Case Name:

Ontario New Home Warranty Program v. Singer

Between
Ontario New Home Warranty Program, appellant (respondent), and
Allen and Nancy Singer, respondents (applicants)

[2002] O.J. No. 3739
Docket No. C36304

Ontario Court of Appeal
Toronto, Ontario
Rosenberg, Feldman and Gillese JJ.A.

Heard: February 25, 2002.
Judgment: October 2, 2002.
(38 paras.)

On appeal from the judgment of the Divisional Court dated October 20, 2000, supplementary reasons dated December 14, 2000 (Then J. and Blair R.S.J., Coo J. dissenting).

Counsel:

James C. Tory and John Terry, for the appellant.
Kevin D. Sherkin and John Melia, for the respondents.

The judgment of the Court was delivered by

¶ 1 **FELDMAN J.A.**:— In the case of Sunforest Investment Corp. v. Ontario New Home Warranty Program (1997), 32 O.R. (3d) 59 (C.A.), this court held that the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31 applies to condominium units purchased as tax sheltered investments. The main issue in this appeal is whether, in those cases, compensation for losses arising from the default of the vendor is payable under s. 14(1)(a) of the Act, in respect of both the portion of the purchase price of the unit that is referable to land and buildings and the portion that is referable to services. The Divisional Court split on the issue. For the reasons that follow, I would uphold the decision of the majority of the Divisional Court that compensation is payable in respect of the entire purchase price paid for the unit.

FACTS

¶ 2 On December 14, 1987, the respondents entered into agreements with Reemark Sterling Club I Limited for the purchase of condominium units 1308 and 1201 in a Scarborough, Ontario condominium project sold as tax-sheltered investments. The total purchase price for unit 1308 was $102,990 and the total purchase price for unit 1201 was $137,990. Because of the tax-sheltered nature of the investments, and in order to facilitate the applicable tax deductions, the purchase price for each unit was stated to be divided between land and construction costs and services as follows:

	Unit 1308	Unit 1201
Land and construction	$84,044	$114,040
Services	$18,946	$ 23,950

¶ 3 The services were to be provided by the vendor, but paid for by the purchaser, thereby allowing the tax deductions. The services provided included legal and accounting services, landscaping, paving, the arrangement of

financing, a buy-down of the interest rate, a guarantee of the first mortgage, guarantees relating to rentals of the units and cash-flow. The units were to be paid with a deposit, a promissory note, and assumption of a first mortgage. The respondents paid the cash deposits and the promissory notes (including interest) in the amounts of $32,015 for unit 1308 and $42,985 for unit 1201. The largest portion of the initial deposit and promissory notes was applicable to the services portion of the purchase price and was therefore immediately deductible.

¶ 4 Unfortunately, due to financial problems, the vendor was unable to deliver title to the condominium units to the respondents. They sued and obtained judgment from White J., [1992] O.J. No. 1083, in the Ontario Court (General Division) for breach of contract with damages ordered in the amount of all the monies they had paid plus prejudgment and post-judgment interest. The vendor went into receivership, the project was sold under power of sale, and the respondents were unable to collect the amount of the judgment. They then applied to the Ontario New Home Warranty Program ("Program") to obtain some recovery under s. 14(1)(a), the guarantee provision of the Act.

¶ 5 Subsections 14(1)(a) and (2) provided at that time [See Note 1 below]:

> 14(1) Where,
>
> (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract;
>
> ...
>
> the person ... is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.
>
> (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person ... from any source.

Note 1: Section 14(1) now reads as follows:

> "Subject to the regulations, a person who has entered into a contract to purchase a home from a vendor is entitled to receive payment out of the guarantee fund for the amount that the person paid to the vendor as a deposit to be credited to the purchase price under the contract on closing if,
>
> (a) the person has exercised a statutory right to rescind the contract before closing; or
>
> (b) the person has a cause of action against the vendor resulting from the fact that title to the home has not been transferred to the person because,
>
> (i) the vendor has gone into bankruptcy, or
>
> (ii) the vendor has fundamentally breached the contract."

The current s. 14(6) provides:

> "In assessing the amount for which a person is entitled to receive payment out of the guarantee fund under this section, the Corporation shall take into consideration any benefit, compensation, indemnity payable, or the value of work and materials furnished to the person from any source."

¶ 6 Section 6 of the corresponding Regulation referable to agreements entered into prior to June 30, 1988 limited the amount recoverable under s. 14(1)(a) to deposits paid to the vendor up to a maximum of $20,000, plus in the case of condominium units, specified interest. The term "deposits" is defined in s. 1 of the Regulation as follows:

> "deposits" means, in respect of a home, all money received before the date of possession by or on behalf of the vendor from a purchaser on account of the purchase price payable under a purchase agreement, and, in the case of a condominium dwelling unit, includes money received by or on behalf of the vendor after the date of possession and prior to the date of transfer but does not include moneys,
>
> (i) paid under the purchase agreement as rent or as an occupancy charge and not part of the purchase price, or
>
> (ii) specified in the purchase agreement as moneys paid under subsection 51(6) of the Condominium Act ...

¶ 7 The Program denied the respondents' claims. The initial denial was based on the fact that the units were purchased as an investment in rental accommodation. However the Sunforest case effectively overruled that reasoning, holding that a tax sheltered investment in a condominium unit was the purchase of a home for occupancy purposes and qualified for compensation under s. 14(1)(a). The Program then made a supplemental decision in which it allowed compensation only for the portion of the purchase price referable to the land and building and not the portion referable to services or interest paid. After deducting the tax and other benefits received, the Program concluded that nothing was owing to the respondents on their claims. The Commercial Registration Appeal Tribunal upheld that decision.

¶ 8 The respondents then appealed to the Divisional Court pursuant to s. 11 of the Ministry of Consumer and Commercial Relations Act, R.S.O. 1990, c. M.21 (now the Ministry of Consumer and Business Services Act) which provides for a full appeal on questions of fact or law or both. The majority decision of the Divisional Court overruled the Tribunal and granted the respondents their claim. Coo J. in dissent, agreed with the decisions of the Program and the Tribunal. The award to the respondents consisted of the amount of their loss as calculated and awarded by White J. in their action against the vendor, including prejudgment interest, minus their tax savings and rentals received, plus interest on the award at the rate set by the Condominium Act, R.S.O. 1990, c. C.26.

ISSUES

¶ 9 The appellant Program raises three issues on the appeal:

> (1) What is the meaning of "a contract with a vendor for the provision of a home" in s. 14(1)(a) of the Act, where a contract for a condominium unit breaks down the price and attributes part to the land and building and part to the provision of services by the vendor? Did the majority of the Divisional Court err in concluding that the contract for the unit was one contract for the provision of a home?
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> (2) Did the Divisional Court err in failing to deduct the Guarantee Agreement benefits received by the respondents from the vendor?
>
> (3) Did the Divisional Court err by including in the amount to be compensated, the amount of the prejudgment interest awarded to the respondents in their action against the vendor?

ANALYSIS

Issue 1: The Scope of the Warranty

¶ 10 The appellant submits that s. 14(1)(a) should be interpreted having in mind the role of the warranty program, which it says is to provide compensation where homes are either never built or are badly built. The appellant also refers to the fact that the program is a not-for-profit, self-funded corporation. In this context, the appellant submits that the term "contract with a vendor for the provision of a home" should be narrowly interpreted, and that the compensation provided must be strictly limited to damage suffered referable to a vendor's default in providing the contracted home. The term "home" is also defined in the Act and includes "a condominium unit, including the common elements." The appellant relies on this definition, which refers to the physical structure, as supporting its contention that the intention of the legislature was to protect purchasers only in respect of problems with the physical properties of the home.

¶ 11 The appellant submits that because in this case the purchase price was broken down between the land and

construction and the services, the Divisional Court's interpretation could obligate the Plan to compensate for the loss of services and not just for loss in respect of the physical condominium unit.

¶ 12 In order to determine the extent and intent of the scope of the guarantee provision, one must examine the terms of the section which I will repeat here for convenience:

> 14(1) Where,
>
> (a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract; ...
>
> the person ... is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.
>
> (2) In assessing damages, the Corporation shall take into consideration any benefit, compensation or indemnity payable to the person ... from any source.

¶ 13 In my view, there are really two issues which are raised by the appellant. One is the proper interpretation of the agreements between the vendor and the purchasers and whether the agreements were for the provision of a home, or for a home plus some services. If there are, in effect, two contracts, one for a home and one for services, then it may be appropriate to treat them as separate for the purpose of the guarantee fund.

¶ 14 The second issue is the nature of the breach by the vendor, and the consequent damage suffered by the purchaser. In this case, the condominium units were constructed. The vendor's failure was not in respect of the construction but was the failure to deliver title to the units to the purchasers. The failure to perform the contract resulted in financial loss to the purchasers. This type of failure to perform and resulting financial loss are clearly covered by the section. However, had the vendor breached an obligation to provide, for example, the accounting services associated with the development of the project, the issue would be whether that was the type of breach contemplated by the section, and whether any financial loss the purchaser may have suffered as a result of the breach is compensable out of the guarantee fund.

¶ 15 In this case, the concern raised by the appellant on the second issue does not arise, because the breach was the failure of the vendor to deliver title to the unit and not a breach of the obligation to provide services. As White J. stated in his reasons for judgment in the respondents' action against the vendor:

> The applicants entered into the general agreements and the ancillary agreements and other documents with the intention of purchasing legal title to condominium units. The respondent intended and promised to deliver legal title by a fixed transfer date. All other agreements and benefits flow from the underlying agreement of the applicants to purchase from the respondent legal title to two condominium units. The applicants did not purchase a tax package. They purchased legal title to two condominium units and the accompanying income tax benefits. Whether income tax benefits were utilized by the applicants, or not, and whether if they did obtain income tax benefits they will be allowed to retain them by the revenue authorities, is beside the point. The applicants, as purchasers were entitled to legal title to two condominium units. They would have been free to exercise all rights of a titleholder of real property in respect of the condominium units. They would have the right to mortgage such units or sell such units as they saw fit. Without the benefit of legal title, the applicants have not received that for which they bargained.
>
> The general agreement has not been substantially performed. The applicants cannot assert legal ownership of the condominium units. They cannot deal with the units as owners.
>
> The failure of the respondent to deliver legal title to the condominium units goes to the root of the general agreements and deprives the applicants of that for which they bargained, i.e. title to two condominium units.

¶ 16 It is essential however, to examine the first issue: was the series of agreements between the vendor and the respondents a contract for the provision of a home or two contracts, one for the home and one for the services? Apparently,

the arrangements made between the Program and the developer were that the enrolment fees paid by the developer into the guarantee fund were based not on the full purchase price of each unit, but rather on the portion of the price attributed to the land and construction only. Of course this was done without the involvement of the purchasers.

¶ 17 The package of agreements for the purchase of each unit consisted of 9 agreements: the General Agreement, the Unit Purchase Agreement, the Financial Schedule, the Trust Agreement, the Development Agreement, the Services Agreement, the Rental Management Agreement, the Guarantee Agreement and the Appliances Lease Agreement. Article 1.01 of the Unit Purchase Agreement provides that the purchaser is purchasing beneficial ownership in the Purchaser's Land "for the price set forth and payable in accordance with Article 2.01 hereof." Article 2.01 provides that: "The Purchase Price for the Purchaser's Lands, the Work, Landscaping, Paving and the Initial Services shall be allocated as set forth in the Financial Schedule ...". It is common ground that the purchase price was allocated in a manner that facilitated the tax deductions, the savings from which would then be used by the purchaser to finance the investment in the condominium unit.

¶ 18 In my view, in order to determine whether the agreements constituted one contract or two, one must examine the market value of the home being purchased. Was it the price attributed to the land and construction only, or was it the full purchase price? If the purchasers were effectively paying a premium for the services that was not reflected in the current value of the unit, then there would be merit in the submission of the appellant. However, if the purchasers were buying a unit whose market value was the total sale price under the agreements, then no amount was paid for the services as a separate cost.

¶ 19 An examination of the promotional material for the condominium units reveals that the developer projected a 6% increase in property values commencing in 1988 and that the units would be sold in 1999. The assumed sale prices used for 1999 are calculated based on 1987 original values that correspond with the total purchase prices of the respective units. In other words, the original total purchase price of each condominium unit is represented by the developer as the current market value of the unit, so that the portion of the price attributed to services therefore forms part of the value of the unit. I conclude, as did White J., that there was one contract for the purchase of a home and that the total purchase price reflected its fair market value at the time.

¶ 20 Consequently, in this case, when the vendor failed to deliver title to the unit, the damages suffered by the respondents were the amounts paid, which formed part of the price of the "home" within the meaning of s. 14(1)(a) of the Act. In those circumstances, the Program is providing compensation not for services, but for the failure of the vendor to deliver the home contracted for.

¶ 21 It is unfortunate that the Program accepted enrolment fees from the vendor of these units that did not reflect the "final sale price" of the units as required by s. 8(3) of the Regulation, but rather reflected a reduced price based only on the portion attributable to the land and construction in the agreements. However, that circumstance cannot affect the proper interpretation of the agreements and of s. 14(1)(a) of the Act.

Issue 2: Whether Certain Guarantee Payments by the Vendor Should Have Been Deducted

¶ 22 The appellant submits that the Divisional Court erred by failing to deduct, under s. 14(2), the amounts the respondents received as benefits under the Guarantee Agreements that formed part of the purchase agreements for their respective units.

¶ 23 In calculating the damages and deductions from them, the Divisional Court included the amount of damages as determined by the judgment obtained by the respondents against the vendor, including pre-judgment interest, then deducted for each unit the tax savings as well as net rentals received. The Court made no mention of including or not including benefits received under the Guarantee Agreements. The appellant now argues that for the 1991 year, the respondents received revenue, operating expense and cash flow guarantee amounts provided by the vendor under the Guarantee Agreements to fund mortgage payments and operating costs on behalf of the respondents. Apparently the applicable numbers did not form part of the information in the record in respect of subsequent years.

¶ 24 The respondents' position on this point is that these amounts were never actually received by the respondents, but were used to offset payments made by the vendor to cover operating costs and mortgage payments. The respondents point out that the net rentals deducted by the Divisional Court were never actually received by them either and are in the same category. The factum explains that there was no cross-appeal of that deduction by the Divisional Court because it would have had "little impact on the ultimate award."

¶ 25 I agree with the position of the respondents. These amounts were not actually received. Had they not been used by the vendor to offset other expenses, presumably the respondents would have been called on to pay those expenses, thereby increasing their damages claim. Because the deduction of the rental amounts was not the subject of a cross-appeal, that deduction remains in place to the benefit of the Program.

Issue 3: Prejudgment Interest

¶ 26 The Divisional Court included in the amount of damages for financial loss the amount of prejudgment interest awarded by White J. in the respondents' action against the vendor. White J. allowed prejudgment interest at the mean rate of interest from the respective dates of the last advance payments on the units to the date of release of his reasons for judgment. Following release of the reasons for judgment of the Divisional Court, the respondents asked the Court to clarify whether it was awarding interest on the amount to be paid out of the fund which could exceed the $20,000 cap, as provided in s. 6(2) of the Regulation. Counsel and the Court referred to the then current version of ss. 6(1) and (2) (R.R.O. 1990 Reg. 892) which provides:

> 6(1) A purchaser who has a claim under s. 14(1)(a) of the Act in respect of a purchase agreement entered into after the 30th day of June, 1988 is entitled to be paid out of the guarantee fund an amount for damages arising from the breach of the agreement by the vendor that does not exceed $20,000.
>
> (2) In the case of a home that is a condominium unit, the maximum limit under subsection (1) is increased by the amount of any interest owing on the amount to be paid out of the guarantee fund under subsection (1).

"Interest" is defined in the Regulation to mean "the interest at the rate or rates prescribed under the Condominium Act required to be paid by the vendor on deposits."

¶ 27 The Divisional Court interpreted these provisions to mean that where the home is a condominium unit, the $20,000 maximum can be exceeded by interest at the Condominium Act rate on the amount payable out of the fund.

¶ 28 The appellant submits that the Divisional Court erred in its award of prejudgment interest as part of the damages to be compensated from the fund. The appellant says that there are two errors. First, interest was awarded on the wrong principal amount, that is the amount of the respondents' financial loss before reducing that amount by the amount of the deductions. Second, the prejudgment interest awarded was at the Courts of Justice Act, R.S.O. 1990, c. C.43 rate, rather than at the rate set under the Condominium Act.

¶ 29 The issues are complicated by the fact that a previous version of the Regulation applies to agreements entered into prior to June 30, 1988. Section 6(1) of the Regulation as it read at that time (R.R.O. 1980 Reg. 726 as amended by O. Reg. 78/84) provided:

> 6(1) A purchaser who has a claim under clause 14(1)(a) of the Act in respect of a purchase agreement is entitled to be paid out of the guarantee fund the amount of all deposits owing by the vendor to the purchaser under the purchase agreement to a maximum of $20,000.
>
> (2) In the case of a home that is a condominium unit, the maximum limit under subsection (1) is increased by the amount of any interest owing on the amount to be paid out of the guarantee fund under subsection (1).

The definition of "deposits", quoted at para. 6 above, includes all monies paid by the purchaser to the vendor before closing as part of the purchase price.

¶ 30 In my view, both issues are affected by the interpretation and proper application of s. 6(2) of both versions of the Regulation. On my reading of s. 6(2) together with the definition of "interest", the intent of the section which allows the limit of $20,000 to be exceeded in the case of condominium units, is to allow recovery from the guarantee fund of the interest mandated by s. 53(2) of the Condominium Act to be held by the vendor on amounts paid by a purchaser before

closing. These amounts were required to be held in trust by virtue of s. 53(2) of the Condominium Act, R.S.O. 1980, c. 84, R.S.O. 1990, c. C.26; (now see Condominium Act, 1998, S.O. 1998, c. 19, s. 82) which provided that such amounts are held by vendors in trust and that where the transaction is not completed, interest is payable by the vendor at the rate set by the Act.

¶ 31 Subsection 6(2) of both versions of the Regulation refers to "any interest owing on the amount to be paid out of the fund". It does not say that interest will be owed, but rather speaks of interest that may already be owing. That is the interest owing by virtue of s. 53(2) of the Condominium Act, the purpose of which is to compensate the purchaser for the loss of the use of money paid to the vendor on an abortive transaction.

¶ 32 The effect of s. 6(2), which applies only to condominium purchasers and not to purchasers of other homes, is twofold: (1) it makes it clear that the interest prescribed under the Condominium Act on amounts paid to a vendor by a purchaser forms part of the damages recoverable from the guarantee fund in accordance with s. 14(1)(a) of the Ontario New Home Warranties Plan Act; and (2) it allows the cap of $20,000 to be exceeded if the accrued interest has that effect.

¶ 33 For new homes that are not condominiums as well as for financial losses that do not consist of amounts paid to condominium vendors which must be held in trust at interest, the more restrictive wording of the earlier version of s. 6(1) of the Regulation could arguably affect whether prejudgment interest on financial losses is recoverable from the guarantee fund. However, in this case it is not necessary for the court to fully address and decide that issue.

¶ 34 The Divisional Court judgment uses the figure of $32,015.18 as the basic amount claimed for the loss on unit 1308, which amount represents the deposit amounts paid by the respondents to the vendor. The figure is $42,984.55 for unit 1201. As a result of s. 6(2) of the Regulation, a condominium purchaser is entitled to be paid out of the fund the amount of interest that would have accrued on deposits paid to the vendor at the Condominium Act rate. That interest represents the prejudgment interest to which the respondents are entitled. See s. 128(4)(g) of the Courts of Justice Act and Scanlon v. Castlepoint Development Corp. et al. (1991), 86 D.L.R. (4th) 573, supplementary to 85 D.L.R. (4th) 443, reversed on other grounds: 99 D.L.R. (4th) 153.

¶ 35 The regulation also provides the answer to the other issue raised by the appellant, whether the interest runs only on the final amount payable from the fund after deducting the tax savings and the rental amounts. In my view the answer is no. The interest referred to is interest which would have accrued on the deposits paid to the vendor from the date of their payment. The deductions must therefore be subtracted from the total of principal plus accrued interest.

¶ 36 I therefore conclude that the purchasers are not entitled to the prejudgment interest awarded by White J., but they are entitled to interest at the rate prescribed by the Condominium Act on the amounts they paid to the vendor from the dates that the payments were made. From the amounts paid to the vendor plus the prescribed interest must be deducted the tax savings and rental amounts.

RESULT

¶ 37 I would dismiss the appeal except in respect of the treatment of prejudgment interest.

¶ 38 Although the appellant was partially successful, the decision of the Divisional Court was substantially upheld in favour of the respondents. I would therefore award the respondents their costs on a partial indemnity basis. If counsel cannot agree on the costs, the respondents may file a bill of costs with brief submissions within 14 days, the appellant may respond within 7 days thereafter, and the respondents may reply, if so advised, within 4 days after that.

FELDMAN J.A.
ROSENBERG J.A. — I agree.
GILLESE J.A. -- I agree.

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