

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

OTTAWA-CARLETON STANDARD
CONDOMINIUM CORPORATION NO. 650

Plaintiff

- and -

CLARIDGE HOMES CORPORATION,
CLARIDGE HOMES INC. and TARION
WARRANTY CORPORATION

Defendant

- and -

SUBHASH "BILL" MALHOTRA

Third Party

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)
) Ron Price and Nadia Authier, for the
) Plaintiff
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) Paul A. Webber, Q.C. and Helmut R.
) Brodmann, for the Defendants
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) Paul A. Webber, Q.C. and Helmut R.
) Brodmann, for the Third Party
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) **HEARD:** April 16 & 17, 2009

) **DECISION :** May 26, 2009

REASONS FOR DECISION

The Honourable Mr. Justice Robert L. Maranger

[1] This was a motion pursuant to Rule 21(1)(a) of the *Rules of Civil Procedure*. The question of law arises as a result of an action taken directly against Tarion Warranty Corporation (Tarion) for payment out of a fund created pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31. The Plaintiff seeks payment out of the fund to carry out remedial repair work to a condominium complex. Tarion postulates that there are certain unmet conditions precedent set out in the Statute and Regulations that should operate so as to preclude the suit from continuing.

The Factual Background

[2] The following are the relevant facts in this case:

- The Plaintiff condominium is a 12-storey brick clad building with a penthouse that houses 47 individually owned units. It was registered on July 11, 2002 in accordance with the *Condominium Act*, S.O. 1998, c. 19.
- Shortly thereafter a number of letters were sent to the builder and Tarion complaining of various deficiencies. The most significant deficiency was water leakage problems throughout the windows and sliding doors in the building.
- On June 5, 2003 a copy of the Performance Audit was prepared and served on the Defendant Tarion by the Plaintiff Condominium Corporation.
- In four letters the Ontario New Home Warranty Program (Tarion) advised the Plaintiff of the following general information:

“If you wish to proceed with a formal claim on behalf of your client we have enclosed a Common Elements Request for Conciliation form. We ask that your client give us the opportunity to follow our process of conciliation and allow us to determine warrantability under the Ontario New Home Warranties Plan Act before you decide whether to proceed with litigation, in addition you should refer to the Construction Performance Guidelines.”

- The Plaintiff responded by indicating that if the deficiencies listed in their correspondence, and Performance Audit report were not corrected, then an action would be instituted.
- Correspondence dated January 12, 2004 from Rasmussen Starr Ruddy indicated the following:

“A performance audit prepared by Morrison Hershfield in June of 2003 was provided. The response of Claridge to the problems identified has been unsatisfactory.....You have been reminded of your warranty obligations on a number of occasions both by OCSCC 650 and the Ontario New Home Warranty Program. We require the following:

- 1.A detailed description of the corrective action Claridge will take with respect to each deficiency identified in the Performance Audit; and
2. A detailed timeline showing when the corrective action will be undertaken and by whom.

OCSCC 650 has been very patient. Its patience has run out.

If this information is not received by January 31, 2004 we have been instructed to commence legal action.”

- The Plaintiff’s claim is for damages incurred as a result of significant building deficiencies. They are seeking to recover the approximate sum of \$7,500,000.00 from the builder. They were advised that the building company had no assets, and consequently the only source of funds available to the Plaintiff is from the guarantee fund maintained by the Tarion warranty corporation allowing for approximately \$2,350,000.00 of recovery.
- Paragraph 30 of The Fresh Amended Statement of Claim states the following:

The plaintiff further alleges that the defendant Tarion has been and continues to be in breach of its statutory duties in failing or refusing to ensure that the defendant Claridge carried out all required warranty work

in a timely manner and in failing or refusing to perform such warranty work itself once it became clear that the defendant Claridge would not do so and in failing or refusing to provide the plaintiff with payment from the fund created through the warranty program so as to permit the plaintiff to carry out its own remedial work.

Questions to be determined by the Court

- (a) What is the cause of action available against Tarion Warranty Corporation under the legislation?
- (b) What is the process contemplated by the legislation and regulations?
- (c) Is the process described therein a condition precedent to initiating an action against Tarion for payment out of the fund?

What is the cause of action available to the Plaintiff against the Tarion Warranty Corporation?

[3] Section 14(3) of the *Ontario New Home Warranties Plan Act*, *supra* stipulates the following:

Subject to the regulations, [the Plaintiff] is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,

- (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

[4] In this case the only funds likely available to the Plaintiff will be the guarantee fund maintained by Tarion that has a maximum recovery of \$2,350,000.00 plus costs and interest. The action against the Claridge companies is for in excess of \$7,000,000.00.

[5] In the matter of Belanger v.686853 Ontario Inc. Carswell Ont. 673 (Ont. Dist. Ct.), Wright D.C.J. held that a suit can be brought against the corporation directly, reasoning that nothing in the statute seems to operate to preclude it, I agree with this proposition.

What is the process contemplated by the Legislation and its Regulations with respect to advancing a claim?

[6] The process described in s. 4(1) through 4(2) of the Regulations and s. 14 of the *Act* would indicate the following:

- (a) That each person with a claim under the plan should give written notice of the claim to the corporation;
- (b) That forthwith upon receipt of such a notice of claim the warranty corporation shall furnish the claimant with such forms as it or the insurers may reasonably require for the purposes of establishing or verifying the claim or loss;
- (c) If the corporation does not furnish the forms the claimant can make the claim by written notice to the corporation setting out in reasonable detail the information relating to the claim;
- (d) Promptly after receipt by the corporation of all information required to be furnished to it in respect to the claim, and after a determination of any disputes between the claimant and the vendor, the corporation then is to serve a notice under s. 14 of the *Act*;
- (e) Written reasons are to be provided with respect to the decision under s. 14;

[7] There is no factual dispute that the process of filing specific forms or documents referenced at s. 4(2) through to s. 4(4) of the Regulations was never undertaken by the Plaintiff. The process of examining the premises and providing a written decision never occurred, and a lawsuit was initiated in relation to the various deficiencies and for payment by the corporation out of the fund without any of these steps taking place.

Are the filing of forms and the process described in the Regulations a condition precedent to initiating a lawsuit against the warranty corporation for payment out of the fund?

[8] The issue to be determined here is whether or not the process described in the Regulations of the *Ontario New Home Warranties Plan Act*, *supra*, are a mandatory procedure before one can have access to the contemplated funds indicated in s. 14(3) of the *Act*. This is a question of statutory interpretation.

[9] The issue of the requirement for filling prescribed forms and following a specified process prior to suing is important in this case because the warranties provided by the legislation are limited in time. Some claims made under the common elements of a condominium corporation begin to take effect upon the date of registration of the declaration and description, some claims, depending on the nature of the claim, need to be made within one year of the date that the warranty takes effect, other claims extend to two years.

[10] In the Supreme Court of Canada decision of *Bell Express Vu Ltd. Partnership v. Rex*, [2002] S.C.C. 42, 2002 the court cited with approval the following method of statutory interpretation at paragraph 26:

In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):

Today there is only one principle or approach; namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings:

[11] In my view, when reading the legislation as a whole, the filing of forms, as described in s. 4(2), (3) and (4) of the Regulations, for the purposes of triggering certain mechanisms described in s. 13 through to s. 16 of the statute, cannot be considered conditions precedent to being capable of suing to recover from the fund in the circumstances of this case. I make that determination for the following specific reasons:

- The *Ontario New Home Warranties Plan Act*, *supra* is in essence consumer protection legislation, it has as its overarching purpose the protection of individuals who have had new buildings constructed. If the intent of the legislature was that certain conditions precedent involving the filing of forms and the undertaking of a process were a prerequisite to initiating an action against the corporation, then the statute would have had to stipulate this requirement in clear and unequivocal terms. It does not.

- The *Condominium Act, 1998, supra*, at s. 44(10) specifically stipulates that the filing by a condominium project of a Performance Audit is deemed to be notice under the Regulations as contemplated under the *Ontario New Home Warranties Plan Act, supra*:

“The filing of the report with the Corporation within the meaning of the *Ontario New Home Warranties Plan Act* shall be deemed to constitute notice of acclaim that the corporation gives to the Corporation within the meaning of the Act under the regulations made under that Act for the deficiencies disclosed in the report.”

- This can and should be interpreted as being notice for all purposes, including the triggering of the inspection process as contemplated by the rest of the legislation, what occurred thereafter was up to Tarion.
- There is no doubt in this case that Tarion received full and complete notice including very specific information concerning the nature and extent of the deficiencies. To deny the continuation of this action on the basis of the failure to file specific forms would be a grave injustice, particularly on the facts of this case.
- With regard to the argument that allowing a direct lawsuit in lieu of the steps contemplated by the act could open the floodgates and seriously undermine the use of the conciliation process thus impeding out of court resolutions. I would (in response to this proposition) adopt the commentary of Wright J in *Belanger v. 686853 Ontario Inc.*, 1990 *supra* at paragraph 14 where he suggested :

“I would assume that it would be a rare case that will proceed before the Courts, given the conciliation provisions, the arbitration provisions and the expeditious procedure set out in the Act, but there seems to be no reason why such actions cannot proceed, and this appears to be a case where it should.”

Conclusion

[12] Therefore, I find that the Plaintiff does have a cause of action against Tarion Warranty Corporation by virtue of s. 14(3) of the *Ontario New Home Warranties Plan Act, supra*. The

service and filing of a Performance Audit Report by the Plaintiff constituted notice of a claim within the meaning of the legislation. The filing of any prescribed forms, as described in the Regulations and the process that follows are not conditions precedent to initiating a lawsuit against Tarion.

Costs

[13] This was a novel issue. I am inclined to leave costs in the discretion of the trial judge; however, if counsel wish they may provide written argument of no more than two pages within 15 days of the release of this decision.

Mr. Justice Robert L. Maranger

DATE RELEASED: May 26, 2009

COURT FILE NO.: 05-CV-030553A
DATE HEARD: 2009/04/16

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Maranger J.

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