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

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 (WOODBINE) INC. AND URBANCORP (BRIDLEPATH) INC., THE TOWNHOUSES OF HOGG'S HOLLOW INC., KING TOWNS INC., NEWTOWNS AT KINGTOWNS INC. AND DEAJA PARTNER (BAY) INC. (COLLECTIVELY, THE "APPLICANTS")

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

FACTUM
OF THE MONITOR
(Motion Returnable June 26, 2018 – Tarion Delay Warranty Claim)

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PART I ~ OVERVIEW

1. This motion deals with whether or not, pursuant to their home buyer agreements, home buyers are entitled to recover costs that they did not incur, cannot incur and for which they did not file a claim.

PART II ~ FACTS

2. The facts are set out in the Twenty Fifth Report of the Monitor dated May 30, 2018 (the "**Report**"). The salient facts pertaining to the motion are set out below. Capitalized terms used herein and not otherwise defined have the meaning ascribed to them in the Report.

3. Urbancorp (Mallow) Inc., Urbancorp (Lawrence) Inc., Urbancorp (St. Clair) Inc., applicants in these proceedings (the "**Cumberland Proceedings**"), and Urbancorp (Bridlepath) Inc. and Urbancorp (Woodbine) Inc., applicants in a separate CCAA proceeding bearing Court File No. CV-16-11549-00CL (the "**Bay LP Proceedings**") in which KSV Kofman Inc. is also the monitor (collectively, the "**Property Companies**" and each a "**Property Company**") each held an interest in real property as bare trustees (collectively, the "**Properties**"). (The Cumberland Proceedings and the Bay LP Proceedings are referred to as the "**CCAA Proceedings**".)

4. Each of the Properties was raw land at the date the respective CCAA proceedings commenced, with the one exception of Bridlepath which had an unfinished underground parking garage but was otherwise undeveloped. No development activity took place during the respective proceedings and accordingly, the Properties remained in the same state at the date they were sold in the respective proceedings.

5. Prior to the CCAA Proceedings, the Property Companies pre-sold 185 freehold homes and collected deposits totalling $15.6 million from home buyers (the

"**Deposits**"). The Deposits were spent by management of the Urbancorp Group prior to the commencement of the CCAA Proceedings.

6. The Monitor carried out a sale process for the Properties. The approval and vesting orders in respect of each of the 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 their home buyers (the "**Home Buyer Agreements**"). Accordingly, each home buyer had a claim arising from the failure of the Property Companies to complete the Home Buyer Agreements.

7. Each of the Home Buyer Agreements was prepared in a standard form, amended to reflect the details of each sale (purchase price, closing date, unit purchased, purchaser's name, etc.).

8. 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 as provided for in the Tarion Addendum (the "**Addendum**"). Based on the terms of the Home Buyer Agreements, the Monitor determined that home buyers only had a claim for the return of their Deposits.

9. Pursuant to the Claims Procedure Orders issued in the respective CCAA proceedings, 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. The Monitor allowed each Home Buyer's claim in the amount of its Deposit. Home buyers were entitled to accept the claims as determined by the Monitor or to dispute the

amount of the claim by filing an objection notice (the "**Home Buyer Objection Notice**").

10. Sixty-four (64) of the 185 home buyers filed a Home Buyer Objection Notice claiming damages in addition to their allowed deposit amount. None of these objections included delay closing compensation. Of the home buyers submitting a Home Buyer Objection Notice, fifty-six (56) were represented by Dickinson Wright LLP ("**Dickinson Wright**"), which was appointed as representative counsel to home buyers who "opted in" to its representation pursuant to orders issued on August 29, 2016 in the respective CCAA proceedings.

11. The Monitor referred the damage claims asserted by the home buyers to Court for determination. Pursuant to an endorsement issued by the Honourable Mr. Justice Newbould on April 18, 2017 (the "**April 18 Endorsement**"), the damage claims were disallowed in full.

12. Pursuant to Court orders issued on June 27 and November 30, 2017 in the respective CCAA Proceedings, the Monitor has repaid all Deposits to home buyers.

13. In response to the Claims Procedure Orders, Tarion Warranty Corporation ("**Tarion**") filed 21 claims totaling approximately $5.8 billion against the entities subject to the Cumberland Proceedings and seven claims totaling approximately $174 million against the entities subject to the Bay LP Proceedings.

14. On November 11 and 14, 2016 and December 9, 2016, the Monitor issued Notices of Revision or Disallowance to Tarion disallowing all of Tarion's claims (the "**Disallowances**"). On December 6 and 16, 2016, Tarion filed omnibus notices of dispute in respect of the Disallowances.

15. On April 30, 2018, the Court approved Minutes of Settlement between the Monitor and Tarion in both the Cumberland Proceedings and the Bay LP Proceedings (jointly, the "**Minutes of Settlement**").

16. Pursuant to the terms of the Minutes of Settlement, the Monitor has resolved all of Tarion's claims other than approximately $1.805 million related to delayed closing compensation, comprised of approximately $1.2 million against the Cumberland Entities and approximately $605,000 against the Bay CCAA Entities (the "**DCC Claims**"). The Minutes of Settlement require a motion before this Court to resolve the DCC Claims.

17. Each of the Home Buyer Agreements contains the Addendum. The Addendum is a compulsory supplement to all purchase agreements for all new homes sold in Ontario pursuant to the *Ontario New Home Warranties Plan Act* and the regulations thereunder. Pursuant to the terms of the Addendum, Tarion, *inter alia*, backstops warranty coverage to new home purchasers, including the delayed closing warranty.

18. The Addendum is a standard form prepared by Tarion. The only section of the Addendum that can be modified by a builder is the Statement of Critical Dates

(the "**SCD**"). The SCD determines, *inter alia*, when a home buyer may be eligible for delayed closing compensation.

19. Delayed closing compensation is intended to compensate purchasers for costs incurred as a result of a delay in closing the purchase of their homes.

20. To the Monitor's knowledge, no such claims have been made by any home buyer against Tarion since the April 18 Endorsement. Moreover, as noted above, no DCC Claims were submitted during the claims processes.

21. All of the Properties were sold prior to any of the Outside Closing Dates in the respective Home Buyer Agreements. Accordingly, it is impossible that a home buyer could have incurred any costs for living, accommodation, storage, moving and other costs as a result of the delay in closing (the "**Delay Costs**").

PART III ~ ISSUES AND THE LAW

22. The issue on this motion is whether or not home buyers can validly claim Delay Costs pursuant to their Home Buyer Agreements when such costs were not and cannot be incurred and the Home Buyer Agreements were either terminated or had otherwise become impossible to perform more than a year ago.

Home Buyer Agreement Provisions

23. The key relevant provisions of the Addendum are as follows:

7. Delayed Closing Compensation

(a) The Vendor warrants to the Purchaser that, if Closing is delayed beyond the Firm Closing Date (other than by mutual agreement or as a result of Unavoidable Delay as permitted under section 4 and 5), then the Vendor shall compensate the Purchaser up to a total amount of $7,500, which amount includes: (i) payment to the Purchaser of a set amount of $150 a day for living expenses for each day of delay until the date of Closing or the date of termination of the Purchase Agreement, as applicable under paragraph (b) below; and (ii) any other expenses (supported by receipts) incurred by the Purchaser due to the delay.

(b) Delayed closing compensation is payable only if: (i) Closing occurs; or (ii) the Purchase Agreement is terminated or deemed to be terminated under paragraph 10(b) of this Addendum. Delayed closing compensation is payable only if the Purchaser's claim is made to Tarion in writing within one (1) year after Closing or after termination of the Purchase Agreement, as the case may be, and otherwise in accordance with this Addendum. Compensation claims are subject to any further conditions set out in the ONHWP Act.

...

(d) Living expenses are direct living costs such as for accommodation and meals. Receipts are not required in support of a claim for living expenses as a set daily amount of $150 per day is payable. The Purchaser must provide receipts in support of any claim for other delayed closing compensation, such as for moving and storage costs. Submission of false receipts disentitles the Purchaser to any delayed closing compensation in connection with a claim.

...

10. Termination of Purchase Agreement

...

(b) If for any reason (other than breach of contract by the Purchaser) Closing has not occurred by the Outside Closing 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 within such 30-day period then the Purchase Agreement shall continue to be binding on both parties and the Delayed Closing Date shall be the date set under paragraph 3(c), regardless of whether such date is beyond the Outside Closing Date.

...

11. Refund of Monies Paid on Termination

(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 10(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. ...

[emphasis added]

Determinations Already Made by This Court

24. The key provisions of the April 18 Endorsement are as follows:

> [9] ... The clause in all of the purchase 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.
>
> ...
>
> [12] It is argued by the home buyers that the clause by its terms only applies when there has been a delay in closing and not when there has been a failure to close. The language certainly does not say that. It is argued however that the last sentence of the clause that excludes damages and costs makes an exception for "those costs set out in the Tarion Addendum". It is argued that section 7 in the Tarion Addendum to the purchase agreements provides for compensation for delayed occupancy, but only if the purchase closes, which is said to be an indication that clause 45 was meant to apply only to a delay in occupancy, not a failure to provide occupancy.
>
> [13] I do not agree. Each of the purchase agreements for the five developments contained the same Tarion Addendum as set out in the agreed statement of facts. Before paragraph 7 of the Addendum is a heading "MAKING A COMPENSATION CLAIM". Section 7 begins with the heading Delayed Occupancy Compensation. It provides for payment of $150 per day of delay and for other things such and moving and storage and moving costs. Paragraph 12 under the same general heading is headed Refund of Monies Paid on Termination and provides for a refund on termination of any deposits made and money paid for upgrades and extras.
>
> [14] I think it an unwarranted stretch of the last proviso in clause 45 of the purchase agreement to say that the costs referred to are only the types of costs set out in section 7 and not to those referred to in section 12 of the Tarion Addendum.
>
> ...
>
> [19] ..., there was no arbitrary action or repudiation by Urbancorp of the purchase agreements. What occurred was a consequence of the Israeli bond issuance, the later Israeli and CCAA proceedings and a court-approved sales process.
>
> ...
>
> [23] As stated, the sales process undertaken by the Monitor resulted in the projects being sold as raw land with no purchaser being willing to take an assignment of the purchase agreements of the home buyers and with vesting orders being provided to the buyers giving them free title. That left the Urbancorp entities with no

> ability to complete the purchase agreements. I cannot, however, find that there was some unlawful repudiation of those purchase agreements by Urbancorp.
>
> ...
>
> [26] I find that clause 45 applies in the circumstances of this case. Once the Monitor sold the properties to buyers who would not take an assignment of the purchase agreements and who obtained vesting orders that provided that title was taken free of any obligations under the purchase agreements, Urbancorp could not complete construction or close the purchase agreements as referred to in clause 45. Thus the damages claimed by the home buyers are excluded by the language of clause 45.
>
> [emphasis added]

Frustration Bars Any Delayed Closing Compensation Claims

25. It is clear from the April 18 Endorsement that this Court has already accepted that there has been an absolute failure to close as a result of it becoming impossible for the Property Companies to perform the Home Buyer Agreements.

26. Where a contract has become impossible to perform, the parties obligations under that contract are discharged with only the remedies pursuant to the *Frustrated Contracts Act*, R.S.O. 1980, c. F.34 being available.

> McCamus, John D. *The Law of Contracts,* 2nd ed. Toronto: Irwin Law Inc., 2012 at 606-608 and 637-638, Monitor's Book of Authorities, Tab 1.
>
> *Dhillon v. PM Management Systems Inc.*, 2014 ONSC 5407, 2014 CarswellOnt 12734 at paras. 11 and 13, Monitor's Book of Authorities, Tab 2.

27. To the extent that the *Frustrated Contracts Act* applies, the Home Buyers would have been entitled to a return of their Deposits pursuant to Section 3(1)(a) of the *Frustrated Contracts Act.*

28. Section 7(b) of the Addendum, upon a true construction, is clearly not intended to have effect in the event of circumstances that operate to frustrate the contract nor intended to have effect whether such circumstances arise or not as its effect is only triggered by a specifically referenced termination right pertaining to a clearly specified event.

29. Section 7(b) of the Addendum requires a termination pursuant to Section 10(b) of the Addendum: "If for any reason (other than breach of contract by the Purchaser) Closing has not occurred by the Outside Closing Date, then the Purchaser has 30 days to terminate the Purchase Agreement by written notice to the Vendor."

30. Contracts are to be interpreted in a manner so as to eliminate inconsistencies and avoid absurdities.

> Hall, Geoff R., *Canadian Contractual Interpretation Law*, 3rd ed., Toronto: LexisNexis Canada, 2016 at 18; Monitor's Book of Authorities, Tab 3.

31. It is inconsistent and illogical to require a 30-day termination right when the contract itself has been frustrated and, therefore, performance under it discharged. Accordingly, Section 7(b) of the Addendum cannot be properly construed as being intended to have effect upon a frustration of the Home Buyer Agreements.

32. Even if it were so construed, as was the case in the April 18 Endorsement dealing with clause 45 of the Home Buyer Agreements, a proper

construction of this provision given the facts in this case would be to conclude that the condition of "Closing has not occurred by the Outside Closing Date" has already been met as there cannot be any closing at all. In other words, it was known with certainty as at the date of the April 18 Endorsement that closing would not and could not occur by the Outside Closing Date, or any other date for that matter.

33. However, no home buyer sought to terminate the Home Buyer Agreements by written notice within 30 days of the April 18 Endorsement or at any point to date, nor did any seek a lifting of the stay of proceedings to permit doing so.

34. Accordingly, even if Section 7(b) of the Addendum is held to have been intended to have effect in the event of circumstances that operate to frustrate the contract, none of the home buyers exercised their rights pursuant to this provision in the time required to do so. They therefore no longer have or can validly make any claim for delayed closing compensation against the Property Companies and, in turn, Tarion's DCC Claims must be a nullity.

Effective Termination Bars Any Delayed Closing Compensation Claims

35. As of the date of the April 18 Endorsement, the Home Buyer Agreements were either held to be effectively terminated or, alternatively, frustrated.

36. The Home Buyer Agreements were in fact treated by the Monitor as having been terminated by admitting the Deposit claims in the claims processes. Pursuant to Section 11 of the Addendum, the Deposit is only refundable upon a termination of the Home Buyer Agreement.

37. Likewise, they were treated by the Home Buyers as having been terminated by accepting the return of their Deposits and, in some cases, filing damage claims, primarily for loss of bargain.

> Perell, Paul M. and Bruce H. Engell, *Remedies and the Sale of Land*, 2nd ed. Toronto: Butterworths, 1998 at 195-196, Monitor's Book of Authorities, Tab 4.

38. If the Home Buyer Agreements are held to have been effectively terminated, then pursuant to section 7(b) of the Addendum a home buyer has up to one year from the date a purchase agreement is terminated to file a claim for delayed closing compensation. To the Monitor's knowledge, no such claims have been made by any home buyer against Tarion since the April 18 Endorsement. Moreover, as noted above, no DCC Claims were submitted by any of the home buyers during the claims processes.

39. Accordingly, the home buyers no longer have or can validly make any claim for delayed closing compensation against the Property Companies and, in turn, Tarion's DCC Claims are a nullity.

Reasonableness and Fairness Bars Any Delayed Closing Compensation Claims

40. All of the Properties were sold prior to any of the Outside Closing Dates. Accordingly, it is impossible that a home buyer could have incurred or can reasonably now incur any costs for living, accommodation, storage, moving and other costs as a result of the delay in closing.

41. To conclude that the Home Buyer Agreements have not been terminated or frustrated such that the home buyers may in the future provide termination notices once their Outside Closing Date expires so as to be eligible to claim compensation for Delay Costs would be completely artificial in this case and unreasonable as it would provide compensation to home buyers for expenses they did not incur and cannot incur, and after they acknowledged that the Home Buyer Agreements had been terminated through the acceptance of the return of the Deposits.

42. Furthermore, given that the Outside Closing Dates in the various Home Buyer Agreements have already expired for approximately 50% of all home buyers, only certain of the home buyers on Lawrence, Mallow and Bridlepath would be entitled to make any such claim at this point in time which would result in a windfall recovery for some while leaving others behind – a wholly inequitable result for the home buyers caught up in these proceedings.

43. While the Court's power to make orders under the CCAA is broad, it is not unlimited and must be exercised in a manner consistent with the purposes and provisions of the CCAA. These limitations are reflected in section 11 of the CCAA itself.

> *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, [2010] 3 S.C.R. 379 at para. 70; Monitor's Book of Authorities, Tab 5.

44. Accordingly, it would not be appropriate in these circumstances to contrive a means for only certain of the home buyers to now be able to seek recovery for delayed closing compensation against the Property Companies.

PART IV ~ RELIEF SOUGHT

45. As the home buyers cannot legally seek recovery for delayed closing compensation against the Property Companies, the DCC Claims filed by Tarion in these proceedings pursuant to the Claims Procedure Orders should be disallowed in full.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 14th day of June, 2018.

Robin B. Schwill
Davies Ward Phillips & Vineberg LLP

Lawyers for the Monitor

SCHEDULE "A"

LIST OF AUTHORITIES

1. McCamus, John D. *The Law of Contracts,* 2nd ed. Toronto: Irwin Law Inc., 2012
2. *Dhillon v. PM Management Systems Inc.*, 2014 ONSC 5407, 2014 CarswellOnt 12734
3. Hall, Geoff R., *Canadian Contractual Interpretation Law*, 3rd ed., Toronto: LexisNexis Canada, 2016
4. Perell, Paul M. and Bruce H. Engell, *Remedies and the Sale of Land*, 2nd ed. Toronto: Butterworths, 1998
5. *Re Ted Leroy Trucking [Century Services] Ltd.*, 2010 SCC 60, [2010] 3 S.C.R. 379.

SCHEDULE "B"

STATUTORY PROVISIONS

***Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended**

General power of court

11. Despite anything in the Bankruptcy and Insolvency Act or the Winding-up and Restructuring Act, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

Ontario

Français

Frustrated Contracts Act

R.S.O. 1990, CHAPTER F.34

Consolidation Period: From December 2, 1993 to the e-Laws currency date.

Last amendment: 1993, c.27, Sched.

Legislative History: [+]

Definitions

1 In this Act,

"contract" includes a contract to which the Crown is a party; ("contrat")

"court" means the court or arbitrator by or before whom a matter falls to be determined; ("tribunal")

"discharged" means relieved from further performance of the contract. ("libéré") R.S.O. 1990, c. F.34, s. 1.

Application of Act

2 (1) This Act applies to any contract that is governed by the law of Ontario and that has become impossible of performance or been otherwise frustrated and to the parties which for that reason have been discharged. R.S.O. 1990, c. F.34, s. 2 (1); 1993, c. 27, Sched.

Exceptions

(2) This Act does not apply,

(a) to a charterparty or a contract for the carriage of goods by sea, except a time charterparty or a charterparty by way of demise;

(b) to a contract of insurance; or

(c) to a contract for the sale of specific goods where the goods, without the knowledge of the seller, have perished at the time the contract was made, or where the goods, without any fault on the part of the seller or buyer, perished before the risk passed to the buyer. R.S.O. 1990, c. F.34, s. 2 (2).

Section Amendments with date in force (d/m/y) [+]

Adjustment of rights and liabilities

3 (1) The sums paid or payable to a party in pursuance of a contract before the parties were discharged,

(a) in the case of sums paid, are recoverable from the party as money received for the use of the party by whom the sums were paid; and

(b) in the case of sums payable, cease to be payable. R.S.O. 1990, c. F.34, s. 3 (1).

Expenses

(2) If, before the parties were discharged, the party to whom the sums were paid or payable incurred expenses in connection with the performance of the contract, the court, if it considers it just to do so having regard to all the circumstances, may allow the party to retain or to recover, as the case may be, the whole or any part of the sums paid or payable not exceeding the amount of the expenses, and, without restricting the generality of the foregoing, the court, in estimating the amount of the expenses, may include such sum as appears to be reasonable in respect of overhead expenses and in respect of any work or services performed personally by the party incurring the expenses. R.S.O. 1990, c. F.34, s. 3 (2).

Benefits

(3) If, before the parties were discharged, any of them has, by reason of anything done by any other party in connection with the performance of the contract, obtained a valuable benefit other than a payment of money, the court, if it considers it just to do so having regard to all the circumstances, may allow the other party to recover from the party benefitted the whole or any part of the value of the benefit. R.S.O. 1990, c. F.34, s. 3 (3).

Assumed obligations

(4) Where a party has assumed an obligation under the contract in consideration of the conferring of a benefit by any other party to the contract upon any other person, whether a party to the contract or not, the court, if it considers it just to do so having regard to all the circumstances, may, for the purposes of subsection (3), treat any benefit so conferred as a benefit obtained by the party who has assumed the obligation. R.S.O. 1990, c. F.34, s. 3 (4).

Insurance

(5) In considering whether any sum ought to be recovered or retained under this section by a party to the contract, the court shall not take into account any sum that, by reason of the circumstances giving rise to the frustration of the contract, has become payable to that party under any contract of insurance unless there was an obligation to insure imposed by an express term of the frustrated contract or by or under any enactment. R.S.O. 1990, c. F.34, s. 3 (5).

Special contractual provisions

(6) Where the contract contains a provision that upon the true construction of the contract is intended to have effect in the event of circumstances that operate, or but for the provision would operate, to frustrate the contract, or is intended to have effect whether such circumstances arise or not, the court shall give effect to the provision and shall give effect to this section only to such extent, if any, as appears to the court to be consistent with the provision. R.S.O. 1990, c. F.34, s. 3 (6).

Where contract severable

(7) Where it appears to the court that a part of the contract can be severed properly from the remainder of the contract, being a part wholly performed before the parties were discharged, or so performed except for the payment in respect of that part of the contract of sums that are or can be ascertained under the contract, the court shall treat that part of the contract as if it were a separate contract that had not been frustrated and shall treat this section as applicable only to the remainder of the contract. R.S.O. 1990, c. F.34, s. 3 (7).

Français

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Proceeding Commenced at Toronto

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