

# COURT OF APPEAL FOR ONTARIO

CITATION: Ingarra v. 301099 Ontario Limited (Previn Court Homes), 2020  
ONCA 103  
DATE: 20200211  
DOCKET: C67092

Simmons, Lauwers and Nordheimer JJ.A.

BETWEEN

Anthony John Ingarra

Applicant (Respondent)

and

301099 Ontario Limited o/a Previn Court Homes

Respondent (Appellant)

Ian P. Katchin, for the appellant

Nicholas J. Cartel and Glenn Brandys, for the respondent

Heard: January 24, 2020

On appeal from the judgment of Justice Jessica Kimmel of the Superior Court of Justice, dated May 30, 2019, with reasons reported at 2019 ONSC 3347.

**Lauwers J.A.:**

[1] Anthony John Ingarra bought a home from Previn Homes in a new residential subdivision. The transaction did not close. On March 20, 2018 Mr. Ingarra brought an application seeking the interpretation of the agreement of purchase and sale between the parties and an order for specific performance. The house was later sold by Previn Homes to another buyer.

[2] The application judge dealt with the interpretation issue but not the remedy. She found that Previn Homes breached the agreement, not Mr. Ingarra and granted declarations to that effect. She also found that Mr. Ingarra was entitled to a remedy to be determined in later proceedings.

[3] For the reasons set out below, I would allow the appeal and dismiss Mr. Ingarra's application.

### **Factual Context**

[4] The agreement of purchase and sale was dated March 26, 2016. Because it was for a new home, it included a "Tarion Addendum," which governs the relations between the parties, in part. The Tarion Addendum derives from the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31, as amended.

[5] Under the terms of the agreement and the Tarion Addendum, the parties fixed what the Tarion Addendum called a "Firm Closing Date" for January 11, 2017.

[6] Previn Homes was required to provide an occupancy permit to Mr. Ingarra on or before the closing. The occupancy permit was not provided until January 12, 2018. Previn Homes was therefore not in a position to close on the Firm Closing Date.

[7] For his part, Mr. Ingarra was also not in a position to close on the Firm Closing Date because he was not yet in funds. His lender needed five days from its appraisal to complete the process and approve the loan. However, when the

appraiser attended on January 8, 2018, the home was not complete because the exterior bricks and soffits/fascia had not been installed. Mr. Ingarra's counsel sent a letter to Previn Homes' counsel, dated January 11, 2018. It stated:

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.

[8] Although the Tarion Addendum prescribes a framework for changing dates the parties did not follow that framework. Instead by agreement between the lawyers, the closing date was extended to January 15, 2018. By letter dated January 15, 2018, Mr. Ingarra's counsel wrote to counsel for Previn Homes requesting 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.

[9] Counsel for Previn Homes agreed in correspondence on January 15, 2018:

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.

[10] 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, but counsel for Previn Homes refused, stating in his responding letter:

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 Issue**

[11] The application judge correctly identified the issue at para. 46 of her reasons:

The decision in this case comes down to whether the agreement between the 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.

### **The Decision Under Appeal**

[12] The application judge found that the parties did not have the contractual freedom to set a closing date outside of the confines of the Tarion Addendum. She stated, at para. 46:

Their agreement did not comply with the requirements prescribed by section 4 of the Tarion Addendum, which the parties were clearly familiar with having adhered 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.

[13] Previn Homes had options regarding the setting of a new closing date under the Tarion Addendum. However, 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: at para. 56.

The provision states:

If 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.

[14] 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 Addendum precedence: at paras. 47-48. The application judge, at para. 41, rooted this effect in the “consumer protection objectives” of the legislation, citing the trial decision in *Sirisena v. Oakdale Village Homes Inc.*, 2010 ONSC 2996, 100 R.P.R. (4th) 94, at paras. 11 and 45-53, aff’d 2013 ONSC 1051, 30 R.P.R. (5th) 31 (Div. Ct.).

[15] The application judge considered the requirements prescribed by s. 4 and concluded, at para. 51:

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 invalid) termination of it on January 17, 2018.

[16] In consequence, the application judge found, at para. 54: "The Vendor's purported termination of the APS on January 17, 2018 was invalid." She did this on the basis that: "None of the permitted grounds for termination under section 10 of the Tarion Addendum were available to the Vendor."

### **Analysis**

[17] I agree with the application judge 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: at para. 56. However, she 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.

[18] It is not surprising that the lawyers did not use the cumbersome, paper-intensive and therefore expensive process set out in s. 4 of the Tarion Addendum, part of which is reproduced in the appendix to these reasons, to set new closing dates. Were they free to set new closing dates in the manner they did? In my view they were, for two reasons.

[19] First, s. 4 of the Tarion Addendum does not render unenforceable non-compliant amendments. Despite stating that the Addendum sets out “a framework” for altering the Critical dates “which cannot be altered contractually except as set out in this 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 date is not “invalid” as the application judge found. It is only voidable.

[20] 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: see *Domicile Developments Inc. v. MacTavish* (1999), 45 O.R. (3d) 302 (C.A.) and *King v. Urban & Country Transport Ltd.* (1973), 1 O.R. (2d) 449 (C.A.). This was the effect of the letter from counsel for Previn Homes, who gave an extension one day longer than Mr. Ingarra’s counsel requested. It was not argued before the application judge nor before this court that notice of the new closing date was unreasonable, nor was it unreasonable under the circumstances.

[21] Second, s. 10 of the Tarion Addendum addresses “Termination of the Purchase Agreement”. Section 10(e) provides: “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 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 Homes to terminate the agreement of purchase and sale. Doing so was not prohibited by the Tarion Addendum.

[22] In my view the application judge was correct in her conclusion, at para. 51, 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”. But she 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 the Purchaser had not by then exercised his right to void the lawyer's agreement, Previn Homes' termination was valid under s. 10(e) of the Tarion Addendum.

[23] I reach this conclusion without satisfaction. The Tarion Addendum is not “consumer protective” by any stretch of the imagination. The current document is only marginally better drafted than its predecessor, which I described in the trial decision in *Sirasena*, at para. 11, as containing “consumer-unfriendly language”. It is 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.).

[24] The Tarion Addendum is a small-font, single spaced, convoluted and confusingly long and obscure document, as s. 4 in the appendix to these reasons amply shows. It is a trap for the unwary, particularly the unwary lay person. 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. The Addendum is the territory of real estate lawyers, and any lawyer practising residential real estate involving new homes must be familiar with its terms, as we assume the lawyers were in this case.

### **Disposition**

[25] I would allow the appeal with costs to the appellant in the amount of \$15,000 all-inclusive and reverse the costs payable in the court below.

Released: "P.L." February 11, 2020

"P. Lauwers J.A."

"I agree. Janet Simmons J.A."

"I agree. I.V.B. Nordheimer J.A."

## Appendix

Section 4 provides, in part:

### 4. Changing Critical Dates – By Mutual Agreement

(a) This Addendum sets out a framework for setting, extending and/or accelerating Critical dates, which cannot be altered contractually except as set out in this section 4. Any amendment not in accordance with this section is voidable at the option of the Purchaser.

(b) The Vendor and Purchaser may at any time, after signing the Purchase Agreement, mutually agree in writing to accelerate or extend any of the Critical Dates. Any amendment which accelerates or extends any of the Critical Dates must include the following provisions:

- (i) the Purchaser and Vendor agree that the amendment is entirely voluntary – the Purchaser has no obligation to sign the amendment and each understands that this purchase transaction will still be valid if the Purchaser does not sign this amendment;

- (ii) the amendment includes a revised Statement of Critical Dates which replaces the previous Statement of Critical Dates;

- (iii) the Purchaser acknowledges that the amendment may affect delayed closing compensation payable; and

- (iv) if the change involves extending either the Firm Closing Date or the Delayed Closing Date, then the amending agreement shall:

- i. disclose to the Purchaser that the signing of the amendment may result in the loss of delaying closing compensation as described in section 7;

- ii. unless there is an express waiver of compensation, describe in reasonable detail the cash amount, goods, services, or other consideration which the Purchaser accepts as compensation; and

iii. contain a statement by the Purchaser that the Purchaser waives compensation or accepts the compensation referred to in clause ii above, in either case, in full satisfaction of any delayed closing compensation payable by the Vendor for the period up to the new Firm Closing Date or Delayed Closing Date.

If the Purchaser for his or her own purposes requests a change of the Firm Closing Date or the Delayed Closing Date, then subparagraphs (b)(i), (iii) and (iv) above shall not apply.