

CITATION: Shah v. 625 Sheppard Bayview Village GP Inc., 2025 ONSC 1779
DIVISIONAL COURT FILE NO.: 236/24
DATE: 20250325

**SUPERIOR COURT OF JUSTICE – ONTARIO
DIVISIONAL COURT**

RE: NIRANJAN SHAH, Applicant

AND:

625 SHEPPARD BAYVIEW VILLAGE GP INC., Respondent

BEFORE: Matheson, Trimble, Nakatsuru JJ.

COUNSEL: *Sean Dewart and Andrew Jia*, for the Applicant

Sarah Rustomji, for the Respondent

HEARD at Toronto: March 19, 2025

ENDORSEMENT

[1] In this Application for Judicial Review, the Applicant seeks an order of *certiorari* quashing the costs award against it by Arbitrator Marvin Huberman, made on March 18, 2024, in which the Arbitrator ordered that the Applicant pay the Respondent’s legal fees on a substantial indemnity basis of \$119,499.34.

[2] The Applicant seeks an order that it recover from the Respondent his legal fees and disbursements under the specific regime that applies under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 (the “*ONHWPA*”) and his arbitration agreement, including s. 15(c) of the Tarion Addendum to the parties’ Agreement and Purchase and Sale (the “*APS*”). The Tarion Addendum is statutorily required, as set out in s. 8(1)1 of O. Reg. 165/08 under the *ONHWPA*.

[3] There is no issue that the *ONHWPA* is consumer protection legislation aimed at protecting purchasers of new homes in Ontario: *Tarion Warranty Corporation v. Kozy*, 2011 ONCA 795, at para. 2.

BACKGROUND:

[4] The Applicant entered into the APS with the Respondent on April 23, 2016 to purchase a condominium unit in a building to be built at 625 Sheppard Avenue East, Toronto, Ontario. The Respondent cancelled the project on July 10, 2019, relying on an early termination clause contained in the Tarion Addendum to the APS for Condominiums, which stated that the APS was

conditional upon the Respondent receiving by July 10, 2019, confirmation that financing for the project was available. In the event the project was terminated early, the Respondent agreed to take all commercially reasonable steps within its power to satisfy the early termination conditions.

[5] With respect to disputes that may arise, s. 17(4) of the *ONHWPA* states as follows:

Every purchase agreement and construction contract between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitration Act, 1991* applies.

[6] In accordance with the above, the Tarion Addendum to the APS included subsection 15(a), which provided that:

The Vendor and Purchaser agree that disputes arising between them relating to termination of the Purchase Agreement under section 11 shall be submitted to arbitration in accordance with the *Arbitration Act, 1991* (Ontario) and subsection 17(4) of the ONHWP Act.

[7] Section 15(c) of the Tarion Addendum to the APS provided for a costs regime that is markedly different from the *Rules of Civil Procedure*:

The Vendor shall pay the costs of the arbitration proceedings and the Purchaser's reasonable legal expenses in connection with the proceedings unless the arbitrator for just cause orders otherwise.

[8] The Applicant commenced an arbitration seeking an order for specific performance and/or an order for damages he alleged to have sustained due to the Respondent's cancellation of the project.

[9] The parties agreed to appoint Arbitrator Huberman and executed an Agreement to Arbitrate and Terms of the Appointment (the "Arbitration Agreement"). The Arbitration Agreement provided that: "the Award is final, binding, and subject only to the appeal rights under the *Arbitration Act, 1991*".

[10] The Arbitration Agreement did not deal with appeals. As a result, there could be an appeal on questions of law, with leave, is provided for under s. 46(1) of the *Arbitration Act, 1991*.

THE ARBITRATION

[11] The Arbitrator delivered the arbitral award on January 29, 2024, dismissing the arbitration in its entirety. The Arbitrator found that the Respondent took all commercially reasonable steps to satisfy the early termination conditions and that the Applicant failed to establish that he was entitled to an order for specific performance, damages in lieu of specific performance and/or damages for breach of contract. The Arbitrator further noted the "significant delays" caused by the Applicant in failing to comply with various procedural directions and refusing to answer/refuse

his undertakings. The Applicant did not appeal the arbitration order. The Arbitrator invited written costs submissions.

THE DECISION UNDER REVIEW

[12] The Arbitrator decided the question of costs based on written submissions. He received submissions from both parties and reply submissions from the Applicant.

[13] The Applicant/Purchaser argued that the Respondent/Vendor should pay the Arbitrator's fees and disbursements, and pay his legal fees, both pursuant to s. 15(c) of the Tarion Form addended as part of the APS. As noted above, s. 15(c) requires an order in favour of the Purchaser unless the arbitrator, for just cause, orders otherwise.

[14] The Respondent argued that the Applicant should pay both the Arbitrator's fees and disbursements and pay the Respondent's legal fees on a substantial indemnity basis.

[15] The Arbitrator released his decision on March 18, 2024. In it, he held that the Vendor/Respondent should pay the Arbitrator's fees and disbursements, finding no just cause to order otherwise. However, he denied the request that the Vendor pay the Purchaser's reasonable legal expenses. He applied costs principles from the *Rules of Civil Procedure* and ordered that the Applicant pay the Respondent's costs on a substantial indemnity basis.

ISSUES

[16] There are these issues on this Application for Judicial Review:

- a. Does this Court have Jurisdiction?
- b. Was the Arbitrator's Decision Reasonable?

Issue 1 - Does this Court have Jurisdiction?

[17] The Respondent challenged the jurisdiction of this Court, submitting that this is an entirely private dispute and not subject to judicial review by this Court. However, given the *ONHWPA*, which imposes mandatory arbitration, we conclude that this Court has jurisdiction to hear this Application for Judicial Review (see: *Port Arthur Shipbuilding Co. v. Arthurs*, [1969] S.C.R. 85, at pg. 90 to 91; *Setia v. Appleby College*, 2013 ONCA 753 at paras. 20 and 23; Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (Toronto: Canvasback Publishing, 1998) (loose-leaf updated 2024) ch 1 at 1:14).

Issue 2 - Was the Arbitrator's Decision Reasonable?

[18] The Arbitrator's costs decision decided two things – who paid the Arbitrator's fees, and who paid the legal fees of which party and in what amount. His decisions conflict.

[19] This Court has no issue with the Arbitrator's decision that the Respondent was required to pay the Arbitrator's fees and disbursement. The decision is reasonable and there is a clear, logical path of reasoning explaining the result. However, the Arbitrator's decision that the Applicant had to pay the Respondent's legal fees and disbursements on a substantial indemnity basis is not reasonable. We say this for these reasons.

[20] First, the starting point is s. 15(c) of the Tarion Addendum to the APS, which imposed the following costs rule on the Arbitration:

The Vendor *shall* pay the costs of the arbitration proceedings and the Purchaser's reasonable legal expenses in connection with the proceedings *unless the arbitrator for just cause orders otherwise*. [Emphasis added.]

[21] Subsection 15(c) changes the costs regime from the costs rules imposed by s. 131 of the *Courts of Justice Act*, and the *Rules of Civil Procedure*. That regime does not govern the question of who reimburses whom for fees and disbursements. The general rule of costs following the event under the *Rules of Civil Proceedings* does not govern. Instead, purchasers are presumed entitled to their costs regardless of the outcome of the Arbitration. Subsection 15(c) provides that the Arbitrator may only deviate from the presumption that Vendors pay the Arbitrator's fees and disbursements and the reasonable fees and disbursements of the Purchaser "for just cause". The phrase "for just cause" is not defined and the Arbitrator does not define it. It is notable that the words "in accordance with standard costs principles" or something similar were not used.

[22] The Arbitrator acknowledged that the *ONHWPA* is a remedial statute designed to offset the significant power imbalance between the Vendor and the Purchaser in disputes arising from a real estate transaction (see: paras. 39 - 40 of his interlocutory costs award quoted at p. 6 of the Costs Endorsement, and para. 68 to 70 of the latter).

[23] Notwithstanding this acknowledgement, in his explanation for awarding substantial costs to the Vendor/Respondent, the Arbitrator relies on traditional civil litigation costs rules and principles. The Arbitrator does not rationally connect those principles to the purpose of the *ONHWPA* or the markedly different costs regime that does apply.

[24] Further, the Arbitrator's costs decision is internally inconsistent. It does not follow a coherent chain of analysis. Based on the same factual matrix and mandated costs regime, he finds that there is no just cause to depart from the presumption that the Vendor shall pay for the Arbitrator's fees and disbursement, as set out in s. 15(c), but that there was just cause to depart from the presumption that the Vendor shall pay the Purchaser's reasonable fees and disbursements. We cannot trace the Arbitrator's reasoning without encountering the fatal flaws as discussed above.

[25] The above errors render the decision to require that the Applicant pay costs unreasonable: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at paras. 85, 103.

RESULT

[26] The Application is granted. The determination of the Applicant's claim for his costs and reasonable legal expenses is remitted back to Arbitrator Huberman for reconsideration following the principles set out in these Reasons for Decision. We are not persuaded that it must go to someone else for decision.

COSTS

[27] The Respondent shall pay the Applicant costs of the Judicial Review in the agreed upon amount \$10,000.00.

Matheson J.

Trimble J.

Nakatsuru J.

Date: March 25, 2025