due to vandalism, collision, Acts of God, and Acts of Nature, and from any loss, property damage, bodily injury or death suffered by any person arising in whole or in part, from the use or condition of the Equipment while in the possession of Customer or assignees.
- b. Customer hereby agrees to hold harmless, indemnify and reimburse BSB against all liabilities, claims, demands, actions, causes of action, damages, losses, costs, expenses, property damage, bodily injury or death, suffered or incurred by Customer and/or any third party as a result of the services provided by BSB or its agents, and/or the use, storage of property in or transport of Equipment by the Customer and/or BSB including, all fines, forfeitures, seizures, penalties and liabilities that may arise from any infringement or violation of any law or regulation and for any damage to Equipment, whether caused by BSB, a third party, or due to vandalism, collision, fire, lightning, theft, explosion, flood, windstorm, Act of God or any other intervening factor.
- c. Customer will indemnify and save BSB, its employees, officers, and agents, harmless from any loss, damage, cost, and expense, including legal fees and disbursements, resulting from Customer's or assignee's use of Equipment and from all fines, forfeitures, seizures, penalties and liabilities that may arise from any infringement or violation of any law or regulation by Customer or assignee, their respective its employees, contractors, or others for whom Customer and/or assignee are responsible at law.

...

17. GENERAL:

...

- f. Customer will pay all costs (including legal fees and disbursements) incurred by BSB in enforcing any of the terms, provisions, covenants and

I understand that BSB does not insure contents, is not responsible for loss or damage to Customer contents, and that I am responsible to acquire contents insurance for the duration of all rentals.

I agree to limit the liability of BSB, and its employees, officers/directors, and agents, for any claim of loss, damage or expense pursuant to the *Warehouse Receipt Act*, RSBC 1996, c 481, or equivalent legislation in the Province in which the Equipment is located, to the value of monies paid by Customer pursuant to this Agreement up to a maximum of \$1,000.00 CAD.

(Collectively, the “**Exclusion Clauses**”)

13. The terms of the Rental Agreements were non-negotiable and were entered into by the Plaintiff and the Class Members without the benefit of legal advice. At the time of execution, the Defendant’s representatives did not draw the Plaintiff’s and the Class Members’ attention to the Exclusion Clauses, nor did they advise of the repercussions such clauses had on their legal rights as against the Defendant considering the Representations that induced them to enter into the Rental Agreements.

The 2021 BC Floods

14. Between November 14 and December 17, 2021, a type of moisture-laden atmospheric river colloquially known as a “Pineapple Express” brought heavy rain to parts of southern British Columbia culminating in flooding (the “**2021 BC Floods**”).
15. As a result of the 2021 BC Floods, the Storage Containers housed by the Defendant at the Abbotsford Site were penetrated by water, causing damage to the Plaintiff and Class Members’ property.
16. Shortly after the Plaintiff and Class Members contacted the Defendant to advise of the property damage, and on a date known only to the Defendant, the Defendant’s representation replicated above at paragraph 9(d) was amended as follows:
 - (a) Under the heading “WEATHER-PROOF”, the Defendant represented, “Our containers are weather and rodent-proof. They’re made of 8-gauge steel, so they won’t bend or shift from the weight of your contents.”
17. The Defendant removed any reference to the Storage Containers being “water...proof”.
18. After advising the Defendant of the Plaintiff’s and the Class Members’ personal property damage following the 2021 BC Floods, the Defendant denied any fault and invoked the Exclusion Clauses to avoid liability.
19. At all material times, the Defendant:
 - (a) knew that the Abbotsford Site was situated on a flood plain;
 - (b) failed to advise the Plaintiff and Class Members of same; and
 - (c) induced the Plaintiff and Class Members to enter the Rental Agreements by way of false Representations which pertained to performance characteristics of the Storage Containers when exposed to water.
20. At the time the Plaintiff and Class Members entered the Rental Agreements, the Defendant’s Representations were untrue, inaccurate, or misleading because the Storage Containers were not “waterproof”, “water tight” and were prone to leaking due to heavy rain.

21. In promoting its Storage Containers as such, the Defendant knowingly or recklessly marketed or advertised the Storage Containers falsely and/or deceptively.
22. In deciding to enter into the Rental Agreements, the Plaintiff and Class Members relied upon the Defendant's Representations made by way of marketing, advertising, and product labels about the Storage Containers to the effect that the Storage Containers were waterproof, water-tight, and not prone to leaking from heavy rain.

Damage to the Plaintiff and Class

23. By storing their personal property in the Defendant's Storage Containers under the belief that they performed as marketed by the Defendant, the Plaintiff and Class Members suffered loss or damage. The Storage Containers that the Plaintiff and Class Members were provided pursuant to the Rental Agreements were falsely or misleadingly marketed and advertised in violation of the federal *Competition Act*, RSC 1985, c. 19 (the "***Competition Act***"), and the *Business Practices and Consumer Protection Act* SBC 2004, c. 2 (the "***BPCPA***").

Mitigation

24. The Plaintiff and Class Members have taken and continue to take reasonable steps to mitigate their losses.

Part 2: RELIEF SOUGHT

1. An order certifying this action as a class proceeding against the Defendant and appointing the Plaintiff as representative plaintiff in respect of the Class.
2. As against the Defendant:
 - (a) Damages for fundamental breach of the Rental Agreements;
 - (b) Damages for breaches of collateral contracts and/or warranties;
 - (c) A declaration that the Defendant misrepresented the characteristics of the Storage Containers intentionally and/or negligently;
 - (d) Damages for negligent misrepresentation;
 - (e) Damages for negligence on account of the Defendant's failure to warn;
 - (f) Damages for gross negligence;
 - (g) Disgorgement of the benefit obtained by Defendant as a result of its tortious conduct on the grounds of waiver of tort;
 - (h) An order for restitution flowing from the Defendants' unjust enrichment;
 - (i) Relief for contravention of the *BPCPA* as follows:

- (i) A declaration that the Defendant's Representations constitute a "deceptive act or practice", contrary to s. 4 and 5;
- (ii) A declaration that the Defendant's Representations, in tandem with the Rental Agreements and/or the Exclusion Clauses were unconscionable, contrary to s. 8-10 of the *BPCPA*;
- (iii) Relief under s. 10 of the *BPCPA*, that the Rental Agreements and/or Exclusion Clauses be deemed not binding on the Plaintiff and the Class Members;
- (iv) Damages under s. 171 of the *BPCPA*, or, in the alternative, an order pursuant to s. 172(3)(a) of the *BPCPA* that the Defendants restore to the Plaintiff and all other putative class members any and all monies which the Defendant may have acquired in contravention of the *BPCPA*, including an order that the Defendant refund all monies charged by the Defendant to the Plaintiff and putative class members pursuant to the Rental Agreements;
- (v) A declaration pursuant to s. 172(1)(a) of the *BPCPA* that the Representations made by the Defendant contravened the provisions of the *BPCPA*;
- (vi) A permanent injunction pursuant to s. 172(1)(b) of the *BPCA* restraining the Defendant from contravening the *BPCPA* by way of the Representations;
- (j) A declaration that the Defendant violated Part VI of the *Competition Act*;
- (k) Damages under s. 36(1) of the *Competition Act*;
- (l) Costs of investigation and prosecution of this proceeding pursuant to s. 36 of the *Competition Act*;
- (m) Punitive, aggravated, and exemplary damages;
- (n) Costs for the administration of any court award or judgment obtained in this action;
- (o) An order for interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
- (p) Costs; and
- (q) Such further relief as this Honourable Court may deem just.

Part 3: LEGAL BASIS

1. This is a proposed class proceeding on behalf of the Plaintiff and a putative class of individual consumers in British Columbia to whom the Defendant represented that its

Storage Containers were “waterproof”, “water tight” and not prone to leaking when subjected to heavy rainfall.

Rental Agreements and/or Exclusion Clauses Unconscionable

2. The Plaintiff pleads that the Rental Agreements and/or the Exclusion Clauses contained therein are unconscionable bargains under common law, and/or are contrary to public policy.
3. The Plaintiff asserts that the Rental Agreements are unreasonable and that such unreasonableness stems from an inequality of bargaining power that existed between him and the Class Members *vis-à-vis* the Defendant at the time of entering into the said agreements. The Plaintiff further pleads that neither he nor the Class Members were capable of adequately protecting their interests at the time of contractual formation and that the Defendant, as the stronger, commercially sophisticated party who drafted the Rental Agreements, gained undue advantage or benefit that was secured as a result of that inequality.
4. Further, as measured at the time that the Rental Agreements were entered into, the Plaintiff pleads that they were an improvident bargain. The Plaintiff and the Class Members did not understand or appreciate the meaning and significance of the Exclusion Clauses. The terms of the Rental Agreements and/or the Exclusion Clauses were unfair as they flouted the Plaintiff's and the Class Members' reasonable expectations and/or caused unfair surprise to them when considering the Representations.

Exclusion Clauses Invalid Due to Statutory Consumer Protections

5. The Plaintiff further pleads that, to the extent that the Exclusion Clauses purport to preclude him and the Class Members from claiming for losses or damages arising from the Rental Agreements under section s. 36(1) of the *Competition Act*, and s. 171 of the *BPCPA*, they are invalid. Both the *Competition Act* and the *BPCPA* preserve the Plaintiff's and the Class Members' rights to claim for losses or damages arising from the Defendant's deceptive and/or unconscionable, and/or false and/or misleading Representations, irrespective of contractual provisions to the contrary. The Plaintiff pleads that the Defendant is foreclosed from contracting out of statutory consumer protections under either/both statutes.
6. Further, under s. 3 of *BPCPA*, any waiver or release by a person of the person's rights, benefits or protections under the statute is void, except to the extent that the waiver or release is expressly permitted by the *BPCPA*. The Plaintiff and Class Members plead that to the degree the Exclusion Clauses purport to limit rights protected by the *BPCPA* and are not expressly permitted by the *BPCPA*, they should be deemed *void ab initio*.

Breach of Contract

Fundamental Breach

7. The Plaintiff pleads that the Representations formed implied terms of the Rental Agreements. It was an implied term of the Rental Agreements that the Storage Containers

were waterproof, watertight, and capable of withstanding heavy rainfall without leakage, especially considering that the Abbotsford Site was situated on a flood plain.

8. In light of the nature of the bargain – the storage of personal property in rented Storage Containers that were housed on the Defendant’s property, the Plaintiff pleads that it was an implied term of the Rental Agreements that the Storage Containers be stored in a location that did not pose undue risk of property damage. The Plaintiff pleads that such terms were fundamental conditions to the Rental Agreements that formed primary obligations of the Defendant.
9. By failing to supply the Plaintiff and Class Members with waterproof and watertight Storage Containers that were not prone to leakage from heavy rainfall, and keeping the Storage Containers on a flood plain, the Defendant failed to perform a primary obligation under the Rental Agreements. Further, by failing to keep the Storage Containers in a location that was safe and did not pose undue risk of property damage, the Defendant failed to perform another of its primary obligations under the Rental Agreements.
10. By so doing, the Defendant deprived the Plaintiff and Class Members of substantially the whole benefit of the Rental Agreements. The Defendant fundamentally breached its Rental Agreements with the Class Members, including the Plaintiff.

Collateral Contracts and/or Warranties

11. Alternatively, the Plaintiff and Class Members plead that the Representations formed collateral contracts and/or warranties of the Rental Agreements which were breached by the Defendant given the actual performance of the Storage Containers and the resulting damage to the Plaintiff’s and the Class Members’ property.

Tort Claims and Claims Related to Tort

Negligent Misrepresentation

12. The Defendant was in a proximate and special relationship with the Plaintiff and the Class Members, which gave rise to a duty of care owed by the Defendant to the Plaintiff and the Class Members, which the Defendant breached.
13. The Defendant owed a duty of care to the Plaintiff and Class Members to ensure that its Representations regarding the Storage Containers were accurate and that the Storage Containers would be kept in a place that did not unduly expose the Plaintiff and the Class Members to risk of property damage.
14. The Defendant represented to the Plaintiff and Class Members, by way of marketing and advertisement, including statements on the labels of the Storage Containers, that the Storage Containers were:
 - (a) “waterproof”;
 - (b) “water tight”; and
 - (c) were not prone to leaking from heavy rain fall.

15. These representations were false. Further, the Defendant failed to inform the Plaintiff and Class Members that the Abbotsford Site was situated on a known flood plain.
16. The Defendant failed to take adequate steps to ensure the accuracy of its Representations regarding the functional characteristics of the Storage Containers and the degree of risk to property damage that the Plaintiff and Class Members were actually exposed to under Rental Agreements.
17. It was intended by the Defendant and reasonably foreseeable that the Class Members would reasonably rely upon the Representations when entering into the Rental Agreements and would suffer damages described above because of the Representations, which in fact the Plaintiff and the Class Members did suffer.
18. The representations were material to the Plaintiff and the Class Members' decision to enter into the Rental Agreements, and the Plaintiff and Class Members reasonably relied upon the Defendant's Representations in deciding to rent the Defendant's Storage Containers.
19. The Class Members' reliance on the Representations is established, among other things, by their entering into the Rental Agreements. Had the Class Members known that the Representations were false and misleading, they would not have entered into the Rental Agreements.
20. The Plaintiff and Class Members suffered loss or damage because of relying on the Defendants' Representations, through damage to their personal property that was stored in the Storage Containers. The Plaintiff and Class Members would not have entered into the Rental Agreements but for the Defendant's false Representations. The Defendant is liable to pay damages to the Class Members.

Negligence re Duty to Warn

21. The Plaintiff further pleads that the Defendant, through its employees, officers, directors and agents, owed the Class Members a duty of care. That duty of care included a duty to warn the Plaintiff and the Class Members that:
 - (a) The Abbotsford Site was situated on a flood plain,
 - (b) Keeping the Storage Containers on the Abbotsford Site exposed the Plaintiff and Class Members to an elevated risk of property damage; and
 - (c) The Storage Containers were not adequately engineered or designed to sustain water penetration from heavy rain fall and/or flooding.
22. The Defendant knew and it was reasonably foreseeable that the Plaintiff and the Class Members would trust and rely on the Defendant's skill and integrity in renting and storing Storage Containers at its various Storage Sites, including the Abbotsford Site. The Defendant also knew, and it was reasonably foreseeable that, if the Storage Containers were not waterproof or watertight, while being stored in a location situated on a flood plain, flooding of the plain would cause damage to Class Members' property.

23. The reasonable standard of care expected in the circumstances required the Defendant to act fairly, reasonably, honestly, candidly and with due care while advertising and marketing its Storage Containers at the Abbotsford Site. The Defendant, through its employees, officers, directors and agents failed to meet the reasonable standard of care expected in the circumstances and similarly failed to warn the Plaintiff and the Class Members that the Storage Containers were prone to water penetration in the event of flooding, and that the Abbotsford Site was situated on a flood plain.
24. The negligence of the Defendant resulted in damage to the Plaintiff and the Class Members. Had the Defendant complied with the required standard of care, the Defendant:
 - (a) Would not have stored the Storage Containers at the Abbotsford Site; or
 - (b) Would have rented the Storage Containers as advertised pursuant to the Representations while fully and proactively disclosing the elevated risk of property damage posed by the Abbotsford Site. Under such circumstances, the Plaintiff and the Class Members would have been offered and/or acquired the Storage Containers for rental prices that represented their true value and commensurate with the risk of keeping the Storage Containers on a known flood plain.
25. As a result of the Defendant's Representations, the Plaintiff and Class Members suffered damages.

Gross Negligence

26. The Plaintiff pleads that the Defendant's negligence pursuant to the Representations in tandem with its failure to warn amounted to a marked departure from the applicable standard of care which culminated in very great negligence. The Defendant's conduct was positive, intentional and/or affirmative and not passive. The Plaintiff further pleads that the Defendant's conduct was so arbitrary that it reflects complete disregard for the consequences.
27. The Defendant knew that the Abbotsford Site sat on a flood plain and intentionally decided against warning the Plaintiff or the Class Members of same. Further, the Defendant's Representations pertained to the superior performance characteristics of the Storage Containers when exposed to water and heavy rain.
28. The Representations were made by the Defendant with reckless disregard of or wanton indifference to the harmful consequences to the Plaintiff's and the Class Members' property. The Defendant knew or should have known that such Representations would have and did have such harmful consequences on the Plaintiff and the Class Members.

Waiver of Tort

29. In the alternative to damages, the Plaintiff and Class Members plead that they are entitled to elect "waiver of tort" and thereby to claim an accounting or other such restitutionary remedy for disgorgement of the revenues generated by the Defendant because of its tortious conduct.

30. The Defendant accrued a benefit, namely the collection of the Rental Payments, as result of its tortious conduct. The Plaintiff and Class Members are entitled to disgorgement of the benefit obtained by the Defendant.
31. The Plaintiff claims that such an election is appropriate for, among other things, the following reasons:
 - (a) Revenue was acquired in a manner in which the Defendant cannot in good conscience retain;
 - (b) The integrity of the marketplace would be undermined if an accounting was not required;
 - (c) Absent the tortious conduct, the Storage Containers could not have been marketed as they were, nor would the Defendant have received as much revenue from the Class Members as it did; and
 - (d) The Defendant engaged in wrongful conduct by falsely advertising Storage Containers as being waterproof and watertight when they were not and then storing said Storage Containers in a flood plain without informing the Plaintiff or the Class Members of same.

Equitable Relief - Unjust Enrichment

32. In the alternative to damages for breach of contract/tort/waiver of tort, the Plaintiff and Class Members plead the equitable remedy of unjust enrichment. The Defendant caused the Plaintiff and the Class Members to tender Rental Payments for Storage Containers that were bound to fail to perform as advertised, without disclosing the elevated risk of exposure to property damage. The Plaintiff and the Class Members should not have remitted Rental Payments for the Storage Containers, or, in the alternative, they should have paid less than they did while fully informed of the inherent risk to their property.
33. As a result, the Defendant was enriched by the Plaintiff's and the Class Members' payment or overpayment of the Rental Payments.
34. The Plaintiff and the Class Members suffered a deprivation corresponding to the Defendant's enrichment.
35. Since the Rental Payments were made on account of the Defendant's wrongful acts, and the payments were made for Storage Containers with performance characteristics that were advertised, and stored at a location that did not expose the Class to undue risk of property damage, neither of which they received, there is and can be no juridical reason justifying the Defendant's retaining the Plaintiff's and the Class Members' Rental Payments. The Class Members are entitled to restitution and/or disgorgement of profits as a result of the Defendant's unjust enrichment.

Statutory Claims

Business Practices and Consumer Protection Act

36. At all material times to this action, the Plaintiff and the Class Members were “consumers” within the meaning of the term “consumer” as defined in s. 1 of the *BPCPA*.
37. At all times material to this action, the Defendant was a “supplier” within the meaning of that term as defined in s. 1 of the *BPCPA*.
38. The Rental Agreements, as described in paragraphs 3 to 6 herein, were “consumer transactions” within the meaning of that term as defined in s. 1 of the *BPCPA* in that the Plaintiff and Class Members entered into the Rental Agreements for personal, family or household use and not for resale or for the purpose of carrying on business.
39. At all material times, the Exclusion Clauses were “representations” with the meaning of the term “representation” as defined in s. 4(1) of the *BPCPA*.
40. The Representations constitute a “deceptive act or practice” within the meaning of s. 4 of the *BPCPA* in that they collectively had the capability, tendency or effect of deceiving or misleading the Plaintiff and Class Members given that, among other things, the Defendant knew or ought to have known that:
 - (a) The Representations were false, misleading and/or deceptive;
 - (b) The Defendant created a false impression that the Storage Containers were “waterproof” or “watertight”, and not prone to leakage when exposed to heavy rain fall, when in fact they did not perform accordingly;
 - (c) The Storage Containers did not have the performance characteristics, uses, benefits or qualities as set out in the Representations;
 - (d) The Storage Containers were not of the particular standard, quality or grade as set out in the Representations;
 - (e) The Exclusion Clauses were representations to the Plaintiff and the Class that the Rental Agreements involved or did not involve rights, remedies or obligations that differed from the fact;
 - (f) The Representations used exaggeration, innuendo and/or ambiguity as to a material fact and failed to state a material fact in respect of the Storage Containers;
 - (g) The Plaintiff and Class Members were unable to receive all expected benefits from the Storage Containers;

- (h) The Abbotsford Site was situated on a flood plain, which exposed the Plaintiff and Class Members to elevated risks of property damage, neither of which was disclosed by the Defendant to the Plaintiff or the Class Members;
 - (i) Because of such further conduct concealed by the Defendant and unknown to the Plaintiff.
41. The Plaintiff also states that the Representations were made on or before the date the Plaintiff and the Class Members entered into the Rental Agreements.
 42. The Defendant's rental of the Storage Containers with the false or misleading Representations about said Storage Containers being "waterproof" and "watertight" was tantamount to a "deceptive act or practice" within the meaning of s. 4 of the *BPCPA*.
 43. S. 5(1) of the *BPCPA* prohibits suppliers from engaging in "deceptive acts and practices" in relation to "consumer transactions" as those terms are defined in the *BPCPA*. Accordingly, the Defendant has breached s. 5(1) of the *BPCPA*. Section 5(2) of the *BPCPA* places the burden of proof on the Defendant to establish that the deceptive act or practice alleged was not committed or engaged in.
 44. The Plaintiff and Class Members plead that the Representations in tandem with the Rental Agreements and/or the Exclusion Clauses amounted to unconscionable acts or practices under s. 8 of the *BPCPA*, because:
 - (a) The Rental Agreements and/or the Exclusion Clauses were excessively one-sided in favour of the Defendant;
 - (b) By the terms of the Rental Agreements and/or the Exclusion Clauses, the Defendant took advantage of the Plaintiff and the Class Members' inability or incapacity to reasonably protect their own interests because, among other factors, their ignorance, illiteracy, age and/or inability to understand the character, nature or language of the Rental Agreements and/or the Exclusion Clauses, or any other matter related to the Rental Agreements and/or the Exclusion Clauses.
 - (c) The terms of the Rental Agreements and/or the Exclusion Clauses and/or in tandem with the Representations, were so harsh or adverse to the Plaintiff and the Class Members as to be inequitable; and
 - (d) The Rental Payments for the Storage Containers grossly exceeded the price at which similar goods or services provided were readily available to like consumers, especially when accounting for the elevated levels of risk that the Plaintiff and the Class Members assumed unknowingly.
 45. S. 9 of the *BPCPA* prohibits suppliers from committing or engaging in an unconscionable act or practice in respect of a consumer transaction. Pursuant to s. 9 of the *BPCPA*, if it is alleged that a supplier committed or engaged in an unconscionable act or practice, the

burden of proof that the unconscionable act or practice was not committed or engaged in is rests on the supplier.

46. S. 10 of the *BPCPA* stipulates that if an unconscionable act or practice occurred in respect of a consumer transaction, that consumer transaction is not binding on the consumer. The Plaintiff and Class Members plead and rely on the s. 10 of the *BPCPA* and state that the Rental Agreements and/or the Exclusion Clauses are not binding on them because they are unconscionable.
47. The Plaintiff and the Class Members are entitled to damages for the losses they suffered under s. 171 of the *BPCPA*, or alternatively, under s. 172 of the *BPCPA*, to the restoration of the purchase price acquired from them in violation of the *BPCPA*.

Competition Act

48. The Defendant made the Representations to the public and in so doing, breached s. 52 of the *Competition Act* because the Representations:
 - (a) Were made for the purpose of promoting the business interests of the Defendant;
 - (b) Were made to the public; and
 - (c) Were false and misleading in a material respect.
49. The Defendant made the Representations knowing them to be false or making them with a reckless disregard as to their truth.
50. As a result of the Defendant's false or misleading Representations, the Plaintiff and Class Members suffered loss or damage of their personal property. The Plaintiff and Class Members are therefore entitled to the following pursuant to s. 36(1) of the *Competition Act*:
 - (a) In any court of competent jurisdiction, to sue for and recover from the Defendant an amount equal to the loss or damage suffered by them from the Defendants; and
 - (b) The cost of the investigation in connection with the Defendant's alleged wrongdoing and of proceedings under this section.

Aggravated and/or Punitive Damages

51. After having advised the Defendant of the Plaintiff's and the Class Members' personal property damage, the Defendant refused to acknowledge its wrongdoing. Instead, it invoked the Exclusion Clauses to relinquish responsibility and avoid liability.
52. The Plaintiff asserts that the Defendant's conduct was high-handed, outrageous, reckless, wanton, entirely without care, deliberate, callous, disgraceful, willful and in contumelious

disregard of the Plaintiff's rights and the rights of the Class Members, and as such renders the Defendant liable to pay aggravated and punitive damages.

Plaintiffs' address for service:	Zacharias Vickers LLP #3 – 45780 Yale Road Chilliwack, BC V2P 2N4
Fax number address for service (if any):	604-392-3272
E-mail address for service (if any):	service@zachariasvickers.com
Place of Trial:	Abbotsford
The address of the registry is:	Abbotsford Courthouse 32375 Veterans Way Abbotsford, BC V2T 0K1

Date: ~~03/Aug/2022~~ 23/May/2023



Signature of lawyer for Plaintiffs
J. Luke Zacharias

Rule 7-1 (1) of the Supreme Court Civil Rules states:

1. Unless all parties of record consent or the Court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a List of Documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.

APPENDIX

Part 1: CONCISE SUMMARY OF NATURE OF CLAIM:

The Defendant is liable to the representative Plaintiff and Class Members for negligent misrepresentation, breach of contract and breach of the statute which protects consumers.

Part 2: THIS CLAIM ARISES FROM THE FOLLOWING:

- | | |
|--|--|
| ☐ a motor vehicle accident | ☐ investment losses |
| ☐ medical malpractice | ☐ the lending of money |
| ☐ another cause | ☐ an employment relationship |
| ☐ contaminated sites | ☐ a will or other issues concerning the probate of an estate |
| ☐ construction defects | ☐ a matter not listed here |
| ☐ real property (real estate) | ☒ the provision of goods or services or other general commercial matters |
| ☐ personal property | |

Part 3: THIS CLAIM INVOLVES:

- | | |
|--|--|
| ☒ a class action | ☐ conflicts of law |
| ☐ maritime law | ☐ none of the above |
| ☐ aboriginal law | ☐ do not know |
| ☐ constitutional law | |

Part 4:

- | | |
|--|--|
| ☐ Builders Lien Act | ☐ Motor Vehicle Act |
| ☒ Court Order Interest Act | ☐ Occupiers Liability Act |
| ☐ Insurance (Motor Vehicle) Act | ☐ Supreme Court Act |
| ☐ Insurance (Vehicle) Act | ☐ Wills Variation Act |
| | ☐ Other: _____ |

1. *Competition Act*, RSC 1985, c. C-34;

2. *Business Practices and Consumer Protection Act*, SBC 2004, c 2;

3. *Class Proceeding Act*, RSBC 1996, c 50; and

4. *Court Order Interest Act*, RSBC 1996, c 79.