

THE COURT OF APPEAL FOR ONTARIO SETS THE RECORD STRAIGHT CONCERNING THE APPLICABILITY OF THE TARIION ADDENDUM IN RESIDENTIAL AGREEMENTS OF PURCHASE AND SALE

by Ian Katchin

Overview

In its release of the highly-anticipated decision in *Ingarra v. 301099 Ontario Limited (Previn Court Homes)*, 2020 ONCA 103 on February 11, 2020 (the "**Appeal Decision**"), the Ontario Court of Appeal addressed the issue of whether an agreement between lawyers (made orally and through the exchange of faxes and emails) to extend the agreed upon "**Firm Closing Date**" to the "**Interim Closing Dates**" (with adjustments remaining as at January 11, 2018) superseded the operation and effect of the provisions of the Tarion Addendum.

In allowing the appeal of the builder, 301099 Ontario Limited (Previn Court Homes) ("**Previn**"), the Court of Appeal for Ontario overturned the decision of the Honourable Madam Justice Kimmel, released May 30, 2019 (reported at 2019 ONSC 3347) (the "**Application Decision**"), which found that the parties did not have the contractual freedom to set a closing date outside of the confines of the Tarion Addendum.

In arriving at its decision, the Court of Appeal noted, among other things, that the Tarion Addendum is:

- a small-font, single spaced, convoluted and confusingly long and obscure document;
- a trap for the unwary, particularly the unwary lay person;
- not "consumer protective" by any stretch of the imagination;
- consistent with Lord Devlin's sardonic remark: "This sort of document is not meant to be read, still less to be understood": *McCutcheon v. David MacBrayne Ltd.*, [1964] 1 W.L.R. 125 (U.K. H.L.);
- only marginally better drafted than its predecessor, which was described in the decision in *Sirasena v. Oakdale Village Homes Inc.*, 2010 ONSC 2996 at para. 11, 100 R.P.R. (4th) 94, aff'd 2013 ONSC 1051, 30 R.P.R. (5th) 31 (Div. Ct.) as containing "consumer-unfriendly language"; and



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- with respect to the process set out in section 4 of the Tarion Addendum, "cumbersome, paper-intensive and therefore expensive."

Facts

On March 26, 2016, Anthony John Ingarra (as buyer) and Previn (as seller) entered into an Agreement of Purchase and Sale (the "**APS**") concerning the property located at 63 Walker Boulevard, Alliston, Ontario (the "**Property**").

As the APS was for a new home, it included a "Tarion Addendum to Agreement of Purchase and Sale – Delayed Closing Warranty" (the "**Tarion Addendum**") as Schedule "T" pursuant to the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended.

Under the terms of the APS and the Tarion Addendum, the parties fixed what the Tarion Addendum called a "Firm Closing Date" for January 11, 2018.

Under the terms of the Tarion Addendum, Previn was required to deliver an "Occupancy Permit" on or before "Closing", which means "the completion of the sale of the home including transfer of title to the home to the Purchaser..."

The "Occupancy Permit" was not delivered by Previn to Mr. Ingarra until January 12, 2018 (one day after the "**Firm Closing Date**"). As such, Previn was not in a position to close on the Firm Closing Date.

But, Mr. Ingarra was also not in a position to close on the "Firm Closing Date" of January 11, 2018, because he was not yet in funds. Mr. Ingarra's lender required five days from its appraisal to complete the process and approve the loan.

The Tarion Addendum sets a framework for changing dates, including closing dates, and the parties did not follow that framework in relation to extending the "Firm Closing Date" from January 11, 2018 to a later date.

Instead, on January 11, 2018, Mr. Ingarra's counsel sent a letter to Previn's counsel stating, among other things, as follows:

"Our client's lender B2B Bank completed their appraisal of the subject property and advised that the exterior of the property is not complete as required by them in order to advance. Accordingly, an extension is required until their advance criteria can be met."

The following day, on January 12, 2018, Previn's counsel agreed with the extension request and the "Firm Closing Date" was extended by mutual agreement to January 15, 2018 – but this extension was not in accordance with the requirements of the Tarion Addendum.

By letter dated January 15, 2018, Mr. Ingarra was still not in a position to close the purchase of the Property. As a result, his counsel write to Previn's counsel and requested an additional extension:

"Our client requires an extension to tomorrow (January 16, 2018) as his lender has not completed the Appraisal. Kindly contact your client and advise."

Previn's counsel agreed with the extension request by correspondence, dated January 15, 2018 as follows:

"Further to your request, my client agrees to extend the closing of the above-noted transaction to no later than Wednesday January 17, 2018 with adjustments remaining as at January 11, 2017 [sic]. All other terms of the Agreement of Purchase and Sale are to remain the same and time is to remain of the essence."

Mr. Ingarra was not in funds on January 17, 2018 and was unable to close.

By letter that day, his counsel requested an additional extension to January 18, 2018 (the third extension request). Previn's counsel refused stating as follows:

"Unfortunately, my client which has been more than reasonable in granting extensions without requiring the payment of an extension fee, has lost its confidence in your client's ability to close this transaction, and is simply not prepared to grant any further extensions."

Under the circumstances, my client hereby declares your client in breach of the Agreement of Purchase and Sale, considers the Agreement of Purchase and Sale to be at an end and deems the deposit paid as forfeited. It is the intention of my client to now relist the property for sale."

The Application

On March 20, 2018, Mr. Ingarra commenced his Application seeking, among other things, an Order (a) interpreting the closing date "as set by [Previn], to be in breach of the [APS]", (b) determining that January 11, 2018 was not a valid "Firm Closing Date" pursuant to the APS and, as such that [Ingarra] was not in breach of the [APS], and (c) requiring Previn to complete the sale pursuant to the APS.

On May 30, 2019, the Honorable Madam Justice Kimmel released the Application Decision and found that the parties did not have the contractual freedom to set a closing date outside of the confines of the Tarion Addendum. At para. 46 of the Application Decision, her Honour stated as follows:

"Their agreement did not comply with the requirements prescribed by section 4 of the Tarion Addendum, which the parties were clearly familiar with having adhere to them when the Amending Agreement was entered into on August 3, 2017. Their failed efforts to retroactively preserve the January 11, 2018 Firm Closing Date through the agreement to Interim Closing Dates have no legal effect."

Although Previn had options regarding setting a new closing date under the Tarion Addendum, it took no steps on January 11, 2018 to set a new closing date under the Tarion Addendum framework. As a result, the Application Judge found that s. 3(c) of the Tarion Addendum operated to set a new "Delayed Closing Date" 90 days after the "Firm Closing Date", on April 11, 2018. This provision states that:

"[i]f notice of a new Delayed Closing Date is not given by the Vendor before the Firm Closing Date, the new Delayed Closing Date shall be deemed to be the date which is 90 days after the Firm Closing Date."

The Application Judge held that s. 4 of the Tarion Addendum limited the contractual freedom of the parties to set a new closing date and that s. 13 gave the Tarion Addendum precedence.

The Application Judge went on to consider the requirements of s. 4 of the Tarion Addendum and concluded that:

"The purported amendments to the Firm Closing Date that were reflected in the agreement between the lawyers were voidable by the Purchaser by virtue of section 4(a) of the Tarion Addendum and were voided by the Purchaser's continued efforts to complete the APS notwithstanding the Vendor's purported (and valid) termination of it on January 17, 2018."

As a result of the foregoing, the Application Judge found that Previn's purported termination of the APS on January 17, 2018 was invalid on the basis that "none of the permitted grounds for termination under section 10 of the Tarion Addendum were available to the Vendor."

In particular, the Application Judge found that the parties' extension agreements (through counsel) were not agreements under, and did not supersede the Tarion Addendum because they were (a) not formalized as amendments to the APS under section 4 of the Tarion Addendum, and (b) were voided by Mr. Ingarra having commenced the Application.

The Application Judge then found that Mr. Ingarra had not breached the APS. Instead, Previn breached the APS by repudiating it on January 17, 2018. Previn's termination of the APS on January 17, 2018 was, thus, invalid.

Lastly, the Application Judge found that the closing date ceased to be January 11, 2018 and was deemed extended to April 11, 2018.

The Appeal

The three main issues on the appeal were whether the Application Judge erred in (a) holding that Previn was in breach of the APS; (b) holding that Mr. Ingarra was not in breach of the APS; and (c) not finding that the doctrines of waiver or estoppel precluded Mr. Ingarra's claims.

In the Appeal Decision, the Court of Appeal found that the Application Judge erred in finding that the parties were not free to set a new advanced closing date before the "Delayed Closing Date", outside of the confines of the Tarion Addendum.

The Court of Appeal found that the parties were free to set new closing dates in the manner in which they did (i.e. outside of the confines of the Tarion Addendum) for two reasons:

1. Section 4 of the Tarion Addendum does not render unenforceable non-compliant amendments. Despite stating that the Tarion Addendum sets out a "framework" for altering the critical dates "which cannot be altered contractually except as set out in section 4", the last sentence in s. 4(a) provides: "Any amendment not in accordance with this section is **voidable** at the option of the Purchaser." (emphasis added)

A non-compliant amendment altering the closing is not "invalid" as the Application Judge found. It is only voidable.

The failure to close on the "Firm Closing Date" of January 11, 2018 had the effect of leaving either party free to specify a new closing date on reasonable notice and restore the force of the "time of the essence" provision.

2. Section 10 of the Tarion Addendum addresses "Termination of the Purchase Agreement" and provides "[n]othing in this Addendum derogates from any right of termination that either the Purchaser or the Vendor may have at law or in equity on the basis of, for example, frustration of contract or fundamental breach of contract."

Since Mr. Ingarra was not in funds to close on the new agreed closing date, it was open to Previn to terminate the APS. Doing so was not prohibited by the Tarion Addendum.

In granting Previn's appeal, the Court of Appeal found that the Application Judge erred in finding that the amended closing date was "voided by the Purchaser's continued efforts to complete the APS notwithstanding the Vendor's purported (and invalid) termination of it on January 17, 2018." To the contrary, as Mr. Ingarra had not by then exercised his right to void the lawyers' extension agreement, Previn's termination was valid under s. 10(e) of the Tarion Addendum which states:

"Nothing in this Addendum derogates from any right of termination that either the Purchaser or the Vendor may have at law or in equity on the basis of, for example, frustration or contract or fundamental breach of contract."

The Court of Appeal summarized its reasoning as follows:

"Before Previn Homes terminated the agreement of purchase and sale on January 17, 2018, Mr. Ingarra had the option to void the newly set closing date, because the alteration was not compliant with s. 4 of the Addendum. The deemed Delayed Closing Date on April 11, 2018 would then have been effective. However, he did not expressly do so..."

Section 4(a) of the Tarion Addendum states that the Addendum is a "framework". It makes non-confirming amendments voidable at the option of the purchaser. Section 4 gave Mr. Ingarra the option to void the APS. He chose not to exercise that option – three times. As such, Previn was within its rights to terminate the APS.

As a result of the foregoing, the Court of Appeal granted Previn's appeal and set aside the decision of the Application Judge and dismissed Ingarra's Application with costs.

** Ian P. Katchin is a Partner in the Commercial Litigation and Alternative Dispute Resolution practice groups at Fogler, Rubinoff LLP. He was counsel to the Appellant, 301099 Ontario Limited o/a Previn Court Homes in this Appeal, and frequently acts for vendors in commercial and residential real estate disputes.*