

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N:

BURFORD LAW PROFESSIONAL CORPORATION and TAIS DAVIS
Plaintiffs

and

DYE & DURHAM LIMITED and DOPROCESS LP
Defendants

Proceeding under the *Class Proceedings Act, 1992*

STATEMENT OF CLAIM

Notice of Action issued on January 26, 2022

I. DEFINITIONS

The following definitions apply for the purpose of this Statement of Claim:

- A. “**Assyst**” means TELUS Assyst Real Estate, the web-based mortgage instruction processing service software owned by D&D pursuant to their purchase of Telus Financial.
- B. “**Burford**” means Burford Law Professional Corporation.
- C. “**Class**” or “**class members**” mean law firms in the province of Ontario who received the Promise or Representation and paid a fee for the use of the Unity software between January 18, 2021 and January 18, 2024.
- D. The “**Competition Act**” means the *Competition Act*, (R.S.C., 1985, c. C-34).
- E. “**D&D**” means Dye & Durham Limited.
- F. “**DoProcess**” means DoProcess LP or Do Process LP.

- G. “**Link Group**” means Link Administration Holdings Limited.
- H. “**Promise**” or “**Contract**” means an electronic communication to class members where DoProcess stated its price per conveyancing transaction for the Unity software would remain fixed for at least three years.
- I. “**Representation**” means an electronic communication to class members where DoProcess stated its price per conveyancing transaction for the Unity software would remain fixed for at least three years.
- J. “**Unity**” means the cloud-based e-conveyancing platform for real estate lawyers in Ontario developed by DoProcess LP.
- K. “**User(s)**” means class members.

II. RELIEF SOUGHT

1. The plaintiffs, on their own behalf and on behalf of class members, claim:
 - (a) an order pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, certifying this action as a class proceeding and appointing the plaintiffs as representative plaintiffs for the Class;
 - (b) a declaration that the defendants are liable for breach of contract;
 - (c) a declaration that the defendants are liable to the Class for breach of the duty of honesty, good faith and fair dealing;
 - (d) a declaration that the defendants violated section 52(1), 52(2) and 52.01(2) of the *Competition Act* and are therefore liable for damages under section 36 of the *Competition Act*;
 - (e) in the alternative, a declaration that the defendants are liable to the Class for negligent misrepresentation;
 - (f) a declaration that the defendants have been unjustly enriched.
 - (g) damages in the amount of \$200 million;

- (h) disgorgement of the profits/revenues the defendants generated through their breaches of the contracts and /or unjust enrichment;
- (i) nominal damages for breach of contract in the event that the Class' damages in contract are unquantifiable or minimal;
- (j) punitive damages in an amount that this Court finds appropriate at the trial of the common issues or at a reference or references;
- (k) an order, pursuant to section 24 of the *Class Proceedings Act, 1992, S.O. 1992, c. 6* directing an aggregate assessment of damages;
- (l) an order directing a reference or giving such other directions as may be necessary to determine any issues not determined at the trial of the common issues;
- (m) pre-judgment and post-judgment interest, compounded, or pursuant to ss. 128 and 129 of the *Courts of Justice Act, R.S.O. 1980, c. 43*;
- (n) costs of this action on a substantial indemnity basis, together with applicable HST or other applicable taxes thereon;
- (o) the costs of administering the plan of distribution of the recovery in this action; and
- (p) such further and other relief as this Honourable Court deems just.

III. OVERVIEW

2. In 2020, D&D acquired DoProcess, a software company that owned a software platform, The Conveyancer. The software facilitates the closing of real estate transactions by allowing law firms to automate its documentation and manage the entire real estate transaction process.
3. In 2020, DoProcess planned to phase out The Conveyancer and replace it with a new software called Unity.

4. In or about January 11, 2021, the fees for using the software increased dramatically in Ontario from \$25 plus HST per conveyancing transaction for The Conveyancer to \$129 plus HST per conveyancing transaction for Unity. Current customers, primarily real estate lawyers, were informed of the 400% plus hike increase through email or through a message notification which the defendants caused to appear when they next used the Unity product.
5. The defendants made the following statement via their emails and notifications announcing the price increase:

In recognition of your loyalty, current customers will receive a minimum three-year price guarantee on purchase, sale, and mortgage files, ensuring no further price increases in the foreseeable future [...]

6. One year later, on or about January 24, 2022, the defendants reneged on their three -year price guarantee by increasing the price for Unity per conveyancing transaction from \$129 plus HST to \$249 plus HST.

IV. PARTIES

i. Plaintiffs

7. Burford is a law firm in Napanee, Ontario. Burford's practice is in real estate conveyancing, generally covering the areas of Napanee, Kingston, Belleville, Lennox and Addington.
8. Tais Davis is a sole practitioner carrying on a real estate conveyancing practice in Toronto, Ontario.

ii. Defendants

9. D&D is a publicly-listed corporation that provides 'cloud-based software solutions' to support the business transactions and regulatory compliance of customers in North America and the United Kingdom. D&D is headquartered in Toronto, Ontario and has twelve other offices in Canada, England, Ireland, and Australia.

10. D&D acquired DoProcess for approximately C\$530 million in December 2020, and in December 2021 acquired TELUS Financial Services for C\$500 million.
11. DoProcess was founded in 1989 and is a provider of practice specific software for law offices in Canada. DoProcess is headquartered in Toronto, Ontario. DoProcess provides the Unity software.
12. DoProcess is an Ontario Limited Partnership. The sole general partner is Dye & Durham Acquisition Limited. DoProcess, Dye & Durham, and Dye & Durham Acquisition Limited have their registered head offices at the same address.
13. DoProcess describes itself as “The number one provider of real estate practice management software in Canada managing over 1.4 million transactions annually including 700,000 in Ontario.
14. D&D treats DoProcess as a wholly integrated part of its operations, including treating all revenues from the sale of Unity as revenues of D&D, since January 2021. In their annual report for 2021, D&D stated that the lawyers who use the Unity Software were its clients:

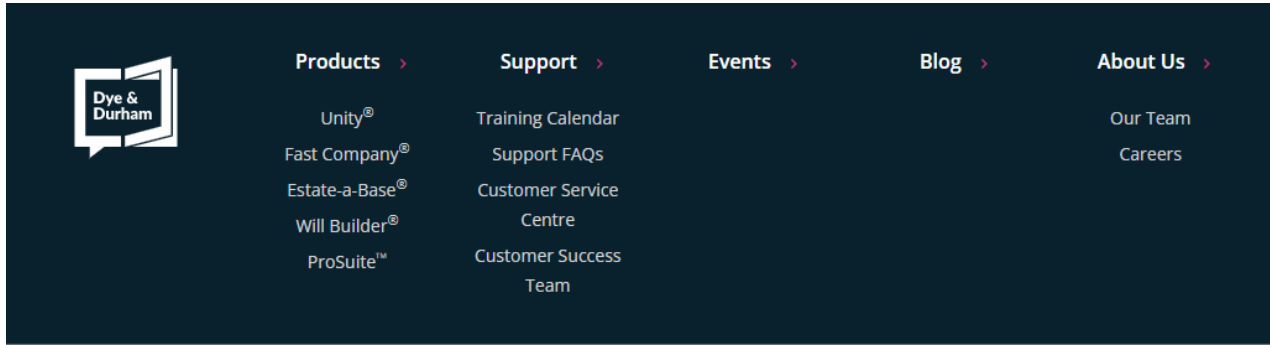
Revenue

Dye & Durham earns the majority of its revenue on a recurring transactional-fee basis as clients perform various automated transactions including automated workflows, public record due diligence searches, associated document preparation, or electronic public records filings through the Company’s cloud-based platforms. If transaction volumes decrease, the Company may be impacted, and revenue may therefore be adversely impacted.

15. D&D’s logo appears next to Unity’s on the Unity software website, welcometounity.doprocess.com:


[HOME](#)
[WHY UNITY](#)
[WHAT'S NEW IN UNITY](#)
[SECURITY](#)
[MOVING TO UNITY](#)
[UNITYPI](#)
[UNITYC](#)
[UNITYDRIVE](#)
[FAQS](#)
[LOGIN](#)
[ORDER NOW](#)

16. D&D's logo also appears at the bottom of the site, in connection with "Products", "Support" and "About Us":



17. D&D's logo appears at the top of the DoProcess Website offering the Unity Software, <https://www.doprocess.com/products/unity-ontario/>. It also appears in connection with the Unity logo:

Home > Products > Unity - Ontario

Unity® Ontario Edition

If you use The Conveyancer today, we will upgrade you to Unity at no additional charge. You can learn more about what your future move to Unity will be like [here](#).

[Overview](#) [Features](#) [UnityPi](#) [UnityC](#) [Partners](#) [Pricing](#) [FAQs](#)

Secure, modern, cloud-based conveyancing

Based on the The Conveyancer – Canada's #1 practice specific solution for real estate practitioners – Unity brings comprehensive and secure conveyancing to the web. Unity combines "work-from-anywhere" convenience with a host of new timesaving features.

Unity is available in several provinces. To ensure the accuracy of the product information displayed, please ensure you select your province below:

Ontario ▾

Getting Started (simply).
[Order Now →](#)
[Request a Demo →](#)

Sales & Support
 Toll Free: 1.866.367.7648

Looking for Support?
[Visit the Online Help Centre →](#)
[See Our Support Resources →](#)

Testimonial

18. On its own website, D&D lists DoProcess as one of its software solutions available in Canada:



DoProcess









Practice made perfect

DoProcess is the #1 provider of practice specific software for law offices in Canada, providing increased efficiency and profitability to over 16,000 practitioners in the areas of real estate, corporate, wills and estate law. As the leading software provider for Canadian legal professionals, we make it our mission to consistently exceed the expectations of our customers through exceptional products, services, ongoing training, and support.

[Learn More →](#)

19. Finally, D&D's logo is associated with each of the current pricing options for Unity software, as listed on DoProcess' website:

Pricing

PAY-AS-YOU-GO	PRO PREMIUM	ENTERPRISE
MOST POPULAR	BIGGEST SAVINGS	BIG BUSINESS PLANS
\$249 PER TRANSACTION	\$199 PER TRANSACTION	\$229 PER TRANSACTION
No minimum transactions	100+ transactions per month	50+ transactions per month
No commitment	3-year term	3-year term
Enhanced Unity features	Save over 20% per transaction	Save over 10% per transaction
Enhanced Unity features	Enhanced Unity features	Enhanced Unity features
	 	 
		

20. On the same page, D&D promises that Users will receive “The Dye & Durham commitment to continually advance the practice of real estate law through new technology and ongoing innovation.”

V. FACTS

A. Background

21. DoProcess developed and provided a software platform, The Conveyancer, that facilitates the closing of real estate transactions. For many years, the software allowed law firms to automate its documentation and manage the entire real estate transaction process. Up until 2021 the price for The Conveyancer was fixed at \$25 per transaction.
22. Law firms who practice conveyancing integrate the conveyancing software into their computer systems, where it functions as a key tool for collecting and storing client information and conducting high volume conveyancing transactions. Law firms are essentially reliant on the platform once it is integrated into their practices. Once invested in the software, the time and costs of transitioning to an alternative software product are immense.
23. In 2020, DoProcess began the process of phasing out The Conveyancer and was planning to replace it with Unity when D&D acquired Do Process.

B. The Promise

24. D&D acquired DoProcess in December 2020. On or about January 11, 2021, DoProcess notified users by email and electronic messaging that on January 18, 2021, transaction fees in Ontario would be increased from \$25 per conveyancing transaction for The Conveyancer, to \$129 plus HST per conveyancing transaction for Unity with no further price increases for at least three years.

25. The email and electronic messaging notification reads as follows:

This is to advise you that **transaction fees for Unity® and The Conveyancer® will be increasing to \$129 effective January 18, 2021**, for purchase, sale, and mortgage files. **In recognition of your loyalty, current customers will receive a minimum three year price guarantee on purchase, sale, and mortgage files, ensuring no further price increases in the foreseeable future.**

For the past 30 years, DoProcess has been committed to advancing the practice of real estate law through technology and innovation. Our primary goal is, as it has always been, to empower law firms to provide exceptional service to their clients, and to ensure legal professionals retain their central role in the real estate closing process.

DoProcess has invested more than \$50 million since 2015 to create Unity, Canada's premium conveyancing and practice-management platform that is, perhaps, the most advanced of its kind in the world. No other company has invested more time and effort to ensure you have the tools and capabilities to satisfy the evolving expectations of your clients and the industry.

In order to maintain our premium service levels and continue to evolve the platform, this price adjustment is necessary. We are confident that our transaction fee aligns with the premium value that DoProcess and Unity provide, and it ensures our ability to properly support and maintain this critical element of your practice. For more information regarding DoProcess' and Unity's premium benefits please visit www.doprocess.com/do-more-with-unity.

Looking forward to 2021 and beyond, **we plan to continue to invest significantly in the platform to improve its reliability, performance, and service levels. We will provide new premium features to streamline your practice and improve your client's experience. We will continue to enhance and improve our first-class customer support, product training, and document customization services.**

Thank you for being our customer and choosing DoProcess to power your real estate practice.

Please contact us if you have any questions.

26. Within the body of the Promise/Representation, there was to a website, www.doprocess.com/do-more-with-unity, which is incorporated by reference. The link describes DoProcess as a Dye & Durham Company.



C. The Defendants Renege on the Promise

27. Approximately one year later, on or about January 24, 2022, at the direction of D&D, DoProcess notified Users that they would be increasing prices in five days' time from \$129 (plus HST) to \$249 (plus HST) per transaction for the Unity software. DoProcess also offered two package options; \$229 for a minimum of 50 Credits or \$199 for a minimum of 100 Credits.
28. This new price increase means that the defendants reneged on their Promise not to raise prices for at least three years. Further, they failed to provide reasonable notice of the new price increase, making it impossible for lawyers to transition to other software options in time to close transactions or service new clients.
29. The defendants have not refunded Credits purchased in advance of the price increase. Users who purchased Credits at the former rate of \$129 per transaction can no longer use those Credits at that former rate.

30. Users were faced with another additional charge of \$6.50, called the ‘Teranet Connect Usage Charge’ which the defendants implemented on December 11, 2021. Teranet Connect was always part of Unity and its usage was always included in the Unity program.
31. Assyst is used by banks to process mortgage instructions. Assyst provides law firms with the instructions from the banks which are necessary for producing the required mortgage documentation. Instructions provided by Assyst can be read by Unity, which can use them to automatically generate the required paperwork. These same instructions could also be ‘exported’ in a format that was readable by LawyerDoneDeal, a rival conveyancing software, allowing lawyers to complete the necessary paperwork in that program.
32. Some time shortly after the January 2022 price increase was implemented, the defendants updated Assyst. This software update removed the ‘export’ feature, rendering the program incompatible with any software other than Unity.
33. This update has forced Users who receive instructions through Assyst to only use Unity’s software despite the price increase.
34. On February 11, 2022, the defendants performed another security upgrade on Unity without providing advance notice to Users. As a result of this upgrade, files older than one year became ‘read-only’. This means that Users could not input any data into these older files. After an outcry, on February 14, 2022 the defendants reversed this change.

D. The Plaintiffs’ Claims

i. Burford

35. For many years, Burford used The Conveyancer software for all or the majority of its conveyancing transactions and for record-keeping purposes. Burford continued with the product when it was rebranded as the Unity software. The lawyers and staff at Burford were very familiar with Conveyancer and the Unity software which was fully integrated into a number of the law firm’s systems and record keeping devices. Burford completes

anywhere from 15-20 real estate transactions/month in the winter to 30-40 transactions/month during the spring and summer.

36. Burford received notice of the price increase together with the Promise by email in or about January 11, 2021.
37. Burford continued to use the Unity platform in 2021 rather than transition to another software product.
38. In 2021, Burford billed the transaction price for the Unity software as a disbursement to its client in some instances. To the extent that all or part of these disbursements are recovered, they will be reimbursed to the clients, less any costs incurred in the recovery.
39. Had Burford transitioned to another conveyancing platform in January, 2021 or thereabouts, Burford would not have been so heavily reliant on the Unity platform as it is today. Therefore, the costs of transitioning would be significantly less and the price per transaction using another platform in 2021 and 2022 would have been \$25 a transaction.
40. Burford suffered damages in 2021 in the amount of \$104 per transaction by paying the increased price of \$129 per transaction. Its damages have increased in 2022 to \$224 per transaction by paying the increased price of \$249 per transaction because it did not receive sufficient notice in order to permit it to transition to another product.
41. Burford is in the course of transitioning to an alternative software product. This transition has resulted in significant overhead, time and expense and has impacted the firm's ability to attract clients.

ii. Tais Davis

42. Ms. Davis used The Conveyancer software for all or the majority of her conveyancing transactions and for record keeping purposes. She continued with the product when it was rebranded as the Unity software. Ms. Davis is very familiar with Conveyancer and the

Unity software which was fully integrated into a number of her systems and record keeping devices. Ms. Davis completes between 120 and 180 real estate transactions annually.

43. Ms. Davis received notice of the price increase together with the Promise by email in or about January 11, 2021.
44. She continued to use the Unity platform in 2021 rather than transition to another software product.
45. In 2021, Ms. Davis billed the transaction price for the Unity software as a disbursement to her clients in some instances. To the extent that all or part of these disbursements are recovered, they will be reimbursed to the clients, less any costs incurred in the recovery.
46. Had Ms. Davis transitioned to another conveyancing platform in January, 2021 or thereabouts, she would not have been so heavily reliant on the Unity platform as she is today. Therefore the costs of transitioning would be significantly less and the price per transaction using another platform would have been \$25 a transaction.
47. Ms. Davis suffered damages in 2021 in the amount of \$104 per transaction by paying the increased price of \$ 129 per transaction. Her damages have increased in 2022 to \$224 per transaction by paying the increased price of \$249 per transaction because she did not receive sufficient notice in order to permit her to transition to another product.

VI. CAUSES OF ACTION

A. Breach of Contract

48. Commencing on or about January 11, 2021 the plaintiffs and every class member entered into a contract with DoProcess and D&D whereby DoProcess on its own behalf and on behalf of D&D promised or guaranteed there would be no further price increase for at least three years.
49. The plaintiff pleads that DoProcess entered into the contract on behalf of and with the ostensible authority of D&D, who held out DoProcess to be its authorized agent with

respect to the Unity software. Through the use of its trademark and logo on various websites including the Unity website and through assurances made on those sites, D&D intended to convey to customers – and did convey – that DoProcess, D&D’s agent with respect to Unity, had ostensible authority to enter into the contracts on D&D’s behalf. Therefore, D&D in its capacity as principal is liable together with DoProcess for breaches of the contract.

50. In the alternative, the plaintiffs plead that D&D, through its wholly owned subsidiary Dye & Durham Acquisition Limited, was the sole general partner of DoProcess and is therefore a party to the contract in that capacity.
51. In the contract, the defendants offered class members a guaranteed price for a term of at least three years, including any software upgrades or extensions, in exchange for their continued use of Unity. The plaintiffs and class members accepted the contract through performance; by continuing to use Unity after receiving the Promise. This was their consideration for the contract.
52. The relevant provisions of the contract are as follows:

(a) The Promise:

- (i) This is to advise you that transaction fees for Unity® and The Conveyancer® will be increasing to \$129 effective January 18, 2021, for purchase, sale, and mortgage files. In recognition of your loyalty, current customers will receive a minimum three year price guarantee on purchase, sale, and mortgage files, ensuring no further price increases in the foreseeable future.
- (ii) Looking forward to 2021 and beyond, we plan to continue to invest significantly in the platform to improve its reliability, performance, and service levels. We will provide new premium features to streamline your practice and improve your client’s experience. We will continue to enhance and improve our first-class customer support, product training, and document customization services.

53. The contract contained the following express terms:
- (a) That in consideration for continuing to use the Unity software at the price increase to \$129.00 plus HST, the defendants would continue to offer their software platform at the price of no more than \$129 plus HST per transaction for a term of no less than three years;
 - (b) That any upgrades or new features of the program would be included at the price of \$129.
54. The defendants breached the contract by increasing the price of Unity in 2022 from \$129 to \$249.
55. Additional breaches of the contract include:
- (a) An additional charge of \$6.50 per transaction after December 11, 2021;
 - (b) Changes to Assyst which prevented Users from exporting mortgage instructions to software providers other than the defendants; and
 - (c) A security upgrade on February 11, 2022 which converted all files older than one year to “read only” within Unity.
56. The plaintiffs plead that it was an implied term of the contract that if the defendants intended to terminate the contract before the end of the agreed upon fixed term of three years, they would provide reasonable notice to class members.
57. The defendants breached the contract by failing to provide reasonable notice of the 2022 price increase. Factors in support of a reasonable notice period include:
- (a) The Promise created an expectation of an ongoing relationship between the parties lasting at least three years.
 - (b) The class members were not expecting a price increase for at least three years.

- (c) The class members were reliant on the Unity software to complete pending transactions and would be harmed by suddenly being forced to use other products.
 - (d) The class members integrated the Unity software into its systems and made a significant investment in terms of training and systems development.
 - (e) The class members client data was located on cloud-based servers operated by the defendants.
 - (f) The class members had purchased credits and could not obtain a refund.
 - (g) The class members staff and lawyers were trained on the Unity software and the firms' document management systems and conveyancing documents/searches were tailored to the software.
58. Based on the circumstances of the Promise and the manner in which the defendants terminated the three-year fixed pricing, the class members would be shocked or surprised at the termination. There was no acrimony and no reason to expect the cancellation of the fixed prices.
59. As a result of the defendants' lack of reasonable notice, class members have paid and continue to pay the 2022 price increase in order to conduct upcoming conveyancing transactions and service clients .
60. As a result of the defendants' breach of contract, the plaintiffs and class members have suffered damages including paying the price increase of \$104 on 2021 transactions and paying the price increase on 2022 transactions of \$224.00 per transaction.
61. The plaintiffs and class members have or will suffer damages for costs incurred in transitioning to an alternative software platform in 2022 or 2023 and the overhead and administrative costs of reimbursing clients who were charged the increased 2021 and 2022 Unity transaction fees as a disbursement.

62. As a result of the defendants' wrongdoing, class members suffered damages, including, but not limited to:
- (a) Additional fees for use of Unity software after the price increase in 2021;
 - (b) Additional fees for use of Unity software after the further price increase in 2022 and levies for accessories;
 - (c) Reputational damages, loss of goodwill, loss of referrals due to the changes in transactional costs to clients;
 - (d) Costs incurred in purchasing new software, re-training staff and/or storing files in order to mitigate damages from the defendants' breach of the Promise; and
 - (e) Overhead and transitional costs for hiring staff and/or consultants to assist the firm in transitioning to an alternative software platform.

Nominal Damages

63. With respect to the claims for breach of contract, the plaintiffs and the other class members seek nominal damages for breach of contract.
64. Nominal damages are appropriate here to affirm that there has been an infraction of class members' legal rights under the contracts. The plaintiffs plead that in the event there are no direct compensable losses to themselves or to class members, an award of nominal damages for breach of contract is appropriate to vindicate these rights.

Disgorgement

65. Class members have a legitimate contract interest in the defendants complying with their contractual obligations.
66. The nature of class members' contract interest is such that it cannot be vindicated by other forms of contractual relief and cannot possibly be quantified in monetary terms, such that

class members' interest in performance of the contract is not reflected by a pure economic measure.

67. In all the circumstances, other remedies would not adequately protect or vindicate class members' contractual right to rely on the Promise:
- (a) Conventional contract damages alone would fail to deter the wrongdoers who have manipulated the Promise with the objective of consolidating the market and damaging competitors (thereby limiting class members' alternatives).
 - (b) Class members' relationships with the defendants engages trust, confidence and vulnerability. The defendants literally told class members that they were "ensuring no further price increases in the foreseeable future." Class members were entirely vulnerable to the defendants' decision to breach this Promise as they comprise the defendants' captive market.
 - (c) Class members have a legitimate interest in preventing the defendants' profit-making activity particularly where such activities relate to and incentivize the defendants' direct breach of the Promise.
 - (d) The defendants expressly contracted not to raise their prices, then did so. The purpose of the contract provision was breached, class members' rights to the price guarantee were quasi-proprietary, and the funds flowing from the breach (the raised prices) have all been to the defendants' gain.
68. Therefore, class members seek disgorgement of profits or revenues generated from the breach of the Promise.
69. It would be unconscionable for the defendants to retain the revenues generated by the conduct set out herein.

B. Breach of the Contractual Duties of Honesty and Good Faith and Fair Dealing

70. The defendants had a duty to be forthright and honest in disclosing matters which directly impacted both the formation and the performance of the contract. The defendants knew that making unequivocal promises and statements in January 2021 about their intention to keep prices fixed for a period of at least three years in circumstances where there was no such intention would have the effect of actively misleading class members about the defendants' intentions to perform on the contract.
71. In the circumstances, the reasonable expectations of class members were that the defendants would continue to charge them \$129 per Unity transaction for a period of at least three years, and that the defendants would not renege on the Promise within a year.
72. The defendants' failure to disclose their plans about a 2022 price increase both at the inception of the contract in January 2021 or during its performance (between January 2021 and January 2022) constitutes a breach of contract, being a breach of the defendants' contractual duty of honesty whereby the parties must not knowingly mislead each other about matters directly linked to the performance of the contract.
73. In the circumstances, it was reckless and contrary to justice for the defendants to actively conceal or fail to disclose to class members their plan to raise the price for Unity in January 2022.
74. As a result of the defendants' breach of its contractual duty of honesty the plaintiffs and class members sustained damages.

C. Breach of the *Competition Act*

75. On or about January 11, 2021, the defendants sent or caused to be sent in an electronic message a Representation to the Class that was false or misleading in a material respect contrary to section 52.01 (2) of the *Competition Act*, for the purposes of promoting directly or indirectly, the supply or use of Unity and the defendants' business interests.

76. The particular portion of the public to whom the Representation was directed are lawyers who were accustomed to using Conveyancer and (as rebranded) Unity and who are in the practice or business of using the conveyancing software platform to conduct a high volume of conveyancing transactions.
77. The Representation left a general impression upon class members that by staying with Unity despite a 400% price increase to \$129 per transaction, lawyers would have the benefit of certainty in terms of price stability for at least the next three years while benefitting from the defendants' continued investment in software platform improvements and additional features and services.
78. The Representation was false or misleading in a material respect in that the defendants represented that there would be no price increase for a period of at least three years and the price would include any improvements to the software. Contrary to the Representation the defendants raised the price for Unity in January 2022 and levied additional fees for services which were to form part of the Unity product.
79. The defendants knowingly made the Representation. At the time they made the Representation, the defendants had no intention of keeping the price for Unity fixed for at least three years or to include additional services in the fixed price fee.
80. In the alternative, the defendants recklessly made the Representation. At the time the decision was made to convey the Representation, the defendants knew there was a real prospect of further price increases in the short term. However, the defendants decided not to do anything about it, being indifferent to the consequences of whether the Representation was false or misleading in a material respect.
81. The Representation caused class members to sustain damages by continuing to purchase access to the Unity software at the increased prices from January 2021 up to the time of pleading and ongoing. The Representation caused class members to sustain damages by increasing their investment in and reliance on the software to conduct conveyancing transactions. As a result of the Representation, class members claim damages pursuant to section 36 (1)(a) of the *Competition Act* for a breach of section 52.01(2).

D. Negligent Misrepresentation

82. In the alternative, the plaintiffs plead that the defendants owed class members a duty of care in their Representation regarding pricing of Unity Software.
83. There was sufficient degree of proximity between class members and the defendants to establish such a duty because:
- (a) Class members were each in a contractual relationship with the defendants;
 - (b) Class members are vulnerable to the defendants pricing practices because the defendants control the market (or almost all the market) for software that supports real estate transactions and have all of the information about the circumstances of the Representation;
 - (c) Through the Promise, the defendants provided a price guarantee for a term of at least three years;
 - (d) It was reasonable for the plaintiffs and class members to rely on the defendants' price guarantee since the defendants held themselves out as reputable companies who were making a sincere effort to improve a software platform which had a long-standing record in the conveyancing industry;
 - (e) It was reasonably foreseeable to the defendants that, in making the Representation class members would rely on it in deciding whether to continue to structure their business around use of Unity. In fact, this was the intended purpose of the Representation; and
 - (f) It was reasonably foreseeable to the defendants that if they breached the three-year price guarantee, class members would suffer damages by failing to transition to an alternative platform in 2021 and instead paying the new, higher price for Unity.

84. The Representation was false, inaccurate or misleading in a material respect because the defendants nearly doubled the price of Unity in less than a year and added fees for services which were to be included in the Unity fee.
85. The defendants were negligent in making the Representation. Particulars of the defendants negligence are:
- (a) The defendants made the Representation in circumstances where the defendants failed to budget or account for the impact of fixed prices on profits leading the defendants to misrepresent their ability to maintain a fixed price for three years; and
 - (b) D&D failed to coordinate and oversee staff at DoProcess in implementing the 2021 price increase leading to confusion and a lack of oversight in terms of corporate policy on price increases for Unity. The Representation did not reflect the defendants actual pricing policies for the Unity product.
86. Reasonable reliance by the Class is inferred by the fact that the Representation was circulated to all class members in a discrete electronic message announcing a 400% price increase. This message was intended to induce the Class to pay the price increase in exchange for three years of price certainty and an improved product and services. The 2021 price increase was a change to a fundamental feature of the product. It can be inferred that class members would have paid attention to it and relied on the fixed price guarantee in continuing to use the software.
87. The class members reasonably relied on the Representation when structuring their businesses for the foreseeable future. They did not seek out alternative software in January 2021 or make plans to migrate their business from Unity. Instead, they continued to use it, relying on the price guarantee.
88. As a result of their reliance, class members incurred higher costs for the Unity software during 2021 and 2022 as opposed to the lower costs of \$25 per transaction they would have incurred had they not relied on the Representation and instead switched to a competitor in

2021. Class members now incur even higher costs as they migrate their business from Unity to other competitors.

89. Plaintiffs and class members have also incurred loss of goodwill and future business since they were forced to bill the Unity fee or a higher Unity fee as a disbursement to their own customers. But for their reliance on the Representation, the Class would not have incurred these damages.
90. As a result of the defendants' negligent misrepresentation, the Class is entitled to pecuniary damages.

E. Unjust Enrichment

91. The defendants were unjustly enriched by using the Promise to entice Users into continuing to purchase access to the Unity software. The defendants were unjustly enriched by increasing their revenues in 2021 and once again in 2022 from each use of the Unity software. The defendants also benefited from the Promise by continuing to dominate the software market for real estate transactions in Ontario and to further enmesh Users in its software, providing it the commensurate ability to charge more for its services in 2022.
92. The defendants' actions, as detailed above, were in direct breach of their contract with class members and the contract is, therefore, insufficient to ground a juristic reason or, in the alternative, the defendants' actions rendered the contracts illegal and/or void such that the contract cannot constitute a juristic reason.
93. Members of the Class suffered a corresponding deprivation by paying more for use of the Unity Software. The plaintiffs plead that they and class members have been deprived of their property, namely the additional fees for use of the Unity software.
94. There is no juristic reason or justification for the defendants' enrichment, as such conduct is unjustifiable and unlawful.
95. It would be inequitable for the defendants to be permitted to retain any of the ill-gotten gains resulting from the Price Guarantee.

96. The plaintiffs and other class members are entitled to the amount of the defendants' ill-gotten gains resulting from their unlawful and inequitable conduct.

F. Punitive Damages

97. The defendants were, at all times, aware that their actions would have a significant adverse impact on class members. The defendants' conduct was high-handed, reckless, without care, deliberate, and in disregard of class members' rights. Accordingly, the plaintiffs request substantial punitive damages.

VII. STATUTES

98. The plaintiffs plead and rely upon the *Class Proceedings Act*, 1992 SO 1992, c 6 and the *Competition Act*, RSC 1985, c C-34.

VIII. PLACE OF TRIAL

99. The plaintiffs propose that the action be tried at the City of Toronto.

Date: February 24, 2022

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BURFORD LAW PC, ET AL

v.

DYE & DURHAM, ET AL

Plaintiff

Defendants

Court File No. CV-22-00675855-00CP

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO

STATEMENT OF CLAIM

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