

**LICENCE APPEAL
TRIBUNAL**

**TRIBUNAL D'APPEL EN MATIÈRE
DE PERMIS**



**Safety, Licensing Appeals and
Standards Tribunals Ontario**

**Tribunaux de la sécurité, des appels en
matière de permis et des normes Ontario**

Citation: Toronto Standard Condominium Corporation No. 2471 v. Tarion Warranty Corporation 2019 ONLAT ONHWPA 11500

Date: 2019-01-04
File Number: 11500 ONHWPA

Appeal of a Decision Letter of Tarion Warranty Corporation under the *Ontario New Home Warranties Plan Act*, R. S.O. 1990, O.31 - to Disallow a Claim

Between:

Toronto Standard Condominium Corporation No. 2471

Appellant

-and-

Tarion Warranty Corporation

Respondent

DECISION and ORDER

Adjudicator: Stephen Scharbach, Member

Appearances:

For the Appellants: Patrick Greco, Counsel

For the Respondent: Michael Owsiany, Counsel

Heard in Toronto: November 28, 2018

Date of Decision and Order: January 4, 2019

OVERVIEW

- [1] Toronto Standard Condominium Corporation No. 2471 (“appellant”) is a condominium corporation that owns and operates a 434 residential building in Toronto (“premises”). The premises were built by Omni (Westlake) Developments Ltd. (“Omni”).
- [2] Pursuant to the *Ontario New Home Warranties Plan Act* (“Act”), the common elements of the premises are subject to the warranties that the Act required Omni as the vendor to extend to the appellant as owner.
- [3] The appellant made both first and second year warranty claims regarding deficiencies in the common elements.
- [4] Omni did not repair or resolve those claims within the repair period. According to a regulation made under the Act (R.R.O. 1990 Regulation 892 (“regulation”)) in order to enforce the warranty through Tarion, the owner must request conciliation within a specified time limit. If the owner does not do so, the owner is deemed to have withdrawn its claims.
- [5] In this case, the appellant missed the deadline for requesting conciliation and Tarion takes the position that the appellant’s first and second year claims are deemed to be withdrawn.
- [6] However, the regulation permits Tarion to extend the time limit for requesting conciliation in “extraordinary circumstances”.
- [7] In this case, the appellant states that the deadline was missed due to extraordinary circumstances and requested that Tarion extend the time limit to allow their warranty claims to proceed.
- [8] Tarion denied that request and the appellant appeals that decision.

ISSUE

- [9] Does the warranty claim in this case involve extraordinary circumstances that would warrant Tarion extending the time for the appellant to request conciliation?

DECISION

- [10] The warranty claim in this case involves extraordinary circumstances that warrant Tarion extending the time for the appellant to request conciliation.
- [11] The time limit for requesting conciliation shall be extended and the appellant's request for conciliation dated May 17, 2018 shall be considered to have been made as of the date of the Tribunal's order.

PRELIMINARY MATTER

- [12] By order of this Tribunal on October 1, 2018, Omni was given notice of these proceedings. The parties and Omni were informed that if any of them intended to request that the Tribunal add Omni as a party it shall serve and file a motion with the Tribunal by October 15, 2018.
- [13] No motion was filed. As a result Omni is not a party to these proceedings and did not participate in it.

THE LAW

- [14] The Act provides that every vendor of a new condominium warrants to the condominium corporation that the common elements shall be, among other things, constructed in accordance with the *Ontario Building Code*, in a workman like manner, free of defects in material, and free of major structural defects.
- [15] A condominium corporation may make a claim to Tarion in respect of breaches of those warranties and ultimately Tarion may pay compensation to the condominium corporation out of the guarantee fund.
- [16] The regulation requires that claims be made within specified time periods. Once a claim is made, the Act and regulation require that claims proceed through a number of steps within specified time periods.
- [17] A condominium corporation may make an initial claim in respect of defects in the construction of common elements that appear within the first-year claim period ("first year claim"), and may make a second claim in respect of defects that appear within the second-year claim period ("second year claims").
- [18] Both first and second-year claims proceed through the following steps¹:

¹ The following steps and associated time periods are set out in s. 5.5 (first year claims) and s.5.6 (second year claims) of the regulation.

- (i) The vendor has a specified period of time (“repair period”) to resolve or repair the claims listed in the claim form.
- (ii) If the vendor does not resolve or repair the listed claims, the owner may, within 60 days of the end of the repair period, request a conciliation by contacting Tarion. Conciliation is a process in which Tarion determines whether a disputed claim is covered by a warranty and whether repairs or compensation are required.
- (iii) If the owner does not request a conciliation within the time period, “.the owner shall be deemed to have withdrawn all claim items listed ...that the vendor does not resolve or repair by the end of the [repair period]”.
- (iv) If the owner does request conciliation, the vendor has 90 days from the date of the request to repair or resolve the listed items.
- (v) If the vendor does not repair or resolve the listed items within 90 days, Tarion shall, within 150 days from the date of the request for conciliation, conduct a conciliation and issue a conciliation report setting out Tarion’s assessment as to whether the listed items are covered by a warranty.
- (vi) The vendor has 90 days from the date the report is issued to repair or resolve all the warranted items.
- (vii) If the vendor does not repair or resolve the warranted items, Tarion shall pay compensation to the owner out of the guarantee fund or shall perform or arrange for the performance of any required work.

[19] In this case, the appellant submitted both its first and second year claims on time. In order to move those claims forward, the appellant was required to request conciliation (see item (ii) above) in respect of both claims by March 22, 2018.

[20] The appellant missed that deadline for reasons discussed below. In these circumstances, the regulation deems the appellant to have withdrawn all claim items not yet repaired or resolved by the vendor (item (iii) above).

[21] However, s. 5.10 of the regulation allows Tarion to extend time periods, including the time period for requesting conciliation. That section states:

The Corporation may, in its sole discretion, extend or abridge any time specified in sectionsif it determines that:

- (a) the vendor is unable or unwilling to repair or resolve the claim items covered by a warranty;

- (b) the warranty claim,
 - (i) relates to items involving health and safety, seasonal repairs or an emergency, or
 - (ii) involves other extraordinary circumstances; or....**

[22] Finally, where, as in this case, Tarion makes a decision under s.14 of the Act, the owner may appeal that decision to this Tribunal by requesting a hearing (Act, s.16(2)).

[23] The Tribunal may, after holding a hearing, order Tarion to take such action as the Tribunal considers that Tarion ought to take in accordance with the Act and regulations and, for that purpose, may substitute its opinion for that of Tarion (Act, s.16(3).)

THE MISSED DEADLINE

(a) Appellant Misses Deadline for Requesting Conciliation

[24] The appellant made both first and second year warranty claims regarding deficiencies in the common elements.

[25] Omni did not repair or resolve those claims within the repair period and the appellant had until March 22, 2018 to request conciliation.

[26] The regulation states that conciliation may be requested by contacting Tarion. In practice, Tarion requires that a condominium corporation complete and submit a 2-page Conciliation/Claim Inspection Request Form along with a completed performance audit tracking summary identifying all of the outstanding deficiencies.

[27] The appellant missed the March 22, 2018 deadline but states that it was missed due to “extraordinary circumstances”.

[28] According to the appellant, those circumstances involve a variety of unusual factors that in combination caused a “perfect storm” that resulted in the missed deadline. In summary, those factors were:

(b) Miscommunication with Engineering Consultant

- [29] The immediate cause of the missed deadline was a miscommunication between DF, the appellant's property manager, and JP, an engineer in training with EXP. EXP is an engineering firm hired by the appellant to prepare the performance audit tracking summary that was required to be submitted with the request for conciliation.
- [30] The appellant had contracted with iCare Property Management to provide the property management services. DF was assigned by iCare to be the appellant's on-site property manager.
- [31] DF testified at the hearing. Although he had acted as a property manager before, he had no previous experience with Tarion.
- [32] Despite that, DF was appointed (on February 9, 2018), by the appellant's Board of Directors as the appellant's designate in all dealings with Tarion involving warranty claims relating to the common elements.
- [33] DF was apparently aware that there was a deadline for requesting conciliation although he was not sure of the precise date. On March 12, 2018, he was in communication via email with an EXP engineer and stated:
- we should file for conciliation just in case and in April I would like to go over the deficiency list and get to an agreement with Omni and get it done...
- [34] The EXP engineer responded that same day;
- We just need to follow the procedure...I believe you need to fill out a form and email it to Tarion. Please let us know if you need our help with it".
- [35] The deadline was Thursday, March 22, 2018. On Monday, March 19, 2018, JP emailed DF and said:
- Since you indicated below that you would like to file for conciliation and the deadline is this week, I just wanted to check with you whether you would like us to help with the request or file it on your behalf. Please let me know.
- [36] DF testified at the hearing that he interpreted JP's statement that it was "this week" to mean the deadline was the last day of the working week – Friday March 23, 2018.
- [37] With that understanding, on Friday March 23, 2018 he emailed the completed conciliation request form to JP. She responded that same day and said:
- "Thank you for sending these however the deadline has passed..."

[38] DF replied that same day:

It is a bit sad. I was told that deadline was this week not that it was Thursday March 22 and then to be called a day later, and being advised three days prior to the deadline when I mentioned to go forward with conciliation in February. Definitely need to work this out.

[39] In a letter dated April 6, 2018 Tarion informed both Omni and the appellant that a request for conciliation was not received by the deadline and as a result the appellant's claims were considered withdrawn and the claim file closed.

[40] DF testified that the missed deadline was in part caused by the failure of EXP's engineer in training to clearly bring the precise deadline date to his attention. However, he also testified that he was unable to bring his full focus and attention to this matter for the following reasons.

(c) Death of DF's Spouse

[41] DF testified that he started with iCare on January 19, 2018 and he began working on site on January 29, 2018. On January 20, 2018, his spouse died unexpectedly.

[42] DF testified that he returned to work soon after his spouse's death because he has a dependant son and was experiencing financial pressures.

[43] However, he was depressed and distracted by his grief and that impacted his ability to effectively carry out the many responsibilities of his new job, including the request for conciliation issue.

(d) Sole Property Manager on Site

[44] DF testified that as property manager, he was responsible for managing and overseeing the operation of many things including the structural and mechanical systems, accounting and record keeping, administration of general meetings, responding to resident concerns and complaints, and seeking instructions from and taking direction from the Board.

[45] According to DF, he was the point of contact for complaints and concerns of the residents, many of which had to do with flooding apparently caused by construction deficiencies in the common elements.

- [46] According to DF, it was a lot of responsibility and he recalled that during the relevant time he was working 8-10 hours per day, 7 days per week with no assistance or support. iCare's contract price was 25% less than that of the previous company. There was no margin that would allow for additional staff and DF was overwhelmed by the workload
- [47] DF essentially testified that his resources were insufficient to meet the demands of his position. His focus and resources were stretched thin by his many responsibilities and that was an additional factor that prevented him from giving his full attention to the Tarion deadline.

(e) Lack of Records/Disorder Left by Previous Onsite Property Manager

- [48] According to DF, the previous property manager, GA, was incompetent, had been terminated by iCare on January 12, 2108, and left on bad terms. DF started about two weeks later on January 29, 2019 so there was no overlap between GA's departure and DF's arrival. There was no orderly transition and no introductory briefing about his new responsibilities.
- [49] According to DF, he found the appellant's records to be disorganised and incomplete. The company that held the property management contract before iCare took care of the appellant's building as well as two other buildings in an interconnected complex. The records it turned over to iCare were chaotically intermingled with records relating to the other buildings. All of this made clarifying the issues and establishing priorities difficult and time consuming.
- [50] After the appellant submitted its first and second year claims, Tarion sent letters to the appellant's [then] designate on 4 occasions² reminding the appellant of the requirement to request conciliation within 60 days of the end of the builder's repair period.
- [51] The four letters stated that if a request was not filed Tarion will consider all claim to be withdrawn and Tarion will no longer be able to assist. Three of the letters spelled out the precise period within which the request would have to be made (January 22, 2018 to March 22, 2018) and warned of the consequences if a request is not filed within that period.
- [52] However, all of those letters were sent to previous Tarion designates before DF took over on January 29, 2018. According to DF, none of those letters were brought to his attention and he was not aware of their existence.
- [53] On January 10, 2018 a "common elements meeting" was held and attended by representatives of Tarion, Omni, GA on behalf of the appellant, and EXP.

² Letters dated June 22, 2016, November 29, 2016, July 25, 2017, December 8, 2017

[54] Tarion prepared a written summary of that meeting which indicated that the March 22, 2018 deadline was discussed. That summary was sent to all meeting participants, including GA on behalf of the appellant. However, the meeting took place before DF started and, according to DF, he did not see that written summary and neither GA nor anyone else brought it to his attention.

(f) Ongoing Construction Issues

[55] According to DF, at the time he began there were many outstanding common element construction deficiencies, the biggest of which related to flooding and mould, apparently caused by back-ups in the drainage system.

[56] The flooding caused much concern and turmoil among the residents. Many residents brought their concerns directly to DF and responding to them consumed much of his time and energy and contributed to his inability to focus on making a timely request for conciliation.

(g) Unresponsive Board of Directors

[57] The appellant's Board of Directors was responsible for providing direction and oversight of management of the premises and DF required direction from the Board to carry out his responsibilities.

[58] However, according to DF, during the relevant period (January 29, 2018 to March 22, 2018) the appellant's Board of Directors (not the current Board) was distant, unengaged and unresponsive. DF had difficulty getting effective direction and guidance from the Board.

[59] According to DF, the confusion, delay and distraction involved in seeking and obtaining clear direction from the Board consumed DF's time and energy and was an additional factor that contributed to his inability to closely manage the request for conciliation issue.

(h) Appellant Does Not Request Extension Until May 17, 2018

[60] Although DF was made aware that the March 22, 2018 deadline had been missed one day later (on March 23, 2018) the appellant did not request an extension to file the conciliation request until May 17, 2018, about 7 weeks after the deadline had passed.

[61] In the meantime, on April 6, 2018, Tarion informed the appellant and Omni that since the appellant did not request conciliation by March 22, 2018, the claim items were considered withdrawn and the Tarion file was closed.

- [62] Tarion had required Omni to post a surety bond of \$800,000 as security for the outstanding deficiencies. On April 30, 2018 Tarion authorised release of the bond.
- [63] According to Tarion, it would now be prejudiced by an extension of the deadline since it can no longer access the surety bond funds in the event that Omni is unwilling or unable to correct the deficiencies.
- [64] According to DW, the current president of the appellant's Board of Directors, a general members' meeting took place on March 29, 2018 and a new Board, including DW, was elected.
- [65] DW testified that she first learned about the missed deadline around April 6, 2018 while preparing for the new Board's first meeting scheduled for April 10, 2018. The issue was discussed by the Board at that meeting and, according to DW, the Board immediately decided to get legal advice.
- [66] The Board got that advice and instructed counsel to request that Tarion extend the deadline. That request was made in a letter dated May 17, 2018 from the appellant's counsel to Tarion.

ANALYSIS

- [67] The onus is on the appellant to establish on a balance of probabilities that the warranty claim in this case involves other extraordinary circumstances that warrant Tarion extending the time for the appellant to request conciliation.
- [68] According to the appellant, the deadline was missed because of a combination of several circumstances which in their totality are extraordinary.
- [69] According to Tarion, the circumstances leading to missing the deadline were all within the appellant's control, or the control of those acting on its behalf, and cannot be regarded as extraordinary, even in their totality.

(a) What are Extraordinary Circumstances ?

- [70] There is no provision in the Act or regulation that defines "exceptional circumstances".

- [71] The determination of whether exceptional circumstances exist is fact driven and contextual. I was referred to a court case that stated that the concept of exceptional circumstances is incapable of precise definition and an attempt to do so is to attempt to foresee the infinitely variable facts of every case that may arise in the future.³ That case was concerned with criminal sentencing but in my view that observation applies equally in this context.
- [72] I was referred to two previous decisions of this Tribunal as examples of factual circumstances that have, and have not, been found to be exceptional.
- [73] In the first case the Tribunal found exceptional circumstances to be present⁴. The homeowners failed to file a conciliation request within the deadline. The homeowners were not at ease with Tarion's online filing system so the deadline may not have come to their attention. However, the homeowners listed deficiencies in the year-end report, did not consider the claim to be resolved, and were actively working with builder when the deadline passed. The Tribunal stated:
- ...to deny the appellants the opportunity to their claim for warranty coverage would be unreasonable and antithetical to the consumer protection nature and character of the Act. The Tribunal finds that the power to extend the time limit in s. 5.10 is a broad discretion that should be exercised in a manner consistent with the remedial consumer protection nature of the legislation...In any event, the Tribunal finds that the circumstances before it fall within the meaning of "extraordinary circumstances"...
- [74] In the second case the Tribunal found there were no exceptional circumstances⁵. The homeowner had been working with the builder to resolve deficiencies but did not request conciliation by the deadline. The first contact with Tarion regarding request for conciliation was made about 10 months after the deadline and the formal request was filed about 15 months after deadline.
- [75] These cases are just two examples of fact situations in which the question of extraordinary circumstances has been considered by this Tribunal.
- [76] In both cases it appears that the analysis was based on assessment of the individual fact situations. The only general principle that emerges, and with which I agree, is that the discretion involved in considering that question should be exercised in a way that is consistent with the consumer protection nature of the *Act*.

³ *R. v Sharma* [2018] ONSC 1141, paragraph 88, 89

⁴ 2016 CanLII 100992 (ON LAT)

⁵ 2016 CanLII 9444 (ON LAT)

(b) Extraordinary Circumstances Present in this Case

[77] In my view, when all of the circumstances relating to the missed deadline are considered in their totality, exceptional circumstances are present in this case that warrant an extension of the deadline.

[78] The deficiencies listed in the appellant's first and second year claims are numerous. I was told that there are hundreds of listed deficiencies and, although many are minor, some are not. They include an alleged deficiency involving drainage within the building which has caused back-ups, flooding and mould. Clearly the claims were of vital interest to the appellant and its residents.

[79] Equally clearly, the appellant was pursuing those claims and, at all relevant times, intended to request conciliation. Once the deadline was missed, the appellant requested an extension without undue delay. In that connection I note that :

- EXP prepared a detailed performance audit tracking summary that was intended to be submitted along with the request for conciliation.
- The previous property manager had attended a meeting with Omni and Tarion on January 10, 2018 to discuss the deficiencies and the possibility of a resolution.
- On March 12, 2018, DF told EXP in an email "we should file for conciliation just in case..."
- DF completed and sent to EXP the request for conciliation form on March 23, one day after the deadline.
- DF learned that the deadline was missed the day after the deadline and immediately expressed his disappointment that EXP had not clearly told him the deadline was March 22.
- Most of the corporation's board was replaced at a general meeting on March 29, 2018 and once the new Board became aware of the issue in early April, it sought legal advice and a formal extension request was filed reasonably soon afterwards on May 17, 2018.

[80] I find that the appellant's failure to request conciliation was the result of a combination of unfortunate circumstances:

- Imprecise communication between EXP and DF as to the date of the deadline.
- The previous Board hired iCare whose contract price was 25% less than the previous property manager. There was no margin that would allow additional staff and DF was overwhelmed by the workload
- iCare assigned DF as the onsite property manager but DF had no experience in managing the Tarion process
- The property manager who DF replaced was terminated and left on bad terms before DF took over as property manager. There was no orderly transition or briefing. The office records were chaotic and disorganised. DF was unaware of the communications from Tarion setting out the deadline date and the consequences if missed
- DF's spouse died about one week before he started working on-site and about one month before the deadline. DF was distracted by his grief and that impacted his ability to focus effectively on the responsibilities of his job
- The Board of Directors at that time was disengaged, remote and uncommunicative. DF's limited resources were in part consumed in attempting to get direction and instructions from the Board.

[81] I conclude that the deadline was missed due to a combination of unfortunate circumstances that in their totality were extraordinary and the deadline for requesting conciliation should be extended to allow the appellant to proceed to conciliation.

[82] Under s.16(3) of the Act, after holding a hearing the Tribunal may, by order direct Tarion to take such action as the Tribunal considers Tarion ought to take in accordance with the Act and regulations.

ORDER

[83] Pursuant to s. 16(3) of the *Ontario New Home Warranties Plan Act* I direct Tarion to:

- (a) extend the deadline for the appellant to request conciliation.
- (b) accept the appellant's request for conciliation (submitted on May 17, 2018) as of the date of this Order.

LICENCE APPEAL TRIBUNAL

A handwritten signature in black ink, appearing to read "Stephen Scharbach", written over a horizontal line.

Stephen Scharbach, Member

Released: January 4, 2019