Court File No. CV-16-11389-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., URBANCORP (ST. CLAIR VILLAGE) INC., URBANCORP (PATRICIA) INC., URBANCORP (MALLOW) INC., URBANCORP (LAWRENCE) INC., URBANCORP DOWNSVIEW PARK DEVELOPMENT INC., URBANCORP (952 QUEEN WEST) INC., KING RESIDENTIAL INC., URBANCORP 60 ST. CLAIR INC., HIGH RES. INC., BRIDGE ON KING INC. (Collectively the "Applicants") AND THE AFFILIATED ENTITIES LISTED IN SCHEDULE "A" HERETO

Court File No. CV-16-11549-00CL

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AND IN THE MATTER OF TCC/URBANCORP (BAY) LIMITED PARTNERSHIP

FACTUM OF THE MONITOR
(Re: Motion Returnable April 13, 2017)

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FACTUM OF THE MONITOR

PART I ~ OVERVIEW

1. There is only one issue on this motion: the enforceability of an exclusion of liability clause contained in residential real estate purchase and sale agreements between a new home developer and individual home buyers.

2. The test for the enforceability of an exclusion of liability clause is uncontested and has been clearly set out and established by the Supreme Court of Canada in *Tercon*,[1] which can be paraphrased as follows:

(a) determine whether, as a matter of contractual interpretation, the exclusion of liability clause applies to the liability in question;

(b) if it applies, then determine whether the exclusion of liability clause was unconscionable at the time the contract was made; and

(c) if not unconscionable, then consider whether the exclusion of liability clause should not be enforced because of the existence of an overriding public policy that outweighs the very strong public interest in the enforcement of contracts.

3. The onus is on the party challenging the enforceability to show why it should not be enforced based on the test set out in *Tercon.*

4. In the end, the home buyers have not provided sufficient evidence to support any one of the bases set out in *Tercon*, with the result being that the exclusion of liability clause in question is enforceable and the home buyers are not entitled to any damages.

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[1] *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] S.C.J. No. 4 [*Tercon*]; Brief of Authorities of the Monitor ("**Monitor's BOA**"), Tab 1.

PART II ~ FACTS

5. On April 21, 2016, Urbancorp (St. Clair Village) Inc. ("**St. Clair**"), Urbancorp (Patricia) Inc. ("**Patricia**"), Urbancorp (Mallow) Inc. ("**Mallow**"), Urbancorp Downsview Park Development Inc. ("**Downsview**"), Urbancorp (Lawrence) Inc. ("**Lawrence**") and Urbancorp Toronto Management Inc. ("**UTMI**") each filed a Notice of Intention to Make a Proposal ("**NOI**") pursuant to Section 50.4(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") (collectively, St. Clair, Patricia, Mallow, Downsview, Lawrence and UTMI are referred to as the "**NOI Entities**"). KSV Kofman Inc. ("**KSV**") was appointed as the Proposal Trustee of each of the Companies.[2]

6. Pursuant to an Order made by the Ontario Superior Court of Justice (Commercial List) (the "Court") dated May 18, 2016 (the "**Initial Order**"), the NOI Entities, together with the entities listed on Schedule "A" attached (collectively, the "**Cumberland CCAA Entities**"), were granted protection under the *Companies' Creditors Arrangement Act* (the "**CCAA**") and KSV was appointed monitor of the Cumberland CCAA Entities (the "**Monitor**").[3]

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[2] Twelfth Report to the Court of KSV Kofman Inc. as CCAA Monitor of the Cumberland CCAA Entities and Fourth Report to the Court of KSV Kofman Inc. as CCAA Monitor of the Bay CCAA Entities dated February 10, 2017 (the "**Twelfth Report**") at Section 1.0, para. 1; Motion Record of the Monitor dated February 10, 2017 (the "**Monitor's Motion Record**"), Tab 2.

[3] Twelfth Report at Section 1.0, para. 2; Monitor's Motion Record, Tab 2.

7. On April 25, 2016, Urbancorp (Woodbine) Inc. ("**Woodbine**") and Urbancorp (Bridlepath) Inc. ("**Bridlepath**") each filed an NOI. KSV was appointed as the Proposal Trustee of each of Bridlepath and Woodbine.[4]

8. Pursuant to an Order made by the Court dated October 18, 2016, Bridlepath and Woodbine and the entities listed on Schedule "B" (collectively, the "**Bay CCAA Entities**", and together with the Cumberland CCAA Entities, the "**CCAA Entities**") were granted protection in a separate CCAA proceeding and KSV was appointed Monitor of the Bay CCAA Entities.[5]

9. Mallow, Lawrence, St. Clair, Bridlepath and Woodbine (collectively, the "**Property Companies**" and each a "**Property Company**") each held an interest in real property as bare trustees (collectively, the "**Properties**"). The Property Companies intended to develop residential homes. In connection with the developments, the Property Companies pre-sold 185 freehold homes and collected deposits totalling $15.6 million from home buyers (the "**Deposits**"). The Deposits were spent prior to the commencement of these insolvency proceedings. There is no statutory or other requirement that the Deposits be held in trust or otherwise segregated.[6]

10. At the commencement of the CCAA proceedings, the Property Companies were in the process of obtaining, and in some cases had obtained,

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[4] Twelfth Report at Section 1.0, para. 3; Monitor's Motion Record, Tab 2.

[5] Twelfth Report at Section 1.0, para. 4; Monitor's Motion Record, Tab 2.

[6] Twelfth Report at Section 2.0, para. 1; Monitor's Motion Record, Tab 2.

approvals required to develop each of their projects (collectively, the "**Projects**"). With the exception of Bridlepath, all of the Property Companies were holding raw land. Construction of an underground garage had been commenced by a prior owner of Bridlepath.[7]

11. From the outset, these were liquidating CCAA proceedings. The CCAA proceedings were precipitated, in part, by Tarion Warranty Corporation ("**Tarion**") issuing to the Property Companies notices to refuse to renew registrations pursuant to the *Ontario New Home Warranty Plan Act*.[8] Without these registrations, the Property Companies are not legally permitted to build and sell new homes:

> 642. Q. Did you have any discussions regarding the treatment of the purchasers of these homes in connection with the filing? Did you discuss...for example, was there a desire to get out of these agreements?
>
> A. We spent March after Tarion revoked our license trying to avoid having to file and made a trip to Israel to meet with the bond holders. But it really spooked them. Understandably. They were Israeli bond holders and unfamiliar with the Ontario system. They didn't understand that. It was a notice to revoke. Our licenses were actually still in place. But it did completely...I wasn't able to calm them. And so we spent a few weeks from the Tarion notice until we filed trying to avoid a filing and trying to see if there was a way to...
>
> MR. LAMEK: To clarify that Tarion...what Tarion did was they issued notices of proposal.
>
> THE DEPONENT: Correct.
>
> MR. LAMEK: Which is different than...I mean, just to clarify...

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[7] Twelfth Report at Section 2.0, para. 2; Monitor's Motion Record, Tab 2.

[8] Agreed Statement of Facts dated April 7, 2017 (the "**Agreed Statement of Facts**") at para. 18.

> THE DEPONENT: Yes, they did. But in Israel, they took that to mean we no longer had the right to build anymore and if they declared a default under the bonds, they could have proceeded against the company in Israel. And we attempted to negotiate a standstill with them but weren't able to do that. So, our goal right up to filing in Canada was to remain solvent and complete the construction of the homes and deliver them, which is what we have been doing the last 25 years.
>
> ...
>
> THE DEPONENT: So, initially we contested everything. Sorry, I should ask, at what point in time? When they first issued their notice of revocation, we objected to them all. We appealed them all, Then once we were at CCAA, it became clear that the sites were going to be sold. There seemed no more point in incurring costs for sites that we were no longer developing.[9]

12. On June 30, 2016, on a motion made by the Monitor, this Court granted orders authorizing a sales process for the Properties in light of opposition from counsel to certain home buyers.[10]

13. The Monitor carried out the court-approved sale process for the Properties. The approval and vesting orders in respect of each of the sale transactions provided each purchaser with title free and clear of all obligations, including the agreements of purchase and sale entered into between the Property Companies and home buyers (the "**Home Buyer Agreements**"). Accordingly, each

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[9] Transcript of Examination pursuant to Rule 39.03 of Alan Saskin on February 24, 2017 (the "**Transcript of Alan Saskin**") at pp. 151-153.

[10] Handwritten endorsement of Mr. Justice Newbould dated June 30, 2016 on the motion record; Monitor's BOA, Tab 2.

home buyer has a contractual claim arising from the failure of the Property Companies to perform the Home Buyer Agreements.[11]

14. Given the foregoing, it should be clear that as a consequence of the court-approved sales of the Properties, the Property Companies simply can no longer complete the Home Buyer Agreements. This is not a repudiation without legal justification. It is a consequence of the CCAA proceedings and a court-approved process at the request of the Monitor designed to maximize the realizable value of the Property Companies' assets in the context of such CCAA proceedings. There is no wrongful conduct on the part of the Property Companies in this context which warrants sanction.

15. On September 15 and October 18, 2016 the Court made orders (jointly, the "**Claims Process Orders**") approving a claims process (the "**Claims Process**"). Pursuant to the terms of the Claims Process Orders, home buyers were not required to file proofs of claim. Instead, the Monitor prepared each home buyer's claim and sent it to each home buyer. Home buyers were entitled to accept the claims as determined by the Monitor or dispute the amount of the claim by filing an objection notice (the "**Home Buyer Objection Notice**").[12]

16. In order to determine the home buyers' claims, the Monitor reviewed the Home Buyer Agreements. Each of the Home Buyer Agreements were prepared using a standard form, which was amended to reflect the details of each sale

[11] Twelfth Report at Section 2.0, para. 3; Monitor's Motion Record, Tab 2.

[12] Twelfth Report at Section 2.0, para. 4; Monitor's Motion Record, Tab 2.

(purchase price, closing date, unit purchased, purchaser's name, etc.). Each of the Home Buyer Agreements contains an "exclusion of liability" clause whereby the home buyer agreed that if the Property Company could not complete the transaction, the Property Company would not be responsible or liable to the home buyer for any damages, other than for the deposit amount (and any applicable interest thereon). Accordingly, the Monitor determined that home buyers only had a claim for their Deposits.[13]

17. Pursuant to the Claims Process, 64 home buyers (representing approximately 35% of total home buyers) filed a Home Buyer Objection Notice claiming damages in addition to their allowed deposit amount.[14]

18. Of the 64 home buyers that submitted damage claims, 56 are represented by Dickinson Wright LLP ("**Dickinson**"), which, pursuant to Orders issued on August 29, 2016, was appointed as representative counsel to home buyers who "opt in" to its representation.[15]

19. Dickinson has not provided the Monitor with a quantification of the damages suffered by the home buyers it represents.[16]

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[13] Twelfth Report at Section 2.0, para. 5: Monitor's Motion Record, Tab 2.

[14] Twelfth Report at Section 2.0, para. 6; Monitor's Motion Record, Tab 2.

[15] Twelfth Report at Section 2.0, para. 7; Monitor's Motion Record, Tab 2.

[16] Twelfth Report at Section 2.0, para. 8; Monitor's Motion Record, Tab 2.

20. As at the date that the Home Buyer Agreements were executed, each of the Property Companies was owned and controlled directly or indirectly by Mr. Alan Saskin or his family.[17]

21. Mr. Saskin is the sole director and officer of the Property Companies, and personally has over 30 years' experience in the real estate development industry in Toronto. The Urbancorp group of companies, under Mr. Saskin's control, has developed thousands of homes and in 2013, had a proven track record of success in the development industry in Toronto.[18]

22. The homes in each Project were available for purchase through sales offices staffed by third party real estate brokers. The brokers were paid a sales management and marketing fee by the Property Companies for each unit sold pursuant to a firm and binding purchase agreement. A portion of the aforementioned fee would be paid 120 days after the purchase agreement became firm and binding with the remainder paid within 30 days of title to the unit being transferred to the purchaser.[19]

23. The sales offices or events operated by the Property Companies were each staffed with sales agents employed by International Home Marketing Group Limited ("**IHM**") (the "**IHM Sales Agents**"). IHM is a fully integrated sales management and marketing company that works with various developers in the

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[17] Agreed Statement of Facts at para. 4.

[18] Agreed Statement of Facts at para. 5.

[19] Agreed Statement of Facts at para. 24.

Greater Toronto Area and, among other things, assists them with marketing projects to the public and staffing sales offices when the projects are first made available to the public for purchase. IHM provided the aforementioned marketing and staffing services, as agent, to each of the Property Companies in connection with their respective projects.[20]

24. Recognizing that the Projects were marketed in varying ethnic communities and to varying potential purchasers, particularly real estate investors with a Chinese background, IHM staffed the sales offices and events with IHM Sales Agents who would be able to communicate with potential purchasers in their native language, including several dialects of Mandarin.[21]

25. The sales offices or events for the Projects were all very well attended by potential purchasers who lined up on the first day that homes were made available to them.[22]

26. The IHM Sales Agents would provide information to the purchasers and the purchasers' sales agents, if they were represented, about the Projects. If a potential purchaser was interested in purchasing a home, they completed a one page summary of pertinent information (the "**Purchaser Summary**"). Once completed, the Purchaser Summary was provided to an IHM Sales Agent. The Purchaser Summary was then provided by the IHM Sales Agent to the IHM staff working in the back office

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[20] Agreed Statement of Facts at para. 25.

[21] Agreed Statement of Facts at para. 26.

[22] Agreed Statement of Facts at para. 27.

who would prepare the relevant standard form purchase agreements and in certain cases, amending schedules thereto for execution by the purchaser.[23]

27. Each of the home buyers completed the Purchaser Summary prior to receiving a Home Buyer Agreement for execution.[24]

28. Once the Home Buyer Agreement was prepared, it would be provided to the purchaser for execution. Once executed, the Home Buyer Agreement and a deposit cheque of 10% or more would be provided to the back office staff and a copy of the executed Home Buyer Agreement would be provided to the purchaser. All Home Buyer Agreements, once executed by the purchasers, were also executed by IHM on behalf of the respective Property Company. When purchasers left the sales office or event on the date in question, they left with a copy of the Home Buyer Agreement that they had executed.[25]

29. Many prospective purchasers had seen signs, flyers, online advertising and/or had been apprised by their own sales agent of the opportunity to purchase a home in one of the Projects. Many of the potential purchasers did not have information about the contractual terms of the Home Buyer Agreements until they

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[23] Agreed Statement of Facts at para. 28.

[24] Agreed Statement of Facts at para. 29.

[25] Agreed Statement of Facts at para. 30.

entered the sales offices or events and a Home Buyer Agreement had been prepared for them to execute.[26]

> 725. Q. And Ms. Corne was talking to you briefly about the marketing and sales process for the various projects. Can you perhaps just take a moment and walk us through how the marketing and sales process worked? And pick any one of the five projects we have been talking about.
>
> A. Sure.
>
> 726. Q. Just walk us through from inception to sale of the unit how it worked.
>
> A. So, if we take Bridlepath, for example, as a project, but all of them followed a very similar path. As the project proceeded far enough that we felt we had some reasonable certainty of getting approved what we wanted approved and at the same time we like to pre-sell some units early to find out that the public wanted what we were in the process of designing and going through a gruelling rezoning process to get. We would be working with International Home Marketing, who represented not just us, but as I said, 15 to 20 other developers. So, they were in the market every day, every week, as opposed to us who maybe would bring out three or four projects a year. So they really had a much more finely tuned sense of the market and what was happening. And, actually, I know it sounds...through this whole period, the market has been very strong and because the Toronto market for the last 15 years has been primarily an investor market, and by that I mean to say most of the buyers of condominiums, most of the buyers of homes are investors who then subsequently close and rent them out. And it has created a great rental market so people can find rentals as well. But as a result, there is an opening almost every weekend. And so I know it is a bit crazy, but it is almost like the movie business where you don't want to open Batman Lego on the same weekend as whatever, the new Wolverine movie. So, the agents, not us, International coordinates with other clients to pick your opening day. Because there is one literally every week. And so an opening date is picked and in the old days...I am going back more than 15 years...when you sold to real buyers who actually

[26] Agreed Statement of Facts at para. 31.

moved in, if there was a downtown condominium and you had a site at Bridlepath, well, you didn't worry about it because anyone who wanted to live in the Bridlepath in a house wasn't going to look at a condo on the waterfront. But that has totally changed now. It is investors who look at the deal you are offering. And they do compare you. They say, "I am going to buy at Harbord Place a condo for $350,000 when it is worth $375,000? Or am I going to buy a home at Bridlepath for 1.2 million and it is worth that?" So, it does matter. The same buyers, the same agents, the same brokers. So you pick your date.

Then you can't advertise more than a week before because their heads are somewhere else. They are buying last week's product. So, approximately a week before International, we would send out a brochure and say, "This is coming in a week". A number of the openings, not ours, have gotten out of hand, there were just too many people. And so the industry, not just us, had evolved this quasi-system...semi-system where you would send out this package a week in advance, seven days in advance, and it would be the renderings, the plans, the site plan; a basic package, and agents, International and others, would disseminate it to thousands of agents. And 24 hours before the opening, agents who had clients would fax in or phone and contact International and give them an indication of what they want. And so we would see a spreadsheet or a sheet or something that showed...at Bridlepath I think we had 40 to sell, I think there were 60 or 70 requests. Now, there could be five or six for the same unit, right? So, really, International with marketing would then look and say, "Okay, well, Tony Mah, he has been really great, buys from us a lot, we will allocate to two or three of his clients". And there was actually something like that going on. On the actual opening...

727. Q. Let me just stop you at that. The decision to allocate units to specific agents, was that a decision that was made by International or by UrbanCorp?

A. They would make a recommendation and we would...I would almost always go along with their recommendation. Because they were taking into account the long-term. Like, it wasn't about price. Everyone was paying, you know, the price as quoted. It was more about long-term relationships. You wanted people to come back, you wanted them happy. Most of the buyers...and I am being specific...most of the buyers are investors. It is a reality in Toronto. So, they would make a recommendation to us and almost always we accepted their recommendation. And then on the day of, we had

a sales centre or sometimes I would tell...in the case of Bridlepath, we did it...it would have been expensive to build a sales centre and there had been a number of very successful openings at the Prince Hotel. They are well set up for it. You can buy a condo there almost every weekend if you trip up to one of the rooms. And so we did it there. You can rent the space for two days, you can put up your displays, and...so the agents and their clients came in and they would sit down with an agent from International and if they wanted to buy that home, there was one sheet of paper they would fill out with the purchaser essentials; name, SIN, all of these sort of things. And then that would go into the back. The back of office was also run by International. And agreements were ready, four or five copies, but, of course, we didn't know who the purchaser was or...you know, those things were filled in. And that process sometimes took 15 minutes to an hour, hour and a half they might have to wait. So the International sales agent actually went off to do other sales. The person's agent, who sat with them through this whole thing and had brought them in, then waited for the agreements to come out. And then one of the International people who look after the paperwork, really administrative, would bring it. And, really, the purchaser's agent would walk them through the signing and collect the cheques and give them to us, because the International agent was off selling to other people in the room at that time.

And I don't want to give a sense of it is as tidy as it sounds. It is as tidy as we can make it. There was, of course, people change their minds, people change their units, not everything is sold. Like, it was still...

...

737. Q. So maybe this is a misnomer on my part between broker and agent, but the purchaser's agent, would they typically attend the sales centre with the purchaser?

A. A hundred percent. There are no exceptions. The agent would frequently drive the purchaser...and a purchaser rarely attended alone. It would be husband/wife, husband/wife/child, husband/wife/child/grandparents. Like, there were groups. You know, the place got pretty full and busy. It is

rare that you have an individual with their agent show up alone.[27]

30. The majority of the home buyers from St. Clair signed their Home Buyer Agreements on January 18, 2014. Approximately half of the home buyers from Lawrence represented by Dickinson signed their Home Buyer Agreements on April 18, 2015. The home buyer from Mallow represented by Dickinson signed on October 18, 2014. With the exception of one home buyer, all of the home buyers from Woodbine represented by Dickinson signed their Home Buyer Agreements on May 24, 2014. A substantial majority of home buyers from Bridlepath signed their Home Buyer Agreements on May 24, 2014.[28]

31. Paragraph 4 of the Home Buyer Agreements reads as follows (the "**10 Day Period**"):[29]

> This Agreement is conditional upon approval of the terms hereof by the Purchaser's solicitor for a period of ten (10) days from the date of acceptance of this Agreement by the Vendor below (the "Acceptance Date"). Unless the Purchaser provides notice to the Vendor, in writing delivered to the Vendor by no later than 11:59 pm on the Acceptance Date, then the Purchaser shall be deemed to have waived this condition and the Agreement shall become firm and binding. Should the Purchaser notify the Vendor in the time aforesaid that this Agreement is unacceptable, this Agreement shall become null and void and the Purchaser's deposit shall be returned in full, without interest. This condition is included for the benefit of the Purchaser and may be waived at the Purchaser's sole option.

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[27] Transcript of Alan Saskin at pp.174-182.

[28] Agreed Statement of Facts at paras. 32 – 36.

[29] Agreed Statement of Facts at para. 38.

32. Due to the condominium components in each of the Projects, the Home Buyer Agreements had to include the 10 Day Period.[30]

33. Section 45 of the Home Buyer Agreements reads as follows (the "**Exclusion Clause**"):[31]

> Notwithstanding anything contained in this Agreement it is understood and agreed by the parties hereto that in the event that construction of the Dwelling is not completed on or before the Closing Date for any reason or in the event the Vendor cannot complete the subject transaction on the Closing Date, other than as a result of the Purchaser's default, the Vendor shall not be responsible or liable to the Purchaser in any way for any damages or costs whatsoever including without limitation loss of bargain, relocation costs, loss of income, professional fees and disbursements and any amount paid to third parties on account of decoration, construction or fixturing costs other than those costs set out in the Tarion Addendum.

34. The Exclusion Clause was not amended in any of the Home Buyer Agreements.[32]

35. Rather than cross-examining each home buyer in connection with its Home Buyer Objection Notice, the Monitor determined it would be more efficient to have each objecting home buyer complete a questionnaire prepared by the Monitor.

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[30] Agreed Statement of Facts at para. 39.

[31] Agreed Statement of Facts at para. 41.

[32] Agreed Statement of Facts at para. 42.

On February 7, 2017, this Court issued an endorsement requiring the objecting home buyers to complete the questionnaire (the "**Monitor's Questionnaire**").[33]

36. The responses reflect that of the objecting home buyers who completed the Monitor's Questionnaire:

(a) 74% have a college or university degree or equivalent;

(b) 84% can read and understand English;

(c) 89% are employed or self-employed, of which the substantial majority have white-collar jobs;

(d) 71% had previously entered into at least one agreement of purchase of sale to purchase a home and more than 53% had previously entered into more than one agreement of purchase of sale to purchase a home;

(e) 58% stated that they were represented by a real estate agent. (This is contrary to the CCAA Entities' books and records, which reflect that approximately 86% of the objecting home buyers were represented by a real estate agent);

(f) 26% had a lawyer review their Home Buyer Agreement during the 10-day rescission period; and

(g) 76% of home buyers that requested an amendment to their Home Buyer Agreement had an amendment made to their Home Buyer Agreement.[34]

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[33] Fourteenth Report to the Court of KSV Kofman Inc. as CCAA Monitor of the Cumberland CCAA Entities and Fifth Report to the Court of KSV Kofman Inc. as CCAA Monitor of the Bay CCAA Entities dated March 10, 2017 (the "**Fourteenth Report**") at Section 2.0, para. 5.

37. Dickinson had also sent their own questionnaire out to their objecting home buyer clients on or about January 30, 2017 (the "**DW Questionnaire**") prior to the Monitor delivering the Monitor's Questionnaire. Of the clients that responded, the DW Questionnaire contains the following results:

(a) 33 out of 55 (60%) stated that the were not represented by agents;[35]

(b) 29 of 55 (53%) stated that they were not aware of the 10 Day Period and two of those believed that the relevant rescission period was only 4 days;[36] and

(c) 35 of the 55 (64%) stated that they did not consult with a lawyer or any legal representative before or during the 10 Day Period.[37]

38. The CCAA Entities reviewed their books and records and determined that 45 (82%) of Dickinson's clients were represented by a real estate agent which is substantiated by 12 co-operating brokerage agreements for Dickinson's clients, representing the difference between those home buyers who stated that they were not represented by an agent and those who were represented by an agent according to the records of the CCAA Entities.[38]

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[34] Fourteenth Report at Section 3.0, para. 4.

[35] Agreed Statement of Facts at para. 27.

[36] Agreed Statement of Facts at para. 39.

[37] Agreed Statement of Facts at para. 40.

[38] Supplement to the Fourteenth Report to the Court of KSV Kofman Inc. as CCAA Monitor of the Cumberland CCAA Entities and Supplement to the Fifth Report to the Court of KSV Kofman Inc. as CCAA Monitor of the Bay CCAA Entities dated April 4, 2017 (the "**Supplemental Report**") at Section 2.0, para. 2.1.

PART III ~ ISSUES AND THE LAW

39. Given the test set out in *Tercon*, there are three questions to answer:

(a) As a matter of contractual interpretation, does the exclusion of liability clause apply to the liability in question?

(b) If it does, was the exclusion of liability clause unconscionable at the time the contract was made?

(c) Does an overriding public policy issue exist regarding the enforcement of the exclusion of liability clause in this case that outweighs the very strong public interest in the enforcement of contracts?

Does the Exclusion of Liability Clause Apply?

40. Yes.

41. As noted above, the relevant provision of the Home Buyer Agreements is as follows:

> 45. Notwithstanding anything contained in this Agreement, it is understood and agreed by the parties hereto that in the event that construction of the Dwelling is not completed on or before the Closing Date for any reason or in the event the Vendor cannot complete the subject transaction on the Closing Date, other than as a result of the Purchaser's default, the Vendor shall not be responsible or liable to the Purchaser in any way for any damages or costs whatsoever including without limitation loss of bargain, relocation costs, loss of income, professional fees and disbursements and any amount paid to third parties on account of decoration, construction or fixturing costs other than those costs set out in the Tarion Addendum.

42. The relevant provision of the Tarion Addendum referred to in the foregoing is as follows:[39]

> 12(a). If the Purchase Agreement is terminated (other than as a result of breach of contract by the Purchaser), then unless there is agreement to the contrary under paragraph 11(a), the Vendor shall refund all monies paid by the Purchaser including deposit(s) and monies for upgrades and extras, within 10 days of such termination, with interest from the date each amount was paid to the Vendor to the date of refund to the Purchaser.

43. The damage claims being asserted by the objecting home buyers are as follows:

(a) the difference between the purchase price of their home and the market value of the home as at the closing date set out in the Home Buyer Agreement;

(b) additional costs and expenses incurred in connection with obtaining and relocating to alternative residential properties; and

(c) legal, appraisal, and other professional fees.[40]

44. The interpretation of a contract always begins with the words it uses. All of the various aspects of contractual interpretation are rooted in the actual

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[39] Twelfth Report, Appendix "A"; Monitor's Motion Record, Tab A.

[40] Twelfth Report, Appendix "B"; Monitor's Motion Record, Tab B.

language used by the parties and it is a "cardinal presumption" that the parties have intended what they have said in a contract.[41]

45. The exclusion of liability clause is clear and unambiguous.

46. On its proper interpretation, the exclusion of liability clause plainly applies to the present fact situation and precludes claims by the home buyers for anything other than a refund of the moneys paid by the home buyers to the Property Companies (plus any applicable interest thereon).[42] The clause applies when the construction of the dwelling is not completed by the closing date "for any reason" or "in the event the Property Company cannot complete the subject transaction on the Closing Date" and then explicitly excludes liability on the part of the Property Company "for any damages or costs whatsoever" and then, for greater specificity, indicates that this phrase includes without limitation "the loss of bargain", "relocation costs", and "professional fees and disbursements."

47. Damages for "loss of bargain" would include the difference between the purchase price of the home and the market value of the home as at the closing date set out in the Home Buyer Agreement.

48. Accordingly, it could not be any clearer that this exclusion of liability clause applies under the circumstances and that it does so to expressly exclude

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[41] Hall, Geoff R., *Canadian Contractual Interpretation Law*, Third Edition, 2016: LexisNexis Canada at 10; Monitor's BOA, Tab 20.

[42] In its Home Buyer Claim Notice the Monitor noted that no interest is payable as the applicable rate in the Home Buyer Agreement is negative. See the Supplemental Report at Section 3.0, para. 3.2.1 (4)(b).

liability specifically for the very types of damage amounts being asserted by the objecting home buyers.

49. The interpretation of the exclusion of liability clause put forward by the objecting home buyers borders on the unintelligible.

50. Given that the Property Companies were selling homes that were yet to be built at the time of entering into the Home Buyer Agreements, it makes no sense to have such a clause read "in the event that construction of the Dwelling is not completed for any reason" without specifying by when (i.e., "on or before the Closing Date"). At the time of entering into the Home Buyer Agreement the dwelling is "not completed" (almost by definition given the context) and was anticipated to be "not completed" for some time after signing.

51. The same applies for the words "in the event the Vendor cannot complete the subject transaction". In order for such a clause to be clear in its operation, it needs to provide an actionable date (i.e., "on the Closing Date"). Otherwise, it would be unknown at any time whether or not the vendor could or could not complete the subject transaction.

52. Accordingly, the events giving rise to the protections afforded by the exclusion of liability clause clearly need to be a failure to have built the home on or before the closing date (which would at least allow interim occupancy) or failure to complete the subject transaction on the closing date. This is the very nature of the essential thing that the Property Companies were to deliver by an agreed to date, as such date could be extended pursuant to the terms of the Home Buyer Agreements.

To say, as the objecting home buyers do, that such an exclusion of liability clause only applies if closing is delayed (but eventually happens), but does not apply if closing doesn't happen at all, is utterly nonsensical.

53. Furthermore, the exclusion of liability clause shields the Property Companies from "any damages or costs whatsoever including without limitation... other than those costs set out in the Tarion Addendum." If all the exclusion of liability clause did was to protect against any damages or costs arising from a delayed closing (i.e., a closing that happens at some point after the agreed to final closing date) other than the delayed closing costs provided for in the Tarion Addendum, then the specifically included items such as "loss of bargain", "relocation costs" and "any amount paid to third parties on account of decoration, construction or fixturing costs" make no sense as the home is in fact delivered on a delayed closing and, therefore, there could be no realistic claim for such specifically enumerated damages or costs.

54. The reality, in the context of this case, is just that no one needs to wait for the "Closing Date" to pass because it is known now that the Property Companies cannot complete construction or the subject transaction at all.

55. In addition, given the language in Section 12(a) of the Tarion Addendum referring to monies to be paid on termination as being "all monies paid by the Purchaser including deposit(s) and monies for upgrades and extras, within 10 days of such termination, with interest from the date each amount was paid to the Vendor to the date of refund to the Purchaser", it is also clear that "costs set out in

the Tarion Addendum" may include more than just delayed occupancy compensation.

56. Accordingly, while the objecting home buyers attempt to confuse and obfuscate what a plain reading of the exclusion of liability clause otherwise clearly means, the fact of the matter is that the clause is clear and unambiguous.

57. The objecting home buyers also suggest that the exclusion of liability clause should not apply because it was not brought to their attention and most of them they didn't read it or the Home Buyer Agreement (or couldn't read it) prior to or even after signing it.

58. The leading Ontario Court of Appeal decision on point[43] articulates and applies the general proposition that parties who have executed contracts cannot escape from the effect of particular contractual provisions by failing to read the contracts in question. They have an obligation to familiarize themselves with the contents. A failure to do so can only be justified in "special circumstances". At paragraphs 32 and 33 of the decision Justice Weiler held:

> In keeping with the principle of self-reliance imposed by law on each party to a contract, the failure to read a contract before signing it is not a legally acceptable basis for refusing to abide by it. Nor is the fact that the clause was not subject to negotiations sufficient in itself: see *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.* (1997), 34 O.R. (3d) 1 at 10 (Ont. C.A.) ; *L'Estrange v. F. Graucob Ltd.*, [1934] 2 K.B. 394 (Eng. K.B.) , at 403.

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[43] *978011 Ontario Ltd. v. Cornell Engineering Co.*, [2001] O.J. No. 1446 (C.A.), leave to appeal refused (2001), 158 O.A.C. 195 (S.C.C.) at paras. 32-33; Monitor's BOA, Tab 3.

> The law does, however, regulate contractual conduct between individuals through the imposition of three types of standards: unconscionability, good faith, and the fiduciary standard. All three standards are points on a continuum in which the law acknowledges a limitation on the principle of self-reliance and imposes an obligation to respect the interests of the other.

59. *Fraser Jewellers*, referred to above, also specifically held that there is no general requirement that a party tendering a document for signature take steps to apprise the party signing of terms (such as an exclusion of liability clause) or to ensure that the she reads or understands them:

> The trial judge held that it was the defendant's responsibility to bring the clause to the "specific attention" of the plaintiff and to explain its effect. Not to have done so, he found, constituted an "unacceptable commercial practice". As I view the matter, there was no special relationship existing between these parties that imposed any such obligation on the defendant. ... Be that as it may, in this commercial setting, in the absence of fraud or other improper conduct inducing the plaintiff to enter the contract, the onus must rest upon the plaintiff to review the document and satisfy itself of its advantages and disadvantages before signing it. There is no justification for shifting the plaintiff's responsibility to act with elementary prudence onto the defendant.[44]

60. Accordingly, even if the home buyers did not read the Home Buyer Agreement and even if the exclusion of liability clause was not specifically brought to their attention, the proper analysis is that the Home Buyer Agreement is an enforceable contract because it is a signed agreement. Whether or not the exclusion of liability clause ought to be enforced as an element of such a contract is then a matter of assessing whether or not it is an unconscionable term in the framework outlined in *Tercon*. This should be especially so in this case where the Home Buyer

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[44] *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, [1997] O.J. No. 2359 (C.A.) [*Fraser Jewellers*] at para. 32; Monitor's BOA, Tab 4.

Agreements contain the 10 Day Period right to rescind and incorporates the provisions of the Tarion Addendum.

Is the Exclusion of Liability Clause Unconscionable?

61. No.

62. There are two sub-elements to the determination of whether or not an exclusion of liability clause ought not to be enforced because of unconscionability at the time the contract was made:

(a) proof of substantial unfairness of the bargain obtained by the stronger party; and

(b) an unfair advantage gained by an unconscientious use of power by a stronger party against a weaker.

> "... a plea that a bargain is unconscionable invokes relief against an unfair advantage gained by a unconscientious use of power by a stronger party against a weaker. On such a claim the material ingredients are proof of inequality in the position of the parties arising out of ignorance, need or distress of the weaker, which left him in the power of the stronger, and proof of substantial unfairness of the bargain obtained by the stronger."[45]

In a leading case, Lambert J.A. stated that the effect of both branches of the unconscionability test could be encapsulated in the following question:

> That single question is whether the transaction, seen as a whole, is sufficiently divergent from community standards of commercial morality

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[45] *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178 (C.A.) at para. 4 *per* Davey J.A.; Monitor's BOA, Tab 5.

that it should be rescinded.[46]

Proof of Substantial Unfairness?

63. With respect to the element of "substantial unfairness", the jurisprudence establishes that the transaction must be "grossly unfair and improvident" at the time it was made.[47]

64. The cases applying *Tercon* do not suggest that limitation of liability clauses in themselves meet the test of making the Home Buyer Agreements "grossly unfair and improvident" transactions. "Waivers" of liability have been upheld in the context of consumer transactions on the basis of the *Tercon*.[48] So, too, has an exclusion of liability in a home inspection contract.[49] In the *Tercon* decision itself, Binnie J. observed that "[t]here is nothing inherently unreasonable about exclusion clauses".[50]

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[46] *Harry v. Kreutziger*, [1978] B.C.J. No. 1318 (C.A.) [*Harry*] at para. 29; Monitor's BOA, Tab 6.

[47] *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, [2005] A.J. No. 1743 [*Cain*] at para. 32; Monitor's BOA, Tab 7. See also *Mundinger v. Mundinger,* [1968] O.J. No. 1339 (C.A.) [*Mundinger*], affd [1970] S.C.R. vi at paras. 5 and 7; Monitor's BOA, Tab 8; *Paris v. Machnik*, [1972] N.S.J. No. 190 (Sup. Ct. [Trial Div.]) [*Paris*] at para. 1; Monitor's BOA, Tab 9; *Gladu v. Edmonton Land Co.*, [1914] A.J. No. 73 (Alta. Sup. Ct.) [*Gladu*] at para. 9; Monitor's BOA, Tab 10; *Black v. Wilcox*, [1976] O.J. No. 2167 (C.A.) [*Black*] at paras. 12, 14, 15 and 16; Monitor's BOA, Tab 11; *Titus v. William F. Cooke Enterprises Inc.* 2007 ONCA 573, [2007] O.J. No. 3148 [*Titus*] at para. 38; Monitor's BOA, Tab 12.

[48] See, *e.g. Gordon v. Kreig*, 2013 BCSC 842, [2013] B.C.J. No. 1002 [*Gordon*] at paras 156-164; Monitor's BOA, Tab 13; *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, [2012] B.C.J. No. 504 at paras. 31-33; Monitor's BOA, Tab 14; *Arif v. Li*, 2016 ONSC 4579, [2016] O.J. No. 4013; Monitor's BOA, Tab 15.

[49] See, *e.g. Gordon*, *ibid.* at para. 165 ("the presence of a liability limitation clause does not automatically signal substantial unfairness"); Monitor's BOA, Tab 13.

[50] *Tercon*, *supra* note 1 at para. 82; Monitor's BOA, Tab 1.

65. Contrary to the general understanding espoused by the objecting home buyers, it is also of interest that in the context of real estate transactions the traditional rule in *Bain* v. *Fothergill*[51] held that in a case where the vendor was unable to make title, the purchaser is unable to recover damages as compensation for the loss of bargain, but rather, is limited to the recovery of the deposit with interest and costs. Although the common law doctrine was narrowed somewhat by the Supreme Court of Canada in more recent years,[52] a contractual term setting out an essentially similar rule cannot be seen to be so "grossly unfair and improvident" as to meet the "substantial unfairness of bargain" element of the test for unconscionability.

66. There is simply no evidence on the record before this Court that can support a determination that the terms of the Home Buyer Agreements are "grossly unfair and improvident" or "sufficiently divergent from community standards of commercial morality".

67. Rather, the evidence on the record suggests that the Home Buyer Agreements and the inclusion of the exclusion of liability clause therein are relatively standard industry contracts used by new home developers when selling homes that have yet to be built:[53]

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[51] [1874-80] All E.R. Rep. 83; Monitor's BOA, Tab 16.

[52] *AVG Management Science Ltd.* v. *Barwell Developments Ltd.*, [1979] 2 S.C.R. 43; Monitor's BOA, Tab 17.

[53] Transcript of Alan Saskin at p. 174. See also, Supplemental Report at Section 3, para. 3.1.

723. Q. Now, Ms. Corne took you briefly to section 45 of the agreement of purchase and sale, which is the limitation of liability provision.

A. Yes.

724. Q. Are you aware whether other Ontario-based developers use the same or similar provisions in their agreements?

A. It is my understanding that most builders use the same or similar clause. The law firm that we use, Harris Shaeffer, is probably one of the top three housing/condo law firms in the city. Their client base is probably, I don't know, 15 of the top 40 builders in the city and it is a standard clause...you know, there might be some word here or there, but essentially a standard clause in all agreements.

68. This risk allocation in such contracts should not be surprising or unexpected. It is the developer that invests its capital in purchasing and developing the land with a view to delivering a home to a purchaser sometime in the future at a price reflecting market values prevailing at the time the agreement is entered into. While the purchaser pays a deposit (often 10% and sometimes 15% of the purchase price) upon signing such an agreement, the purchaser is not obligated to pay the purchase price, and title to the property does not transfer, until the home is substantially complete and occupancy can be delivered. The developer seeks to make its profits by ensuring that the costs of developing and finally delivering the home are less than the price agreed to before much of these costs are incurred. Entering into such agreements prior to incurring such costs permits the developer to obtain the necessary financing to undertake the development activities, in large part on the basis of the anticipated receipt of the purchase price upon final delivery. The developer makes no money as a result of the value of the underlying real estate appreciating prior to transferring title to the home.

> 659. Q. All right. What about the fact that the pricing on pre-sold homes...pre-construction sales of homes would not reflect the actual increase in the value of real estate...wouldn't keep up with the actual increase in the value of real estate?
>
> A. It is always a conundrum. It is, like, if you don't sell any homes, how rich would I be today? Well, I would have nothing, because I didn't sell any homes. So you have to sell homes to arrange financing and build them. And so it is a balance. You just look to make money on each project and move on to the next.[54]

69. As set out in the Home Buyer Agreements themselves, there are numerous reasons why a development may not work out as planned – from by-law variances to site plan agreements – even if the developer remains solvent.[55] There is simply no financial benefit or compensation provided to the developer for taking on the liability for any appreciation in property values if it fails to be able to deliver the homes at the agreed to time in the future.

70. Accordingly, it is commercially sensible that such risk be borne by the purchaser given that the purchaser essentially puts no personal capital at risk. If the developer fails to deliver the home, then the purchaser's deposit plus applicable interest is returned and the purchase price is never paid. While the purchaser doesn't obtain the home bargained for, this was the commercially sensible risk the purchaser took for the chance of obtaining subsequent title to a home having an appreciated market price while "locking in" a purchase price based on the lower market prices prevailing at the time of entering into the purchase agreement. The

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[54] Transcript of Alan Saskin at p. 157.

[55] See Section 1 to Schedule A of the Tarion Addendum to the Home Buyer Agreement at Appendix "A" to the Twelfth Report; Monitor's Motion Record, Tab A.

ongoing solvency of the developer is simply one of a number of risks associated with being able to obtain final delivery of a "pre-sold" home.

71. Properly understood, then, such a bargain simply cannot be characterized as having been "grossly unfair and improvident" at the time it was made. The fact that there is no proof of substantial unfairness of the bargain obtained at the time it was made is sufficient to hold that the exclusion of liability clause is not unconscionable in this case without having to consider the second element of the test: whether an unfair advantage was gained by an unconscientious use of power by a stronger party against a weaker.

72. However, even if this second element is considered, the objecting home buyers have also failed to provide sufficient evidence to show that there was any unfair advantage gained by the unconscientious use of power by the Property Companies against the home buyers.

Unfair Advantage Gained by the Unconscientious Use of Power?

73. Canadian jurisprudence establishes that the party seeking to establish the element of inequality of bargaining power must suffer from an unusual inability to protect their interests in a bargaining context.

74. Thus, the typical cases deal with inequalities in bargaining power resulting from the mental infirmities associated with advancing years,[56] emotional

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[56] See, *e.g.*, *Knupp v. Bell*, [1968] S.J. No. 222 (C.A.); Monitor's BOA, Tab 18.

distress,[57] illiteracy,[58] inability to understand the language in which the transaction is conducted[59] and drunkenness at the time of the transaction.[60] In a leading case,[61] the successful plaintiff was a "mild inarticulate, retiring person ... not widely experienced in business matters"[62] who was "partially deaf, easily intimidated and ill-advised" and induced into the transaction by a "process of harassment."[63]

75. The effect of the Canadian jurisprudence on this point was summarized by the Alberta Court of Appeal as requiring that the plaintiff establish an "overwhelming imbalance in bargaining power caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or similar disability".[64]

76. Similarly, the Alberta Court of Appeal's articulation of this branch of the test was relied upon by the Ontario Court of Appeal in *Titus v. William F. Cooke Enterprises Inc.*[65] in a decision which held that a release executed by a dismissed employee did not involve inequality of bargaining power in the requisite sense.

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[57] See, *e.g.*, *Mundinger*, *supra* note 47; Monitor's BOA, Tab 8.

[58] See, *e.g.*, *Paris*, *supra* note 47; Monitor's BOA, Tab 9.

[59] See, *e.g.*, *Gladu*, *supra* note 47; Monitor's BOA, Tab 10.

[60] See, *e.g.*, *Black*, *supra* note 47; Monitor's BOA, Tab 11.

[61] *Harry*, *supra* note 46 ; Monitor's BOA, Tab 6.

[62] *Harry, ibid.* at para. 2; Monitor's BOA, Tab 6.

[63] *Harry, ibid.* at para. 31; Monitor's BOA, Tab 6.

[64] *Cain, supra* note 47 at para. 32; Monitor's BOA, Tab 7.

[65] *Titus*, *supra* note 47; Monitor's BOA, Tab 12.

77. There is no line of authority suggesting that the mere fact that a consumer of ordinary intelligence and ability is entering into a transaction with a commercial entity establishes the requisite degree of inequality of bargaining power. Indeed, numerous cases suggest otherwise:

> Mere inequality of bargaining power does not entitle a party to repudiate an agreement. The question is not whether there was an inequality of bargaining power. Rather, the question is whether there was an abuse of the bargaining power.[66]
>
> But unconscionability or related doctrines do not require complete equality of bargaining power. If they did, very few contracts would survive, and still fewer between an employer and an employee would. To upset a bargain, there must be a great disparity in bargaining power (and use made, advantage taken, of it)[67]
>
> ..., the Court must find that the relative positions of the parties is so out of balance in the sense that there is a gross inequality of bargaining power ...[68]

78. From the responses of the objecting home buyers themselves in the DW Questionnaire, none of them suggested that they suffered "from any physical or mental illness, learning or cognitive deficiencies, or other disability as a result of which it was difficult" to understand the exclusion of liability clause or other provisions in the Home Buyer Agreement.[69]

79. From the responses to the Monitor's Questionnaire, 74% of the home buyers have a college or university degree or equivalent, 89% are employed or self-

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[66] *Fraser Jewellers*, *supra* note 44 at para. 34; Monitor's BOA, Tab 4.

[67] *Cain*, *supra* note 47 at paras. 62 and 63; Monitor's BOA, Tab 7.

[68] *Black*, *supra* note 47 at para. 12; Monitor's BOA, Tab 11.

[69] Supplemental Report at Section 2.0, para. 2.2 (1)(a).

employed of which a substantial majority have white-collar jobs, and 71% had previously entered into at least one agreement of purchase and sale to purchase a home and more than 53% had previously entered into more than one agreement of purchase and sale to purchase a home.[70]

80. While it appears that 16% of the objecting home buyers responded that they cannot read and understand English,[71] each was able to read and respond to the Monitor's Questionnaire and also the DW Questionnaire. The evidence on the record also shows that it is very likely that the Property Companies' sales agents at the sales presentations where able to communicate with these few people in their native language at the time or that they were otherwise represented by a real estate agent or other person able to communicate and translate adequately with them.[72] Be that as it may, they signed an agreement that they could have had reviewed by a lawyer at any time if they chose to.

81. There is no evidence on the record that anyone forced any home buyer to attend at the Property Company's sales office or site. It would appear that they all attended of their own interest and volition. Many attended with their own real estate agent.

82. At its best, the evidence the objecting home buyers produce paints the picture of a typical pre-sale home presentation centre prevalent at the time (2014).

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[70] Fourteenth Report at Section 2.0, para. 5.

[71] Fourteenth Report at Section 2.0, para. 5.

[72] Agreed Statement of Facts at para. 26; See also Transcript of Alan Saskin quote at para. 26 above.

The number of prospective purchasers in attendance was greater than the number of homes available for sale creating a sense of urgency and loss if one did not act decisively and quickly in entering into a Home Buyer Agreement and tendering their deposit cheque. This undoubtedly created a perception among most prospective purchasers that they were being faced with a "now or never" transaction with little or no choice but to sign the agreement as presented ("take it or leave it") or step aside to permit someone else to do so. Even all of this, however, is not sufficient to conclude that the home buyers suffered from an unusual inability to protect their interests in a bargaining context. They were always free to walk away without signing and tendering their deposit cheques. It is simply not plausible that they did not have any choice but to purchase "this home" from "this developer" at "this location" at "that very moment".

83. Even if they couldn't resist entering into the Home Buyer Agreements in the heat of the moment as it were, the Home Buyer Agreements stated (in section 4 on the first page which was the signature page to the agreement) that the Home Buyer Agreement was conditional upon the approval of its terms by the purchaser's solicitor for a period of ten days from the date of acceptance. Accordingly, they each had ten days to reflect on their decision, have the agreement reviewed by a lawyer or both or more. Indeed, over one quarter of the home buyers said that they in fact did have a lawyer review their Home Buyer Agreement within the 10-day rescission period and chose not to rescind it.[73]

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[73] Fourteenth Report at Section 3.0, para. 4(f).

84. While the evidence for a number of objecting home buyers conflicts as to whether or not the 10-day rescission period was brought to their specific attention (Mr. Saskin stating that this is something that the Property Companies' agent was specifically mandated to do[74] versus some of the responses on point to the DW Questionnaire[75]), the fact remains that it is a provision contained on the first page of the Home Buyer Agreements that any home buyer could have availed themselves of.

> 738. Q. And my last question for you, do you remember...or are you aware of any instances where, during that 10-day cooling off period, a purchaser has come back to Urbancorp and said they didn't want to take the unit that it had contracted for?
>
> A. Yes. I mean, many times. Many times.
>
> 739. Q. Thank you very much.
>
> A. They had an absolute right to cancel.[76]

85. In the end, taken as a whole, there simply is insufficient evidence to establish the requisite element of inequality of bargaining power whereby an unfair advantage was gained by an unconscientious use of power by the Property Companies against the home buyers. Furthermore, even if this could be demonstrated for a particular individual, the fact remains that the bargain simply cannot be characterized as having been "grossly unfair and improvident" at the time it was made.

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[74] Transcript of Alan Saskin at p. 50, Answer to Question 207.

[75] See Agreed Statement of Facts at para. 39.

[76] Transcript of Alan Saskin at pp.182-183.

86. Accordingly, on the basis of *Tercon* and the subsequent related case law, it cannot be said that the exclusion of liability clause was unconscionable at the time the contract was made.

Does an Overriding Public Policy Issue Exist Regarding the Enforcement of the Exclusion of Liability Clause?

87. No.

88. In the analysis of the third step provided by Binnie J. in the *Tercon* decision, the overriding public policy typically relates to policies aimed at severe forms of wrongdoing, such as "(c)onduct approaching serious criminality or serious fraud... that may override the countervailing public policy that favours freedom of contract"[77] Binnie J. also accepted as correctly decided a prior decision of the Alberta Court of Appeal[78] that refused to give effect to an exclusion clause in favour of the defendant supplier of defective plastic resin to a fabricator of natural gas pipelines. The supplier was aware of the defect at the time of its supply, but, rather than disclose this fact to the buyer, chose to rely on the exclusion clause in the event of any difficulty. The Alberta Court of Appeal held that the defendant could not rely on the clause to protect itself from a substantial claim resulting from damages caused by the eventual degrading of the pipelines fabricated with the defective resin.

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[77] *Tercon*, *supra* note 1 at para. 120; Monitor's BOA, Tab 1.

[78] *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.*, 2004 ABCA 309, [2004] A.J. No. 1098; Monitor's BOA, Tab 19.

89. Again, the objecting home buyers have not provided sufficient evidence to establish this requisite degree of wrongdoing.

90. At its highest, the objecting home buyers suggest that the Property Companies entered into the Home Buyer Agreements either: (a) with no intention of ever building the underlying homes; (b) knowing (or when it ought to have known that) it was insolvent and would be unable to deliver the underlying homes; or (c) knowing (or when it ought to have known that) it could not reasonably deliver the underlying homes by the outside closing dates in the Home Buyer Agreements.

91. Even if any one or more of the above could be taken as having been proven, it is not evident how the Property Companies benefited from such actions. In this case, the Deposits will be returned to the home buyers so what the Property Companies in fact did with the Deposits becomes irrelevant. Furthermore, the appreciated value of the real estate comprising the proceeds of realization will be utilized to repay the project-related creditors in full and only, in the immediate term, partially repay the intercompany loans to repay the Israeli bond debt which was incurred in December 2015.[79] There is no evidence that any of this value has gone or will go to Mr. Saskin personally, recognizing the Mr. Saskin himself is the subject of a consumer proposal proceeding under the BIA.[80]

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[79] Supplemental Report at Section 3.0, para. 3.2.1 (3).

[80] Supplemental Report at Section 3.0, para. 3.2.1 (5).

92. The objecting home buyers simply provide no good answer to why the Property Companies would have entered into the Home Buyer Agreements without a view to in fact delivering the underlying homes.

93. In fact, the evidence is to the contrary.

94. The Property Companies always had the intention to develop the lands and deliver the homes and took numerous steps until and, in some cases, shortly after the commencement of their insolvency proceedings.[81]

95. At the time of entering into the Purchase Agreements it was not insolvent and did not foresee its insolvency. Indeed, the Israeli bond issue was implemented so as to put the Property Companies in a better position to raise the necessary additional construction financing:

> 74. Q. And at that point in time, you were optimistic that your success would continue?
>
> A. Yes.
>
> 75. Q. And did that same view continue through the end of 2014?
>
> A. Yes.
>
> 76. Q. So, at that point in time, Urbancorp was on a successful path with respect to acquiring and developing residential real estate with a proven track record of success?
>
> A. Yes.
>
> 77. Q. And you weren't thinking back in 2014 that the Urbancorp group would fail?

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[81] See para. 10 above. See also, Transcript of Alan Saskin, Questions 582-603, 620-621 and 642.

A. No.

78. Q. It was not even something you were expecting at that point?

MR. LAMEK: He answered the question.

79. MS. CORNE: All right.

BY MS. CORNE:

80. Q. The answer is no, correct?

MR. LAMEK: That is what he said.

BY MS. CORNE:

81. Q. Not within your expectation in 2014 that Urbancorp would fail or become insolvent?

A. It was not within my expectation, that is correct.[82]

...

634. Q. Because your attention had to focus on the filing.

A. By the end of March or April, it did.

635. Q. So in January it wasn't focused on that?

A. Not at all.

636. Q. And in February it wasn't focused on that?

A. Not at all.

637. Q. Not at all? When did you first...when did you first start focusing on the filing?

A. When Tarion sent a notice to revoke our licenses.

638. Q. That is March?

A. Whatever the precise date was.

639. Q. March 4th, 2016?

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[82] Transcript of Alan Saskin at pp. 19-20.

A. Is that the date...

640. Q. Yes, that is the date.[83]

...

721. Q. And Ms. Corne took you to the prospectus in that November/December, 2015 time frame. Can you just explain at that time, November or December of 2015, what were your plans for developing Lawrence, St. Clair and Mallow?

> A. The bond offering was to de-leverage our balance seat and to provide the capital required to arrange construction financing. It was subordinated debt, so the banks would count it as part of the equity in the company. So, those inter-company loans were actually all calculated to be, we figured, how much construction financing we would need and then we would say for that amount they are going to want $5,000,000, $6,000,000, $8,000,000 of equity and thus that is how the amounts were determined. For example, Lawrence, it is a larger amount inter-company because it is a larger project and we would need more. So, we were anticipating S. Clair had been approved and permits were underway, so that was the one we were hoping to get started on first. And then we had timelines for the others to go as well. So, we were...the bond offering gave us the subordinated capital to do that and it replaced the expensive nez (phon) [mez] debt that we had in place that wasn't allowed to be subordinated, so it couldn't be used in the construction process.

722. Q. And so did the funds raised through the Israeli offering actually improve the financial position of Urbancorp?

> A. Tremendously. Because it is...it is subordinated debt, whereas the existing debt was not subordinated debt. So, in other words, if we went to BMO to raise $30,000,000 to do Caledonia and we had arranged $6,000,000 of subordinated debt, from BMO's point of view, that subordinated debt was akin to...is the same as equity. It ranked behind them and they were happy. So, by doing the bond offering, we had put in place enough capital to build all of the three projects that were within Urbancorp Inc.[84]

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[83] Transcript of Alan Saskin at pp. 150-151.

[84] Transcript of Alan Saskin at pp. 172-174.

96. The Property Companies were of the view that they could deliver the underlying homes by the outside closing dates in the Home Buyer Agreements based on their experienced assessment of the time and activities required to do so:[85]

> 671. MS. CORNE: My question and my analysis was based on the original...first tentative closing date. And if you...so, that is my question. So, my question is, can you show me how you calculated that closing date? Because it does not appear to me to be within...bear any resemblance whatsoever to the date that I get when I plug in the estimated typical planning approval and construction time frame that we discussed earlier in your evidence. So, I would like to know why there is such a discrepancy there.
>
> THE DEPONENT: Your calculations would be wrong. When we go to market, we come up with an occupancy date that we believe is achievable and if subsequent events cause delays or something like that, we avail ourselves of these extensions and use them.

97. The objecting home buyers suggest otherwise based on the mistaken assumption that the timelines for many of the necessary steps and actions do not overlap and run concurrently in many respects. In any event, the Home Buyer Agreements and the Tarion Addendum specifically contemplate the possibility of not being able to deliver the homes by an outside date and what the remedies are of each party under such circumstances – remedies which have nothing to do with any appreciated value in the underlying real estate:

> 11(b) If for any reason (other than breach of contract by the Purchaser) Occupancy has not been given to the Purchaser by the Outside Occupancy Date, then the Purchaser has 30 days to terminate the Purchase Agreement by written notice to the Vendor. If the Purchaser does not provide written notice of termination with such 30-day period

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[85] Transcript of Alan Saskin at pp. 160-161

> then the Purchase Agreement shall continue to be binding on both parties and the Delayed Occupancy Date shall be the date set under paragraph 3(c), regardless of whether such date is beyond the Outside Occupancy Date.
>
> ...
>
> 12(a) If the Purchase Agreement is terminated (other than as a result of breach of contract by the Purchaser), then unless there is agreement to the contrary under paragraph 11(a), the Vendor shall refund all monies paid by the Purchaser including deposit(s) and monies for upgrades and extras, within 10 days of such termination, with interest from the date each amount was paid to the Vendor to the date of refund to the Purchaser.[86]

98. Accordingly, there is no reasonable basis for concluding, in this case, that there is any overriding public policy against the enforcement of the exclusion of liability clause that outweighs the very strong public interest in the enforcement of contracts.

99. Furthermore, if there were in existence an overriding public policy that required suppliers of new homes and condominium units to guarantee full loss of bargain damages (including the difference between the contract price and the cost of an equivalent home or unit in the market at the time of breach), one would expect that such an overriding policy would be reflected in the Tarion Addendum. It is not.

100. The Tarion Warranty Corporation, the author of the Tarion Addendum, was created pursuant to the provisions of the *Ontario New Home Warranties Plan Act*[87] as a non-profit corporation charged with the administration of the new home

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[86] See Tarion Addendum to Home Buyer Agreement at Appendix "A" to Twelfth Report; Monitor's Motion Record, Tab A.

[87] R.S.O. 1990, c. O.31, s.2.

buyer warranty program set out in the statute. The Tarion Addendum was created in the discharge of these responsibilities. Neither the statute nor the Tarion Addendum confer upon new home owners an entitlement to full loss of bargain damages in the event that a contract to supply a home or condominium unit is not performed. Such protection was simply not conferred. In addition, the Tarion Addendum also does not preclude the use of exclusion of liability clauses by vendors.

101. Lastly, in response to the specific arguments advanced by the objecting home buyers on the public policy prong, the evidence does not support that the Property Companies acted "capriciously, unreasonably or recklessly" in entering into the Home Buyer Agreements or willingly chose not to make a *bona fide* effort to satisfy their obligations thereunder. As discussed above, it is a consequence of the CCAA proceedings themselves (and the factors leading up to the need to seek such protection) and the court-approved sales of the Properties therein that the Property Companies can no longer complete the Home Buyer Agreements. There is simply no wrongful conduct on the part of the Property Companies in this context.

PART IV ~ RELIEF SOUGHT

102. Accordingly, the exclusion of liability clause in the Home Buyer Agreements in this case is enforceable with the result that the only valid claim of the home buyers is for the return of their Deposits as the Monitor has set out in its original Home Buyer Claim Notices pursuant to the relevant Claims Procedure Order.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of April, 2017.

Robin B. Schwill
Davies Ward Phillips & Vineberg LLP

Lawyers for the Monitor

SCHEDULE "A"

Urbancorp (952 Queen West) Inc.

King Residential Inc.

Urbancorp 60 St. Clair Inc.

High Res. Inc.

Bridge on King Inc.

Urbancorp Power Holdings Inc.

Vestaco Homes Inc.

Vestaco Investments Inc.

228 Queen's Quay West Limited

Urbancorp Cumberland 1 LP

Urbancorp Cumberland 1 GP Inc.

Urbancorp Partner (King South) Inc.

Urbancorp (North Side) Inc.

Urbancorp Residential Inc.

Urbancorp Realtyco Inc.

SCHEDULE "B"

The Townhouses of Hogg's Hollow Inc.

King Towns Inc.

Newtowns at Kingtowns Inc.

Deaja Partner (Bay) Inc.

TCC/Urbancorp (Bay) Limited Partnership

SCHEDULE "C"

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4. *Fraser Jewellers (1982) Ltd. v. Dominion Electric Protection Co.*, [1997] O.J. No. 2359 (C.A.)

5. *Morrison v. Coast Finance Ltd.*, [1965] B.C.J. No. 178 (C.A.)

6. *Harry v. Kreutziger*, [1978] B.C.J. No. 1318 (C.A.)

7. *Cain v. Clarica Life Insurance Co.*, 2005 ABCA 437, [2005] A.J. No. 1743

8. *Mundinger v. Mundinger,* [1968] O.J. No. 1339 (C.A.), affd [1970] S.C.R. vi

9. *Paris v. Machnik*, [1972] N.S.J. No. 190 (Sup. Ct. [Trial Div.])

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12. *Titus v. William F. Cooke Enterprises Inc.*, 2007 ONCA 573, [2007] O.J. No. 3148

13. *Gordon v. Kreig*, 2013 BCSC 842, [2013] B.C.J. No. 1002

14. *Loychuk v. Cougar Mountain Adventures Ltd.*, 2012 BCCA 122, [2012] B.C.J. No. 504

15. *Arif v. Li*, 2016 ONSC 4579, [2016] O.J. No. 4013

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17. *AVG Management Science Ltd.* v. *Barwell Developments Ltd.*, [1979] 2 S.C.R. 43

18. *Knupp v. Bell*, [1968] S.J. No. 222 (C.A.)

19. *Plas-Tex Canada Ltd.* v. *Dow Chemical of Canada Ltd.*, 2004 ABCA 309, [2004] A.J. No. 1098

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20. Hall, Geoff R., *Canadian Contractual Interpretation Law*, Third Edition, 2016: LexisNexis Canada

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED
AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP TORONTO MANAGEMENT INC., ET AL.

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF URBANCORP (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., ET AL.

COURT FILE NO. CV-16-11389-00CL
COURT FILE NO. CV-16-11549-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

Proceeding Commenced at Toronto

FACTUM OF THE MONITOR
(Motion Returnable April 13, 2017)

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