CITATION: Fernbrook Homes (Strachan) Ltd. v. Tarion Warranty Corp., 2021 ONSC 4939
COURT FILE NO.: CV-21-00662986
DATE: 20210714

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: FERNBROOK HOMES (STRACHAN) LIMITED, Applicant/Moving Party

AND:

TARION WARRANTY CORPORATION, Respondent

BEFORE: Davies J.

COUNSEL: *Michael Farace*, for the Applicant/Moving Party

David Outerbridge and *Shalom Cumbo-Steinmetz*, for the Respondent

HEARD at Toronto: July 7, 2021

REASONS FOR DECISION

A. Overview

[1] Fernbrook Homes (Strachan) Limited built the Garrison Point condominium development in Toronto.

[2] During construction, Fernbrook discovered a problem with the municipal water supply to Garrison Point. Without an adequate water supply, the sprinkler system in the buildings would not work. And without a properly functioning sprinkler system, the condominium units could not be occupied.

[3] As Fernbrook was working with the City of Toronto to resolve the water supply issue, the World Health Organization declared COVID-19 a global pandemic. In response, the City suspended various municipal services including non-emergency building inspections. The suspension of building inspections delayed Fernbrook from getting occupancy permits for some units at Garrison Point.

[4] Several people who bought condominiums at Garrison Point did not get occupancy of their units on the agreed upon date because of the delays caused by the water supply issue and the suspension of building inspections. Some of the Garrison Point purchasers demanded delayed occupancy compensation under their purchase agreements. Each Garrison Point purchase agreement – like all new condominium purchase agreements in Ontario – is deemed to contain the several

warranties and conditions under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the "*ONHWP Act*"). One of those conditions is that purchasers are entitled to compensation if the occupancy of their unit is delayed beyond an agreed upon date unless the delay was caused by an "Unavoidable Delay." Fernbrook takes the position that the water supply issue and COVID-19 each constitute an "Unavoidable Delay" as defined in the purchase agreements so the Garrison Point purchasers are not entitled to compensation for delayed occupancy.

[5] Some Garrison Point purchasers have made claims to Tarion Warranty Corporation for delayed occupancy compensation and requested conciliation: *ONHWP Act*, s. 17(1). Tarion has a statutory mandate to conciliate disputes between builders and purchasers and promote the expeditious resolution of claims: *ONHWP Act*, s. 2. If Fernbrook and the Garrison Point purchasers do not reach an agreement on delayed occupancy compensation through conciliation, Tarion will decide whether the purchasers' claims are valid.

[6] If Tarion finds the delay was not the result of an "Unavoidable Delay", Tarion will compensate the Garrison Point purchasers and will charge Fernbrook for any compensation paid. Tarion will also put a notation on the Fernbrook's record of the "Chargeable Conciliation." The existence of a "Chargeable Conciliation" will also be noted on Fernbrook's record in the Ontario Builder Directory, which is a publicly accessible database.

[7] Tarion has told Fernbrook that it does not consider the delays caused by the water supply problem as an "Unavoidable Delay" as defined in the Garrison Point purchase agreements. Tarion also told Fernbrook that the delays caused by the City's decision to suspend building inspections in response to the COVID-19 pandemic may qualify as an "Unavoidable Delay" depending on the facts of each particular claim.

[8] Fernbrook has filed an Application in this Court seeking a declaration that the water supply issue and the suspension of building inspections in response to the COVID-19 pandemic, individually or collectively, meet the definition of an "Unavoidable Delay" and no compensation is owing to the Garrison Point purchasers. Fernbrook's Application is scheduled for December 3, 2021.

[9] Fernbrook now seeks an interim injunction to prohibit Tarion from taking any steps in the conciliation process with any Garrison Point purchaser until its December 3, 2021 Application is decided.

[10] The burden is on the Fernbrook to establish that granting an injunction is in the interests of justice: *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 101. When considering whether to grant Fernbrook an interim injunction, I must consider three

questions: see *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311, 111 D.L.R. (4th) 385, at pp. 334-335. First, does the Fernbrook's application for a declaration on the interpretation of the term "Unavoidable Delay" in the Garrison Point purchase agreements have merit? Second, will Fernbrook suffer irreparable harm if the interim injunction is refused? And third, which party will suffer the greater harm from the granting or refusal of the injunction pending a decision on the merits? Although posed as distinct questions, these three factors are related and strength on one part of the test can compensate for weakness on another.

[11] Tarion concedes that Fernbrook's Application for a declaration as to the interpretation of "Unavoidable Delay" has merit. The issues for me to decide are whether Fernbrook will suffer irreparable harm if an interim injunction is refused and whether the balance of convenience favours granting or refusing the injunction.

[12] I find that Fernbrook has not established it will suffer irreparable harm if an injunction is not granted. I also find that even if Fernbrook would suffer harm from the denial of an injunction, the balance of convenience favours denying an injunction. Fernbrook's application is dismissed.

B. Fernbrook has not Established Irreparable Harm

[13] Irreparable harm is a harm that cannot be measured in monetary terms or a harm that cannot be cured through an award of damages: *RJR MacDonald Inc.*, at p. 341.

[14] Fernbrook argues that the registration of any Chargeable Conciliation on its publicly accessible builder record will irreparably harms its reputation among prospective purchasers, lenders and the public. Fernbrook argues that the registration of Chargeable Conciliations will undermine its ability to secure financing for other projects and to sell units in current and future projects.

[15] Permanent loss of market share and irrevocable damage to business reputation, if proven, can constitute irreparable harm: *RJR MacDonald*, at p. 341; *Canpages Inc. v. Quebecor Media Inc.*, 2008 CanLII 26660 (Ont. S.C.), at paras. 11-12; *Bell Canada v. Rogers Communications Inc.*, 2009 CanLII 39481 (Ont. S.C.), at paras. 31-39. However, the evidence does not satisfy me that Fernbrook will suffer irreparable harm to its reputation or market share from the registration of Chargeable Conciliations on its builder record.

[16] Fernbrook's argument is premised on evidence from its Development Manager, Domenic Crignano, that Fernbrook "has zero Chargeable Conciliations registered against it." Mr. Crignano also states, "the presence of one or more Chargeable Conciliations on a vendor's Ontario Builder Directory profile severely harms the

vendor's reputation in the eyes of prospective purchasers, lenders and the public." According to Mr. Crignano, consumers and lenders use Chargeable Conciliations as a measure of Fernbrook's performance. Fernbrook appended a printout from the Ontario Builder Directory for Fernbrook Homes to an affidavit from one of its employees. The printout says that Fernbrook has zero Chargeable Conciliations.

[17] Tarion produced an affidavit from one of its employees attaching a printout of a different page from the Ontario Builder Directory for Fernbrook Homes that includes more detailed information about Fernbrook properties. The pages produced by Tarion shows that 24 Chargeable Conciliations were registered against Fernbrook between 2010 and 2018. No Chargeable Conciliations were registered against Fernbrook in 2019 or 2020.

[18] I find that Mr. Crignano's affidavit is misleading or inaccurate. Contrary to Mr. Crignano's evidence, Fernbrook has Chargeable Conciliations on its record. If consumers searched Fernbrook on the Ontario Builder Directory, they might find the page produced by Fernbrook that says Fernbrook has zero Chargeable Conciliations. They might also find the page produced by Tarion page that says Fernbrook has had 24 Chargeable Conciliations over the last ten years.

[19] Mr. Crignano states in his affidavit that Fernbrook has a superb reputation and has delivered occupancy for 8,261 units in the last ten years. If Mr. Crignano's evidence is true, the 24 Chargeable Conciliations on Fernbrook's record do not appear to have tarnished its reputation or diminished the strength of its business. There is no evidence that the past 24 Chargeable Conciliations had any impact on Fernbrook's reputation. The fact that Fernbrook has 24 Chargeable Conciliations on its record undermines Mr. Crignano's assertion that the presence of any Chargeable Conciliations will severely harm Fernbrook's reputation.

[20] Proof of irreparable harm cannot be based on speculation. Fernbrook has not adduced any expert evidence about the impact of Chargeable Conciliations on a builder's reputation or ability to secure financing. Nor has Fernbrook adduced evidence from prospective lenders or prospective buyers about the impact of Chargeable Conciliations on their decision to lend to or buy from Fernbrook. Mr. Crignano asserts a causal connection between the existence of Chargeable Conciliations and Fernbrook's ability to arrange financing and sell units. If there is a causal connection as Mr. Crignano asserts, Fernbrook should have been able to adduce evidence that the registration of Chargeable Conciliations in the past resulted in a drop in sales or prevented Fernbrook from securing financing in the past. Fernbrook did not adduce any such evidence.

[21] I am not satisfied that the registration of additional Chargeable Conciliations will irrevocably harm Fernbrook's reputation or its market share.

[22] Fernbrook makes an alternative argument that it will suffer irreparable harm if Tarion renders decisions on the Garrison Point compensation claims before its Application for an interpretation of the definition of "Unavoidable Delay" is heard on December 3, 2021 because Fernbrook would be deprived of the ability to challenge or appeal Tarion's conciliation decisions and their Application will be rendered moot. I do not accept this argument.

[23] Tarion routinely decides issue of the statutory or contract interpretation. If either the purchaser or the builder disagrees with Tarion's conciliation decision, they can challenge it. While Fernbrook does not have a statutory right to appeal an adverse decision on the Garrison Point delayed occupancy compensation claims, it can commence a civil action against Tarion to challenge the decision (which it has already done) or seek judicial review of the decision: *2122157 Ontario Inc. v. Tarion Warranty Corporation*, 2016 ONSC 851, at para. 16.

[24] Issue estoppel will not preclude Fernbrook from arguing that the water supply problem and COVID-19 meet the definition of "Unavoidable Delay" on its Application even if Tarion has issued a decision to the contrary: *Metropolitan Toronto Condominium Corp. No. 1352 v. Newport Beach Development Inc.*, 2012 ONCA 850 at paras. 67-76. If the Court comes to a different decision than Tarion on whether the water supply problem or COVID-19 constitute an "Unavoidable Delay" for the purpose of late occupancy compensation, Tarion's decisions will be reversed, any Chargeable Conciliation that has been registered will be removed from the Ontario Builder Directory and Tarion will not seek repayment from Fernbrook of any Garrison Point compensation claims paid.

[25] Fernbrook has a mechanism to review Tarion's decisions on the Garrison Point compensation claims. Fernbrook has already initiated that process. Fernbrook's right to have a court decide the contract interpretation issue will not be irreparably frustrated if the conciliation process continues before Fernbrook's Application is heard in December.

C. Balance of Convenience Favours Denying an Injunction

[26] Even if Fernbrook had established irreparable harm to its reputation or its legal position on its Application, the balance of convenience would still favour denying the injunction.

[27] This is not a dispute between private litigants. Fernbrook is asking for an injunction to prevent Tarion from carrying out its statutory mandate. In essence, Fernbrook is asking this Court to suspend the operation of the *ONHWP Act*. Interim injunction applications involving a challenge to the constitutional validity of legislation or the authority of a government agency to enforce legislation "stand on a different footing

than ordinary cases involving claims for such relief as between private litigants": *RJR-MacDonald Inc.*, at para. 69.

[28] Because Fernbrook is asking the Court to prevent Tarion from carrying out its statutory mandate to conciliate claims, I must consider the interests of new home buyers. I must decide whether it is "equitable and just" to deprive new home owners of the protection of the *ONHWP Act* while Fernbrook litigates the meaning of "Unavoidable Delay": *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at para. 56.

[29] There is a significant public interest in allowing the conciliation process to continue. The *ONHWP Act* was enacted to protect purchasers of new homes: *MTCC 1352 v. Newport Beach*, at para. 7. The *ONHWP Act* protects new home buyers in several ways including by providing compensation when builders fail to comply with the occupancy terms of their purchase agreement. Tarion was created with the express purpose of administering the *ONHWP Act* and protecting new home buyers. Claims submitted to Tarion are meant to be a quick and inexpensive way for homeowners to seek compensation for late occupancy: *MTCC 1352 v. Newport Beach*, at para. 17. The legislation gives Tarion the authority to decide disputes at first instance in an expedited process. If the homebuyer or builder is unhappy with Tarion's decision, they each have a mechanism to review the adverse decision. The legislature deliberately designed the conciliation process to prioritize the interests of the consumers over the interests of the builders. Granting an injunction that would prohibit Tarion from carrying out conciliation is contrary to the intention of the *ONHWP Act*.

[30] Fernbrook argues that granting an injunction will not have broader implications for how Tarion carries out conciliations because the facts giving rise to Fernbrook's application are so unusual. I do not agree. The facts of this case are unusual because of the confluence of a municipal infrastructure problem and a temporary suspension of city inspections in response to a global pandemic. However, it is not unusual for builders to disagree with how Tarion interprets or might interpret its governing legislation, or the warranties under the *ONHWP Act*, or the terms of a purchase agreement. If an injunction were granted in this case, builders who are concerned about how Tarion might rule on a warranty claim would have an incentive to pre-emptively file an Application with the court to avoid an adverse ruling. It would frustrate the purpose of the *ONHWP Act* to allow Fernbrook, or any builder, to stop the conciliation process and delay compensation to homeowners when they anticipate an adverse decision from Tarion by filing an Application in court and seeking an injunction.

[31] I must balance the public interest in allowing Tarion to carry out its statutory mandate against Fernbrook's interests. Fernbrook is asserting a purely private business interest. Fernbrook is only concerned about its own reputation. Fernbrook

has not advanced any public interest in suspending the conciliation process for the Garrison Point purchasers. I find that the harm to the public interest in suspending the conciliation process outweighs Fernbrooks' private interest in avoiding Chargeable Conciliations. The balance of convenience favours denying an injunction.

D. Conclusion

[32] Fernbrook's application for an interim injunction is dismissed. I urge the parties to settle the issue of costs. If they are unable to reach an agreement, they can each upload a bill of costs together with brief written submissions of no more than five pages no later than July 23, 2021.

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Davies J.

Date: July 14, 2021