COURT OF APPEAL FOR ONTARIO

CITATION: Metropolitan Toronto Condominium Corporation No. 1352 v. Newport Beach Development Inc., 2012 ONCA 850
DATE: 20121204
DOCKET: C54462

Winkler C.J.O., Laskin and Watt JJ.A.

BETWEEN

Metropolitan Toronto Condominium Corporation No. 1352

Plaintiff (Respondent)

and

Newport Beach Development Inc., Canderel Stoneridge Equity Group Inc., Tarion Warranty Corporation, Enersys Engineering Group Inc., Eric Pun a.k.a. E.P.K. Pun and Salvatore Spampinato a.k.a. Sal Spampinato

Defendants (Appellants/Respondent)

Irving Marks and Carla Lubell, for the appellants

David Outerbridge, for the respondent Tarion Warranty Corporation

Blaine Fedson, for the respondent Metropolitan Toronto Condominium Corporation No. 1352

Heard: April 2, 2012

On appeal from the order of Justice Katherine B. Corrick of the Superior Court of Justice, dated September 16, 2011, with reasons reported at 2011 ONSC 5445.

Laskin J.A.:

A. INTRODUCTION

[1] Newport Beach Development Inc., along with Canderel Stoneridge Equity Group Inc. and Sal Spampinato, appeal the dismissal of their Rule 21 motion.

[2] The respondent Metropolitan Toronto Condominium Corporation No. 1352 ("Metro 1352") manages a luxury condominium project in Etobicoke near the shore of Lake Ontario. It alleges that the project has two major construction defects. It claims that the sanitary sewer system was not built properly, causing toilets in the condominium units to overflow and the units themselves to flood with sewage. It also claims that a systemic failure of the exterior cladding over the project, called the exterior insulated finish system ("EIFS"), has caused water penetration in the condominium units.

[3] Metro 1352 sought compensation for these two defects under the *Ontario New Home Warranties Plan Act,* R.S.O. 1990, c. 0.31 (the "Act"). The administrator of the Act, the respondent Tarion Warranty Corporation, denied compensation. Instead of appealing Tarion's decisions to the Licence Appeal Tribunal, as it was entitled to do, Metro 1352 started this litigation. It has sued Newport, the vendor and declarant of the project; Canderel, a developer related to Newport; Spampinato, an officer of Canderel; Enersys Engineering Group Ltd. and Eric Pun, the engineers on the project; and Tarion. It has asserted causes of action for breach of statutory warranty, negligence, breach of fiduciary duty and breach of contract. The engineers have been noted in default. The other defendants have not delivered a statement of defence.

[4] On its Rule 21 motion Newport asked for various forms of relief, but principally for an order dismissing the action on the ground that the litigation is an

abuse of process. Newport argued that Tarion's decisions denying warranty coverage could only be reviewed by an appeal to the License Appeal Tribunal. Either the doctrine of issue estoppel or the rule against collateral attack prevented Metro 1352 from re-litigating its claim by a civil action. The motion judge, Corrick J., disagreed and dismissed the motion in its entirety.

[5] On its appeal Newport raises three issues, which I put in the form of questions:

> (1) Did the motion judge err by failing to dismiss Metro 1352's claims relating to defects in the sanitary sewer system and the EIFS, both against Newport and Tarion, as an abuse of process?
>
> (2) Did the motion judge err by failing to dismiss the claim for breach of warranty for defects in the sanitary sewer system on the ground that they do not constitute a major structural defect under s. 13(1)(b) of the Act?
>
> (3) Did the motion judge err by failing to dismiss the claim for defects in the EIFS on the ground that the claim was a new cause of action added by amendment to the statement of claim after the expiry of the limitation period?

[6] Tarion supports Metro 1352's right to maintain a civil action against both it and Newport, although for reasons different from those given by the motion judge.

B. RELEVANT BACKGROUND

(1) The legislative and regulatory framework under the *Ontario New Home Warranties Plan Act*

[7] The purpose of the Act is to protect the owners of new homes. One way the legislature sought to accomplish this was to stipulate certain warranties deemed to be given by vendors to homeowners, and to provide compensation for breach of these warranties out of a statutorily created guarantee fund.

(a) Statutory warranties and compensation for their breach

[8] Section 13(1) sets out the statutory warranties:

> Every vendor of a home warrants to the owner,
>
> (a) that the home,
>
> (i) is constructed in a workmanlike manner and is free from defects in material,
>
> (ii) is fit for habitation, and
>
> (iii) is constructed in accordance with the Ontario Building Code;
>
> (b) that the home is free of major structural defects as defined by the regulations; and
>
> (c) such other warranties as are prescribed by the regulations.

[9] Section 13(6) provides that owners and vendors cannot contract out of or waive these warranties.

[10] Section 14(3) provides for compensation for breach of the warranties in s. 13(1):

> Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
>
> > (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
> >
> > (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

[11] Section 14(4) deals specifically with compensation for damage because of a major structural defect:

> Subject to the regulations, an owner who suffers damage because of a major structural defect mentioned in clause 13 (1)(b) is entitled to receive payment out of the guarantee fund for the cost of the remedial work required to correct the major structural defect if the owner makes a claim within four years after the warranty expires or such longer time under such conditions as are prescribed.

[12] Section 15(a) provides that, for the purposes of ss. 13 and 14, a condominium corporation, such as Metro 1352, shall be deemed to be the owner of the common elements of the corporation, and thus the beneficiary of the statutory warranties for the common elements.

[13] The duration of the statutory warranties for construction defects ranges from one to seven years. The protection given to owners under the Act is, however, limited in the following ways:

- An owner may only make a claim against Tarion for a vendor's breach of a statutory warranty; an owner has no claim against Tarion for any common law causes of action.

- An owner may not make a claim for compensation from the guarantee fund for damage caused by someone other than the vendor.

- An owner's claims against Tarion are limited to remedying the defect and any damage to the features of the home directly caused by the defect; an owner has no claim against Tarion for other damage, such as personal injury or property damage.

- An owner's recovery from the guarantee fund is capped by dollar limits set out in the regulation passed under the Act.

Because of these limits on the statutory protection available to homeowners, s. 13(6) of the Act provides that the statutory warranties are in addition to any other rights the owner may have, including any other agreed upon warranty.

(b) The role of Tarion Warranty Corporation

[14] Tarion, a non-profit corporation, was created under s. 2 of the Act to administer the Ontario New Home Warranties Plan. Tarion also established and administers the guarantee fund for the payment of compensation under s. 14, and assists in conciliating disputes between vendors and owners.

[15] If a homeowner believes that a statutory warranty has been breached, and that the vendor has not remedied the breach, the homeowner may make a claim

to Tarion in accordance with the regulatory framework set out for administering the Act in *Administration of the Plan*, R.R.O. 1990, Reg. 892 ("Regulation 892").

[16] Tarion describes the claims adjudication process under Regulation 892 in its factum. Once a claim is made, the vendor has a specified amount of time to repair the alleged defect. If the vendor does not remedy the defect, Tarion will try to resolve the dispute by conciliation. Typically Tarion gathers information about the alleged defect and conducts an on-site inspection of the property. Both the homeowner and the vendor are given the opportunity to submit arguments, expert evidence, documents, and information from relevant witnesses.

[17] In cases where the dispute is not resolved by conciliation, Tarion issues a warranty assessment report, which is a preliminary assessment of whether an alleged defect is covered by a statutory warranty. If, as occurred in the present case, an owner disputes Tarion's conclusion on warrantability in the warranty assessment report, Tarion will adjudicate the owner's claim for compensation under s. 14 of the Act by issuing a formal decision letter. Section 16(1) of the Act requires that Tarion give the owner notice of the decision, together with reasons.

(c) The Licence Appeal Tribunal

[18] Under s. 16(2) of the Act, an owner dissatisfied with a decision of Tarion is entitled to a hearing before the Licence Appeal Tribunal. Only a Tarion decision

that a claim is not warrantable is reviewable before the Tribunal. A vendor has no right to appeal a Tarion decision that a claim is warrantable.

[19] Section 16(4) of the Act prescribes the persons who are parties to the proceeding before the Tribunal. They include Tarion, the person or owner who has asked for the appeal, and any other person the Tribunal may specify, typically the vendor to the dispute. The hearing before the Tribunal is a trial *de novo* on the issue of warrantability. It is conducted in accordance with the Tribunal's rules for procedure, disclosure and evidence: see Ontario, Licence Appeal Tribunal, *Rules of Practice*.

[20] Section 16(3) of the Act sets out the Tribunal's powers. They are limited to directing Tarion "to take such action as the Tribunal considers [Tarion] ought to take in accordance with this Act and the regulations". In exercising its powers, the Tribunal may substitute its opinion for that of Tarion.

[21] Under s. 11(1) of the *Licence Appeal Tribunal Act, 1999*, S.O. 1999 c.12, Sch. G, either party to a proceeding before the Tribunal may appeal from its decision to the Divisional Court.

(d) A vendor's review rights

[22] As I have said, a vendor has no right to challenge before the Licence Appeal Tribunal a Tarion decision that a homeowner's claim is warrantable. However, a vendor is not without recourse for an adverse warranty decision. For

example, a vendor may challenge a Tarion warranty decision by a full arbitration hearing in the Builder Arbitration Forum.

(2) Metro 1352's warranty claims

(a) The sanitary sewer system claim

[23] Before starting its lawsuit, Metro 1352 claimed compensation from the Tarion guarantee fund for breach of warranty pertaining to the sanitary sewer system. Metro 1352 first reported its claim in August 2002, and submitted further documentation in the summer of 2005. After inspecting the project, Tarion issued a decision letter in September 2005 disallowing Metro 1352's claim.

[24] Metro 1352 appealed Tarion's decision to the Licence Appeal Tribunal. At the request of Tarion, Newport was added as a party to the appeal. Pre-appeal hearings took place. However, six days before the appeal was to be heard, Metro 1352 withdrew its appeal. Before doing so, it obtained Tarion's assurance that Tarion would not plead *res judicata* should Metro 1352 start a civil action and name Tarion as a defendant. Newport was not asked to provide a similar assurance.

[25] Metro 1352 started its lawsuit shortly after withdrawing its appeal.

(b) The EIFS claim

[26] Metro 1352 also brought a warranty claim for payment from the Tarion guarantee fund pertaining to the EIFS defects. It first gave notice of this warranty

claim to Tarion in November 2007, by which time it had started its civil action. In April 2008, Metro 1352 asked Tarion to conciliate its claim. Conciliation did not resolve the dispute. In July 2008, Tarion issued a warranty assessment report, which concluded that the EIFS defects claim was not warrantable. In October 2010, Tarion issued a decision letter formally denying compensation from the fund.

[27] In November 2010, Metro 1352 appealed Tarion's decision to the Licence Appeal Tribunal. As with the appeal on the sanitary sewer system claim, at Tarion's request, Newport was added as a party to this appeal. The appeal to the Licence Appeal Tribunal has been stayed pending the outcome of the appeal before this court.

(3) The litigation

[28] Metro 1352 delivered a statement of claim in August 2006, and an amended statement of claim in July 2010. It has sued Newport, Tarion and several other parties. It alleges not only breaches of the statutory warranties under s. 13 of the Act, but also negligence, breach of contract and breach of fiduciary duty. It claims $2.7 million for repair costs, which exceeds the maximum statutory limit of recoverable compensation of $2.5 million. It also asks for $150,000 in exemplary damages, which are not an included item for recovery under the Act.

[29] Metro 1352 agreed that the defendants did not have to deliver a statement of defence while Tarion was attempting to conciliate the disputes. Although conciliation was unsuccessful, no statement of defence has been delivered.

C. ANALYSIS

First Issue – Did the motion judge err by failing to dismiss Metro 1352's claims relating to defects in the sanitary sewer system and the EIFS as an abuse of process?

[30] Newport moved under r. 21.01(3)(d) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to dismiss Metro 1352's claim for defects in the sanitary sewer system and the EIFS as an abuse of process. Newport sought the dismissal of these claims both against it and the parties related to it, and against Tarion. The motion judge dismissed Newport's abuse of process motion. Newport submits that she erred in doing so. I will consider separately Metro 1352's action against Newport and the parties related to it and Metro 1352's action against Tarion.

(1) Metro 1352's action against Newport

[31] Newport argues that allowing Metro 1352 to maintain this action against it and the parties related to it is manifestly unfair and amounts to an abuse of process. This argument has three prongs:

- Issue Estoppel – Tarion has made a final and judicial determination of Metro 1352's claims;

thus, issue estoppel prevents Metro 1352 from re-litigating these claims in another forum;

- Collateral Attack – Metro 1352's civil action is an impermissible collateral attack on Tarion's decisions; if Metro 1352 wishes to challenge Tarion's decisions, it must do so by an appeal before the Licence Appeal Tribunal, the administrative body intended by the legislature to review Tarion decisions;

- Section 23 of the Purchase Agreements – Section 23 of the purchase agreements between Newport and the homeowners precludes claims for negligence, breach of contract, breach of fiduciary duty, and any warranties apart from those provided for under the Act.

(a) Issue estoppel

[32] Issue estoppel and collateral attack are two doctrines intended to prevent abuse of the process of decision making. Issue estoppel prevents a party from re-litigating in one forum an issue already decided in another forum. It rests on the idea that a litigant should be able to rely on the decision of an authoritative adjudicator being final and binding on the other party: see *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52, [2011] 3 S.C.R. 422, at para. 1.

[33] As I've explained above, Metro 1352 has sued Newport for negligence, breach of contract and breach of fiduciary duty, as well as for breach of the statutory warranties. Section 13(6) of the Act provides that the statutory warranties are in addition to any other rights a homeowner may have. Therefore,

subject to Newport's argument on s. 23 of the purchase agreements, Metro 1352 is entitled to pursue its common law causes of action in the Superior Court. The narrow question Newport's appeal raises is whether issue estoppel forecloses a civil action on the statutory warranties or whether applying issue estoppel would work an injustice.

[34] It is now well accepted that a decision made by an administrative tribunal or officer can give rise to issue estoppel: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, [2001] 2 S.C.R. 460; *British Columbia (Workers' Compensation Board) v. Figliola*, at para. 27. Tarion, though a private corporation, was established under a statute to administer a legislative regime. The decision of a Tarion field claim representative, acting as an administrative officer, may therefore be subject to the operation of issue estoppel.

[35] However, as Binnie J. emphasized in *Danyluk,* at para. 33, the underlying purpose of issue estoppel is to balance the public interest in the finality of litigation against the public interest in ensuring justice is done in a particular case. This balancing requires the court to undertake a two-step analysis. At the first step, the court determines whether the moving party – here Newport – has established the preconditions to the application of issue estoppel. If it has, at the second step, the court determines, in its discretion, whether issue estoppel ought to be applied or whether applying it would work an injustice.

[36] The preconditions for applying issue estoppel are well-established: see *Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248; *Danyluk*, at paras. 35-61. To apply issue estoppel to Metro 1352's civil action, Newport had to establish that:

- Tarion decided the same question or issues now raised in the action;
- Tarion's decisions were judicial decisions;
- Tarion's decisions were final decisions; and,
- The parties or their privies to Tarion's decisions were the same persons as the parties or their privies to the civil action.

[37] The motion judge held that Newport had not made out the preconditions for issue estoppel because Tarion's decisions were neither judicial decisions nor final decisions. Both Newport and Tarion submit that the motion judge erred in her holding. They contend that Tarion decisions are judicial decisions and final decisions for the purpose of applying issue estoppel.

[38] However, their positions then diverge. Newport says that it has satisfied the preconditions for issue estoppel, and the court should apply issue estoppel and dismiss Metro 1352's action as an abuse of process. Tarion says that issue estoppel does not bar Metro 1352's action because the plaintiff has two alternative ways to challenge a Tarion decision: either by an appeal to the Licence Appeal Tribunal or, the way it chose, by an action in the Superior Court.

In other words, because the court action is, in essence, a review rather than a re-litigation of Tarion's decisions, issue estoppel does not apply.

[39] For reasons that I will explain, I agree with Newport and Tarion that for the purpose of applying issue estoppel, Tarion's decisions are judicial and final decisions. I do not agree with either party on what flows from that determination.

[40] Assuming the other preconditions for applying issue estoppel have been met – and I have considerable doubt about the same parties requirement – Tarion decisions could give rise to issue estoppel and bar Metro 1352's statutory warranty claims in the Superior Court. However, I would exercise my discretion not to apply issue estoppel to the Tarion decisions because doing so would work an injustice. Thus, although for different reasons, I reach the same conclusion as the motion judge and Tarion and would not grant Newport's motion to dismiss the claim against it as an abuse of process.

[41] Before dealing with the preconditions for applying issue estoppel and the court's discretion not to apply it, I will explain briefly why I do not accept Tarion's position. Tarion argues that a homeowner's civil action against a vendor is a "statutorily permitted" method of reviewing Tarion's decisions. Therefore, issue estoppel could never bar the homeowner's claim. My short answer to this argument is that the statute does not support Tarion's position.

[42] The Act authorizes only one method for reviewing a Tarion decision: an appeal to the Licence Appeal Tribunal. The Act does not preclude a civil action against the vendor on the statutory warranties. But, the Act does not expressly say, as it does in respect of appeals to the Tribunal, that a homeowner can appeal or review a Tarion decision by commencing a civil action. All that the Act expressly preserves – in s. 13(6) – is the homeowner's other rights against the vendor. The Act's silence, in my opinion, shows that a civil action is not a statutorily authorized review or appeal of a Tarion decision that would automatically preclude issue estoppel. Therefore, Newport can invoke issue estoppel if the preconditions for applying it are met, and applying it would not work an injustice.

(i) First step: have the preconditions for issue estoppel been met?

Same questions or issues

[43] The motion judge did not address this requirement. I am prepared to accept that the questions before Tarion – whether Newport breached the statutory warranties set out in the Act – are also raised in the litigation. At least to that extent, the amended statement of claim raises the same questions that were decided by Tarion. In the light of my finding that issue estoppel should not apply in this case, it is unnecessary to determine the extent to which Tarion's decisions on that issue would restrict the scope of Metro 1352's claims.

Judicial decision

[44] The motion judge held that Tarion decisions were not judicial decisions. She wrote at para. 30 of her reasons:

> There is no evidence before me that Tarion's decisions made in response to the Condominium Corporation's warranty claims were judicial ones. The decisions were not made by a tribunal or administrative authority exercising an adjudicative function. Rather, the evidence is that the decisions were made by Tarion following a conciliation process. "Conciliation" is defined in s. 1 of the Administration Regulation as "a process whereby the Corporation [Tarion] determines whether a disputed item listed on a notice of claim given to the Corporation under this Regulation, including section 4 or any of section 4.2 to 4.6, is covered by a warranty and whether repairs or compensation are required." Conciliation is an informal process during which Tarion investigates the claims made. There may be meetings between the parties, but there is no evidence before me to indicate that Tarion was performing an adjudicative function at the conciliation stage of the process or when it issued the Warranty Assessment Report or Decision Letter.

[45] I take the opposite view. Tarion decisions are judicial decisions. In *Danyluk*, at para. 35, Binnie J. confirmed that a decision will be a judicial decision if three criteria are met. First, the decision was made by a body capable of receiving and exercising adjudicative authority. Second, the decision was required to be made in a judicial manner. And third, the decision in question was, in fact, made in a judicial manner.

[46] Tarion's two decisions disallowing Metro 1352's warranty claims satisfy these three criteria.

[47] Tarion's decisions meet the first criterion because Tarion was established by legislation with a statutory mandate to administer and adjudicate warranty claims. Section 2(2) of the Act shows the legislature's intent that Tarion operate as an adjudicative body. Under s. 2(2), Tarion is charged with determining claims under s. 14. Tarion is also responsible for administering the guarantee fund and the program more generally. However, Tarion's dual role does not detract from its capacity to exercise adjudicative authority on the warranty claims.

[48] A decision maker can perform non-judicial functions as well as judicial functions, and still meet the first requirement for issue estoppel: see *Danyluk*, at para. 39. Administrative decision makers often play many roles in fulfilling their statutory mandate – for example, many administrative bodies engage in policy-making and analysis, or provide information and educational programming to the public. Although Tarion is responsible for investigation and conciliation, it nonetheless is capable of exercising adjudicative authority when it makes decisions under s. 14.

[49] Tarion's decisions meet the second criterion – they are required to be made in a judicial manner – because, they must be made under a prescribed statutory and regulatory regime that reflects many of the characteristics of a

judicial proceeding. Tarion receives written claims and factual information supporting these claims. It makes findings of fact and applies these findings to the objective statutory and regulatory standards for warranty coverage and compensation. Decisions based on findings of fact and the application of an objective legal standard to those facts is, as Binnie J. noted in *Danyluk*, at para. 41, "characteristic of a judicial function." Tarion must also give a written decision on the entitlement of a homeowner to warranty coverage, reasons for its decision, and notice of its decision to the homeowner.

[50] Tarion's procedures are far more informal than the procedures in a court action. However, a decision maker's determinations may still be judicial, even though its procedures are more flexible than those in a courtroom, and the decision is based on facts gathered by the decision maker: see *Minott v. O'Shanter Development Company Ltd.* (1999), 42 O.R. (3d) 321, at p. 335; *Knight v. Indian Head School Division No. 19,* [1990] 1 S.C.R. 653, at p. 685.

[51] Counsel for Tarion pointed out, quite correctly in my view, that the administrative regime for decision making under which Tarion operates is more formal than the administrative regime under which Ontario *Employment Standards Act,* R.S.O. 1990, c. E.14 ("ESA") officers operate. ESA officers make decisions in a very unstructured setting. Typically they sit at their desks, review documents, make phone calls to gather information and, generally, have little direct contact with the parties. Yet in *Danyluk*, the Supreme Court of Canada

held that the decisions of these officers are judicial decisions: see paras. 27-29, 41. Tarion decisions have more of the trappings of adjudication than ESA decisions, and therefore, against the benchmark of *Danyluk*, must be considered judicial decisions.

[52] The Tarion decisions meet the third criterion because they were, in fact, made in the judicial manner I have just described. Tarion's final decision letters on the sewer system and the EIFS claims show that the field claims representative in each case approached his determination in a judicial manner. Each letter sets out the applicable legislative language, identifies the requirements the claimant is obliged to prove, details the evidence and observations on which the decision is based, and reaches a conclusion. The reasons for the decision in each letter show that in making the determination the representative has applied the objective legal standard to the facts of the case.

[53] For these reasons, I disagree with the motion judge that Tarion's decisions are not judicial.

Final decisions

[54] The motion judge also held that Tarion's decisions denying Metro 1352 compensation were not final decisions. She relied, at paras. 31-33 of her reasons, on two letters sent by Tarion officials in respect of the EIFS defects claim – one sent to Metro 1352 and the other sent to Metro 1352 and Newport.

The first letter said, "[i]f you appeal, Tarion is prepared to consider any new relevant information that supports your claim for compensation." The second letter similarly said, "[p]lease note that Tarion will consider all new documents and information properly disclosed to Tarion in the appeal and Tarion may re-assess its decision at any time."

[55] The motion judge concluded, at para. 33, that these two letters showed Tarion's decisions to be "more investigative than adjudicative." Further, she concluded that because the decisions that Tarion makes are subject to change if it receives new information, its decisions are not final.

[56] Again, I take a different view. I make two points. First, that a judicial decision may be appealed does not affect the finality of the decision: see *Minott,* at p. 334-335; *Danyluk*, at para. 57. A Tarion decision is still final if it is not challenged, or not successfully challenged, on review.

[57] Second, Tarion's correspondence saying that it would consider additional information once an appeal is launched is reasonable and does not undermine the finality of its decisions. The hearing before the Licence Appeal Tribunal is a trial *de novo*. The homeowner or the vendor can put forward new evidence. Tarion, therefore, properly advised the parties that it would consider this additional evidence. That it would do so does not make its own decisions any less final if they are not appealed.

Same parties

[58] As I said earlier, I am dubious whether the same parties requirement has been met. In the proceedings before Tarion, Newport was not a party in any formal sense. Tarion was not required to give Newport notice of its decisions. And Newport would have had no right to appeal a decision granting warranty coverage to the Licence Appeal Tribunal.

[59] Active participation in an administrative proceeding might meet the same parties requirement of issue estoppel: see *Minott*, at p. 336. But Newport's participation in Metro 1352's warranty claims before Tarion was sketchy at best. The evidence shows that Newport did not participate at all in the proceedings leading to Tarion's decision on the sanitary sewer system claim, and participated only modestly in the proceedings leading to Tarion's decision on the EIFS claim. In *Radewych v. Brookfield Homes (Ontario) Ltd.*, [2007] O.J. No. 2483, at para. 30, aff'd on other grounds 2007 ONCA 721, Gray J. similarly concluded that the same parties requirement of issue estoppel had not been met because the vendor Brookfield had not played "any adversarial role" with respect to the claim.

[60] Overall, I am doubtful that the same parties requirement has been met. Even it has, however, I would exercise the court's discretion not to apply issue estoppel because to do so would work an injustice. This is the position put forward by Metro 1352, and I agree with it.

(ii) Second step: would applying issue estoppel work an injustice?

[61] As I said above, Metro 1352 is entitled under s. 13(6) of the Act to pursue its common law causes of action against Newport in Superior Court. Therefore, the narrow question on this appeal is whether issue estoppel forecloses a civil action on the statutory warranties or whether applying issue estoppel would work an injustice.

[62] Issue estoppel promotes the orderly administration of justice, but it should not be applied at the cost of real injustice in an individual case: see *Danyluk*, at para. 67. In exercising its discretion to apply or not to apply issue estoppel in any given case, the court must be mindful of context. The balancing exercise will vary with the nature of the proceedings in question.

[63] Where the former proceeding was conducted by an administrative officer or tribunal, the court will necessarily enjoy a broader discretion to decline to apply issue estoppel than where the former proceeding was before another court. This broader discretion arises from the "enormous range and diversity of the structures, mandates and procedures of administrative decision-makers": *Danyluk,* at para. 62. In determining whether justice would be done by applying issue estoppel, a judge must be free to consider the nature of the specific decision maker, the parties, the decision-making process, the statutory scheme, and the underlying legislative objectives.

[64] The considerations that may bear on whether the operation of issue estoppel would work an injustice are open-ended: see *Danyluk*, at para. 67. *Danyluk* lists a series of considerations applicable to that case: see paras. 68-81. *Minott* lists a similar series of considerations: see p. 341-343.

[65] In the case before us, two considerations weigh in favour of applying issue estoppel. First, Tarion has authority to grant significant financial compensation for breaches of the statutory warranties – up to $2.5 million for a claim relating to the common elements of a condominium project: Regulation 892, s. 6(8). There is not, in other words, a harsh statutory limit on recovery that would make closing the courtroom doors to complainants particularly unfair.

[66] Second, Metro 1352 has a right to appeal an adverse warranty decision to the specialized body established by the legislation to review Tarion decisions, the Licence Appeal Tribunal. Indeed, as Binnie J. said in *Danyluk,* at para. 50, “the unsuccessful litigant in administrative proceedings should be encouraged to pursue whatever administrative remedy is available." From the Tribunal’s decision, the homeowner may exercise a further right of appeal to the Divisional Court. Further, as I discuss later, a dissatisfied homeowner may bring an action against Tarion itself, as the administrator of the guarantee fund. Therefore, Metro 1352 would not be left without any recourse if the possibility of a civil action against Newporton the statutory warranties was, by issue estoppel, foreclosed.

[67] Weighed against these two considerations, however, are several considerations that make foreclosing a civil action against Newport unjust. The most important of these considerations is the consumer protection purpose of the legislation. Tarion's mandate is to protect the rights of new home buyers and ensure that builders abide by the legislation. An approach that promotes rather than limits the avenues a homeowner may pursue to obtain relief is consistent with that purpose.

[68] A second and related consideration is the wording of the Act. A major theme in the jurisprudence dealing with *res judicata* in the administrative law context is that parties should challenge the validity of an administrative decision through the appeal mechanism intended by the legislature: see *Danyluk,* at para. 74; *British Columbia (Workers' Compensation Board) v. Figliola*, at para. 34.

[69] This Act, however, does not contain any language to show that the legislature intended to preclude a civil action against the vendor on the statutory warranties and require homeowners to go to the Licence Appeal Tribunal. Although the Act does provide for an appeal to the Tribunal, the language of s. 16(3) is permissive. It says the homeowner is "entitled to a hearing by the Tribunal", not that he or she "shall" or "must" proceed before the Tribunal to the exclusion of any other forum.

[70] The language of the Act also bears on the weight to be given to any potential unfairness to the other party, in this case Newport. I said earlier that issue estoppel rests on the idea that, in organizing their affairs, parties should be entitled to rely on the final and binding nature of certain adjudicated outcomes. However, where an Act fails to expressly preclude an action in the courts, or specifically preserves a party's civil claims, a potential defendant should be on notice that an administrative decision may not be conclusive of liability.

[71] A third consideration – one related to the consumer protection purpose of the Act – is that claims to Tarion are meant to be a quick and relatively inexpensive way for homeowners to obtain relief for construction defects in their homes. Holding that Tarion's decisions could give rise to issue estoppel would make it more likely that its claim adjudication process would become more formal, costly and time-consuming: see *Machin v. Tomlinson* (2000), 51 O.R. (3d) 566, at para. 13; *Danyluk*, at para. 73. This would not be desirable.

[72] A fourth consideration is convenience. Homeowners are entitled to sue for common law damages in the Superior Court, as Metro 1352 has done in this case. Allowing homeowners to maintain all of their claims – including a claim for breach of the statutory warranties – against all parties in one forum has the advantage of convenience.

[73] A fifth consideration is the avoidance of inconsistent results. Metro 1352 has sued both Tarion and the vendor, Newport. As I will discuss, a homeowner can sue Tarion for payment out of the guarantee fund. In that action, Tarion cannot rely on issue estoppel (and indeed does not suggest that it can): Tarion is not a party to its decisions; it is the decision-maker.

[74] Thus, to say that a vendor such as Newport, can rely on issue estoppel when Tarion cannot, raises the real possibility of inconsistent results in cases such as this one, where the homeowner has sued both Tarion and the vendor. Precluding the application of issue estoppel in favour of the vendor avoids this possibility.

[75] A final consideration is the procedural differences between proceedings before Tarion and proceedings in the Superior Court. In proceedings before Tarion, an aggrieved homeowner does not have the right to pre-hearing production and discovery, or the right to cross-examine representatives or witnesses for the vendor. A plaintiff, of course, has these rights under our *Rules of Civil Procedure* governing Superior Court actions. Again, it would be inconsistent with the purpose of the Act and the concern for real justice underlying the doctrine of issue estoppel to deprive a homeowner of this option.

[76] Looking at these considerations cumulatively, I conclude that applying issue estoppel to Tarion's decisions, and thus foreclosing a civil action against

the vendor for damages for breach of the statutory warranties, would work a real injustice.

[77] My conclusion is limited to the effect of Tarion's decisions. If, for example, a homeowner appealed a Tarion decision to the Licence Appeal Tribunal, and the Tribunal dismissed the appeal, a Superior Court action seeking the same relief may well be met with a successful plea of issue estoppel. That scenario is not before us and need not be decided because Metro 1352 elected to abandon its appeal on the sanitary sewer system and its appeal on the EIFS has been stayed.

(2) Metro 1352's claim against Tarion

[78] Newport also asked that Metro 1352's action against Tarion be dismissed. It seeks this relief because if Metro 1352 obtains a judgment against Tarion, then Newport is obliged to indemnify Tarion. Newport's obligation to indemnify arises under the Vendor/Builder Agreement between Newport and Tarion, the "Subrogation" provisions in Part V of Regulation 892, and the indemnification bond given by Newport to Tarion.

[79] Newport makes two submissions in support of this part of its appeal. First, it submits that Tarion is not a suable entity in the civil courts. Second, it submits that s. 45 of the purchase agreements prevents Metro 1352 from suing any party

other than Newport for breach of the statutory warranties. The motion judge did not accept either submission, and in my view, she was right not to do so.

[80] On the first submission, she noted at para. 45 of her reasons that Tarion itself says that a homeowner may bring a civil cause of action against it. That is because Tarion is not only a decision-maker; it is the administrator of the guarantee fund. A civil action against Tarion simply seeks payment out of the fund for breach of the statutory warranties.

[81] Again, the wording of the Act is important. Nothing in the Act precludes a civil cause of action against Tarion. Further, s. 7(2) of Regulation 892 specifically contemplates that a homeowner may obtain a judgment in a civil action against Tarion. Under s. 7(1), Tarion is required to establish and maintain a guarantee fund under a contract with a licensed insurer. Then s. 7(2) states that under that contract, the insurer shall agree to indemnify Tarion for those sums which Tarion is obligated to pay "by reason of settlement of any dispute, judgment, action or claim arising under the Plan".

[82] In *Belanger v. 686853 Ontario Inc*. (1990), 74 O.R. (2d) 114 (Dist. Ct.), at p. 117, Wright D.C.J. held, correctly in my opinion, that a plaintiff homeowner has a right to sue the corporation administering the guarantee fund (now Tarion) because the homeowner has "a clear statutory entitlement to payment if the prerequisites are met". More recently, Maranger J. followed the decision in

Belanger and allowed a homeowner to sue Tarion under s. 14(3) of the Act for failing to pay from the fund damages for breach of warranty,: see *Ottawa-Carleton Standard Condominium Corp. No. 650 v. Claridge Homes Corp.*, [2009] O.J. No. 2139. Also, in *Radewych*, this court upheld the decision of Gray J. adding Tarion as a party defendant to civil proceedings.

[83] Allowing a homeowner to bring an action against Tarion for payment from the fund is therefore consistent with the direction of the jurisprudence in this province and the language and consumer protection purpose of the Act. Of course, the relief to which a homeowner would be entitled in an action against Tarion would be limited to the prescribed compensation for breach of the statutory warranties under the Act and Regulation 892.

[84] Newport's second submission relies on s. 45 of the purchase agreements, which states:

> The Purchaser shall not have any claim or cause of action (as a result of any matter or thing arising under or in connection with this Agreement) against any person or other legal entity, other than the person or entity named as the Vendor in this Agreement.

[85] The motion judge held at para. 47 of her reasons that s. 45 of the purchase agreements did not prevent Metro 1352 from suing Tarion.

> Section 45 is a broadly worded exclusion clause drafted by Newport, the vendor. To the extent that there is any ambiguity in this clause, the ambiguity must be resolved in favour of the purchaser. In my view, the clause is

> ambiguous with respect to Tarion. It is not clear that Tarion's statutory obligations under *ONHWPA* are "matters arising under or in connection with" the purchase agreement precluding any claim or cause of action against Tarion by the purchaser. Resolving the ambiguity in favour of the purchaser, the Condominium Corporation is entitled to bring an action against Tarion, and this claim is therefore not an abuse of process. I dismiss the motion to strike the claim against Tarion.

[86] I agree with her reasons. Accordingly, I would not give effect to Newport's submission that Metro 1352's action against Tarion be dismissed as an abuse of process.

(b) Collateral attack

[87] The second prong to Newport's argument that Metro 1352's civil action is an abuse of process rests on the rule against collateral attack. Newport submits that if Metro 1352 wishes to challenge Tarion's decisions it is required to do so by an appeal to the Licence Appeal Tribunal, the body specifically established by the legislature to review warranty decisions. Challenging Tarion's decisions by an action in the Superior Court amounts to an impermissible collateral attack on those decisions.

[88] The rule against collateral attack seeks to maintain the rule of law and preserve the repute of the administration of justice. The rule may be raised to "prevent a party from using an institutional detour to attack the validity of an order by seeking a different result from a different forum, rather than through the designated appellate or judicial review route": *British Columbia (Workers'*

Compensation Board) v. Figliola, at para. 28. Whether it applies is at bottom a question of the legislature's intent about the appropriate forum: see *R. v. Consolidated Maybrun Mines Ltd.*, [1998] 1 S.C.R. 706.

[89] Here, the question is whether the Act shows a legislative intent that the Licence Appeal Tribunal is meant to be the exclusive forum for challenging Tarion's decisions. The motion judge answered no to this question. She said, at para. 39:

> There is nothing in the legislation that requires the Condominium Corporation to pursue all available remedies under *ONHWPA* before commencing a civil action. The legislature could have required that, as it has done in the *Workplace Safety and Insurance Act*, S. O. 1997, c. 16. Absent express language in the statute, I am unable to conclude that the Condominium Corporation is barred from seeking a remedy from the civil courts.

[90] Gray J. made the same point in *Radewych,* at para. 25:

> Before leaving this issue, I should say that I do not accept the submission that sections 13 and 14 of the *Act* constitute an exclusive statutory scheme to which resort must be held, to the exclusion of any court proceedings. There is nothing in the *Act* to suggest that the statutory scheme is exclusive, or that resort to court proceedings is barred. Indeed, the statute provides additional rights to those which a home buyer might otherwise have had. Had it been the intention of the legislature to set up an exclusive scheme, it would have been simple to say so, but the legislature did not.

[91] I agree with the motion judge and with Gray J. The scheme and language of the Act show that an appeal to the Licence Appeal Tribunal is meant to be

permissive – not the exclusive forum in which a homeowner may seek relief for an adverse Tarion decision on warrantability.

[92] Moreover, several of the other considerations that bear on whether Tarion decisions give rise to issue estoppel also bear on whether a Superior Court action is an impermissible collateral attack on those decisions. Thus, although the availability of an appeal to a specialized tribunal with court-like procedures weighs against permitting a court action, the consumer protection purpose of the legislation and the convenience of having all parties and all claims in one forum weigh heavily in favour of permitting a court action.

[93] Overall, I conclude that Metro 1352's civil action in the Superior Court does not offend the rule against collateral attack.

(c) Section 23 of the purchase agreements

[94] The final prong in Newport's abuse of process argument rests on s. 23 of the purchase agreements between it and the unit owners. Newport submits that s. 23 precludes Metro 1352 from suing for anything other than the breach of warranties in s. 13 of the Act. Therefore, Newport argues that Metro 1352 cannot maintain its claims for negligence, breach of contract and breach of fiduciary duty.

[95] Section 23 of the purchase agreements provides:

> The Purchaser acknowledges and agrees that any warranties of workmanship or materials, in respect of any aspect of the construction of the condominium including the Unit, whether implied by this Agreement or at law or in equity or by any statute or otherwise, shall be limited to only those warranties deemed to be given by the Vendor under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c.O.31 ("O.N.H.W.P.A.") and shall extend only for the time period and in respect of those items as stated in the O.N.H.W.P.A., it being understood and agreed that there is no representation, warranty, guarantee, collateral agreement, or condition precedent to, concurrent with or in any way affecting this Agreement, the Condominium or the Unit, other than as expressed herein.

[96] The motion judge rejected Newport's submission at para. 50 of her reasons:

> This clause limits the warranties given by the vendor to the purchaser of the units to those expressed in *ONHWPA*. It does not exclude or limit a party's liability for negligence, breach of contract, breach of a statutory duty or breach of a fiduciary duty. It deals solely with warranties of workmanship and materials. In my view this clause does not preclude an action by the Condominium Corporation against the defendants for breach of contract, negligence or breach of fiduciary duty.

[97] I agree with this paragraph. I, therefore, would not give effect to this last prong in Newport's argument.

[98] Accordingly, I would not interfere with the motion judge's decision that Metro 1352's claim against Newport and the parties related to it and Tarion should not be dismissed as an abuse of process.

Second Issue – Did the motion judge err by failing to dismiss Metro 1352's claim for breach of warranty for defects in the sanitary sewer system on the ground they do not constitute a major structural defect?

[99] Metro 1352 claims that the defects in its sanitary sewer system amount to a "major structural defect." Newport submits that the motion judge erred by failing to strike this claim because it does not fall within the definition of a major structural defect.

[100] Section 13(1)(b) of the Act provides a statutory warranty "that the home is free of major structural defects as defined by the regulations". Section 1 of Regulation 892 defines a "major structural defect". The definition excludes "damage to drains or services". In its material part, the definition reads as follows:

> "major structural defect" means...
>
> (b) in respect of a home that is enrolled after December 31, 1990 and that is not a post June 30, 2012 home, any defect in work or materials, including any defect that results in significant damage due to soil movement, major cracks in basement walls, collapse or serious distortion of joints or roof structure and chemical failure of materials, if the defect,
>
> (i) results in failure of the load-bearing portion of any building or materially and adversely affects its load-bearing function, or
>
> (ii) materially and adversely affects the use of such building for the purpose for which it was intended,
>
> but does not include any defect attributable in whole or in part to a Year 2000 compliance problem, flood damage, dampness not arising from failure of a load-bearing portion of the building, *damage to drains or services*, damage to finishes, malicious damage or

> damage arising from acts of God, acts of the owners or their tenants, licensees or invitees, acts of civil or military authorities or acts of war, riot, insurrection or civil commotion; ("vice de construction important")…[Emphasis added.]

[101] Newport submits that a sewer is a drain – both are conduits for carrying off water or sewage. Any deficiencies in the sanitary sewer system therefore fall under the category of "damage to drains and services," and are excluded from the types of major structural defects covered by the Act. Thus, Newport submits, the sanitary sewer claim does not disclose a reasonable cause of action under r. 21.01(1)(b) of the *Rules of Civil Procedure*, and the motion judge erred by failing to strike it.

[102] The motion judge rejected Newport's submission at para. 65 of her reasons:

> In my view however, damage to drains or services is not what is excluded from the definition, but rather it is "any defect attributable in whole or in part to damage to drains or services" that is excluded. Even if a sewer is a drain, and I am not persuaded it is, the Condominium Corporation is not claiming a defect attributable to damage to drains. It claims that the sanitary sewer did not function because it was not installed in accordance with the Ontario Building Code. Improper or illegal installation is not a defect attributable to damage to drains or services, nor is it damage to drains or services. This part of the motion is dismissed.

[103] Newport contends that in this passage the motion judge misread the definition of a major structural defect by holding that the words "any defect attributable in whole or in part to" modifies "damage to drains or services";

instead, Newport argues that "damage to drains or services" is just an excluded item.

[104] Even accepting Newport's contention, I agree with the motion judge's decision not to dismiss this claim for breach of statutory warranty. A court may strike out a claim under r. 21.01(1)(b) only if it is "plain and obvious" that the claim discloses no reasonable cause of action: see *Hunt v. Carey Canada Inc.,* [1990] 2 S.C.R. 959. Newport therefore has the burden of showing that it is plain and obvious the alleged deficiencies in the sanitary sewer system do not constitute a major structural defect. It cannot meet this burden for at least three reasons.

[105] First, Metro 1352 has pleaded that the sewer system did not function because it was originally constructed in contravention of the approved permit plans and the Ontario Building Code. The system was not damaged; it was improperly constructed or installed. The motion judge summarized Metro 1352's claim at para. 56 of her reasons:

> The Condominium Corporation alleges the following: that the developer defendants did not build the sanitary sewer system in accordance with the Ontario Building Code or the plans filed with the municipality pursuant to which the building permit was issued; that they concealed this fact from the purchasers; that a professional engineer responsible for the building project confirmed under his signature and professional seal that the system has been constructed in accordance with the Ontario Building Code and plans

> submitted to the municipality; and that the developer defendants gained an economic advantage by doing this.

[106] Even if a sewer is a drain, it is far from plain and obvious that this claim falls within the exclusion for “damage to drains or services” in the definition of a major structural defect.

[107] Second, it is not plain and obvious that a drain in s. 1 of Regulation 892 includes a sanitary sewer system. Regulation 350/06 under the *Building Code Act*, *1992,* S.O. 1992, c. 23, differentiates between a drainage system, a sanitary sewer and a sewage system. Under s. 1.4.1 of Regulation 350/06:

> - A drainage system means an assembly of pipes, fittings, fixtures and appurtenances on a property that is used to convey sewage and clear water waste to a main sewer or a private sewage disposal system, and includes a private sewer, but does not include subsoil drainage piping.
> - A sanitary sewer means a sewer that conducts sewage.
> - A sewage system includes a chemical, incinerating, recirculating or self-contained portable toilet; a greywater system; a cesspool...

[108] These definitions seem to contemplate a difference between drains and sewer systems. Indeed, if the exclusion to the definition of major structural defect in s. 1 of Regulation 892 was meant to exclude sewer systems, the Regulation could have said so expressly.

[109] Third, the Act and Regulation 892 expressly allow for compensation out of the guarantee fund for damage "in respect of a sewage disposal system". Section 14(4) of the Act provides, subject to the Regulation, compensation to an owner who suffers damage because of a major structural defect in s. 13(1)(b). Section 6(10) of the Regulation limits that compensation payable "in respect of a sewage disposal system" to $25,000 per home.

[110] For these reasons, it is not plain and obvious that the defects in Metro 1352's sanitary sewer system are excluded from the definition of major structural defect. Therefore I would not give effect to this ground of appeal.

Third Issue – Did the motion judge err by failing to dismiss the claim for defects in the EIFS on the ground that the claim was pleaded after the expiry of the limitation period?

[111] Under s. 4 of the *Limitations Act 2002*, S.O. 2002, c. 24, Sch. B, a claim must be pleaded within two years of the date that it was discovered. Metro 1352's original statement of claim did not expressly refer to defects or leaks in the EIFS. Newport says that Metro 1352 discovered these alleged defects no later than January 2008. Yet Metro 1352 claimed for EIFS defects for the first time in its amended statement of claim, which was issued in mid-July 2010 – or more than two years after the claim was discovered. Thus, Newport submits that the claim is barred by the expiry of the two-year limitation period.

[112] The motion judge rejected Newport's position for two reasons. First, she held at para. 67 of her reasons that the EIFS claim was, in fact, pleaded in the original statement of claim, even if it was not expressly referred to:

> In my view, this argument fails for two reasons. Firstly, this claim was pleaded in the Statement of Claim, which was issued on August 24, 2006. Paragraphs 9 and 10 of the Statement of Claim refer to two documents that specifically raise the issue of water leaking into the townhouses. The Technical Audit Report dated November 26, 2001 and prepared by Halsall Associates Limited, cited in paragraph 9 of the Statement of Claim, refers to leaks through the doors of townhouses 11 and 22, leakage through the ceiling vent in the basement of townhouse 22 during heavy rain, and water pooling on all ground-floor patios of the townhouses. A further report prepared by Halsall on April 15, 2003, referred to in paragraph 10 of the Statement of Claim, lists leakage into townhouses 1, 12 and 23 through exterior walls/doors as an outstanding item to be addressed by Newport. The Amended Statement of Claim simply pleads additional facts that came to light after the delivery of the Statement of Claim that explain the cause of the leakage, and does not plead a new cause of action.

[113] I agree with the motion judge's reasons.

[114] Second, in the alternative, the motion judge held that Newport's motion was premature because it had not yet delivered a statement of defence, and a limitation defense, like any other defence, must be pleaded. She wrote, at para. 68:

> Secondly, if I am wrong in concluding that the EIFS claim was pleaded in the Statement of Claim issued on August 24, 2006, a motion to strike the EIFS claim on

> the basis of the expiration of the limitation period pursuant to rule 21.01(1)(a) is premature given that no statement of defence has been delivered: *Beardsley v. Ontario*, (2001), 57 O.R. (3d) 1 (C.A.). The Court of Appeal in *Beardsley* suggested that a claim could be struck pursuant to rule 21.01(1)(a) on the basis of the expiry of a limitation period prior to the delivery of a statement of defence if it was obvious from the statement of claim that, "no additional facts could be asserted that would alter the conclusion that a limitation period had expired" [para. 21]. However, as D. M. Brown J. notes in *Greatrek Trust S.A./Inc. v. Aurelian Resources Inc.*, [2009] O.J. No. 611 (S.C.J.),
>
> A court cannot gain a complete picture of the issues in a case without reading all the pleadings. To permit defendants to move to strike using yet-to-be-pleaded limitation defences would distort the pleadings process. Rule 25.06 does not require plaintiffs to plead their claims anticipating defences which might be raised. Replies function to respond to pleaded defences.

[115] I agree. This court's decision in *Beardsley* affirmed, at paras. 21-22, that ordinarily limitation defences must be pleaded:

> The motion to strike based on the expiry of a limitation period could only be made pursuant to Rule 21.01(1)(a), which provides that a party may move for the determination of a question of law "*raised by a pleading*". The expiry of a limitation period does not render a cause of action a nullity; rather, it is a defence and must be pleaded. Although we agree that it would be unduly technical to require delivery of a statement of defence in circumstances where it is plain and obvious from a review of a statement of claim that no additional facts could be asserted that would alter the conclusion that a limitation period had expired, a plain reading of the rule requires that the limitation period be pleaded in all other cases. Plaintiffs would be deprived of the opportunity to place a complete factual context before the court if limitation defences were determined, on a

> routine basis, without being pleaded. Adherence to rules that ensure procedural fairness is an integral component of an appearance of justice. [Internal citations omitted.]

[116] The rules call for a limitation defence to be pleaded in the statement of defence. A plaintiff is entitled to reply to a statement of defence and put before the court further facts, for example, on the question of the discoverability of the claim. Only in the rarest of cases – and this is not one of them – should this court entertain a defendant's motion to strike a claim based on the limitation defence where the defendant has yet to deliver a statement of defence. I would not give effect to this ground of appeal.

D. CONCLUSION

[117] Newport's appeal raises three questions:

> (1) Did the motion judge err by failing to dismiss Metro 1352's claims relating to defects in the sanitary system and the EIFS as an abuse of process?
>
> (2) Did the motion judge err by failing to dismiss the claim for breach of warranty for defects in the sanitary sewer system on the ground that they do not constitute a major structural defect under the Act?
>
> (3) Did the motion judge err by failing to dismiss the claim for defects in the EIFS on the ground that the claim was pleaded after the expiry of the limitation period?

I would answer no to all three questions. I would therefore dismiss Newport's appeal.

[118] The parties may make brief written submissions on the costs of this appeal within ten days of the release of these reasons.

Released: Dec. 4, 2012
"JL"

"John Laskin J.A."
"I agree Warren Winkler C.J.O."
"I agree David Watt J.A."