

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: Harvinder Singh Dhaliwal and Gagandeep Dhaliwal, plaintiffs
AND: 2560262 Ontario Inc. d/b/a. Midland Homes And Development
BEFORE: Mr Justice J.A. Ramsay
COUNSEL: Gregory Weedon for the plaintiffs; W. Chapman for the defendant
HEARD: March 9, 2023 at Welland by videoconference

ENDORSEMENT

- [1] At the conclusion of the hearing I made an order under the *Vendors and Purchasers Act*, R.S.O. 1990, c. V-2 with reasons to follow. These are they.
- [2] The purchaser applied under s.3 of the Act in respect of a requisition or other question arising out of or connected with a contract of purchase and sale of real estate.
- [3] The closing date is March 10, 2023 so the parties needed an answer from me today.
- [4] The respondent is a home builder. The applicants bought a house from the respondent that was to be built. The agreement of purchase and sale was made on December 21, 2020. In accordance with the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O-31, the respondent vendor was required to provide the applicant purchasers with the Tarion warranty attached as an addendum to the agreement. The addendum was also signed on December 21, 2020. It forms part of the agreement of purchase and sale.
- [5] The agreement provided for a purchase price of \$712,900.00 comprised of eight successive deposits of \$5,000.00 and a balance due on closing of \$672,900.00, subject to adjustments. One of the adjustments, the “Added Cost Adjustment” found in paragraph 3(g) of the agreement is in question in the present proceeding.
- [6] The agreement provided:

The Purchaser shall pay to the Vendor, as an adjustment on Closing, the amount of any increases in construction costs or additional expenses expended or incurred by the Vendor for the completion of the dwelling or property and which are over and above those costs or expenses contemplated as at the date of the Purchaser's execution

of this Agreement, and which costs or expenses arise as a result of and/or caused by changes to the Ontario Building Code or any other federal, provincial, municipal or other governmental or utility authority requirement or obligation (any such increase or additional expense being collectively referred to as the "Added Cost"). The amount of the Added Cost shall be determined by a Statutory Declaration sworn on the part of the Vendor, which the Purchaser agrees to accept as the sole and absolute proof thereof and to which the Purchaser agrees to be bound.

- [7] On March 9, 2022, (about a year before the closing date) the applicants received a letter from the respondent's lawyer advising that the respondent intended to rely on the added cost adjustment to increase the purchase price by \$152,640.00. The letter said:

[D]ue to COVID19 there has been a rise in our construction costs and the cost of completing your home has increased significantly. As per Paragraph 3(g)... the builder has no option by the increase the purchase price by \$152,640 to slightly offset the increased costs they are facing. Due to unforeseen supply issues in the construction industry and the aforementioned increase in construction costs, our estimated costs on each home have risen considerably, and in an effort to recoup only a fraction of these costs, the builder will have to proceed with a price change.

- [8] The respondent gave the applicants two options: agree to the price change or terminate the contract and return the deposits.
- [9] After a number of requests and the filing of the present motion, the respondent provided the following statutory declaration earlier this week:

Further to Paragraph 3(g) of the Agreement of Purchase and Sale, the Vendor hereby certifies that the following increases in construction costs or additional expenses expended or incurred by 2560262 Ontario Inc. are over and above those costs or expenses contemplated as at the date of the Purchasers execution of the Agreement of Purchase and Sale, and such costs and expenses arose as a result of changes to the Ontario Building Code or other federal, provincial, municipal, or other government or utility authority requirement or obligation, and in particular governmental requirements and obligations arising out of the governmental response to the COVID-19 Pandemic:

Framing	33%
Lumber & General building material	75%

Foundation	44%
Brick & Siding	25%
Gypsum (Drywall)	38%
Flooring, Trim & Paint	40%
Metal and Steel Beams	38%
Roofing	30%
Plumbing HVAC & Electrical	45%

The Vendor hereby certifies that the aforesaid increases resulted in an overall increase in the amount of \$152,640.00 for the completion of the Dwelling or Property located at 44 Autumn Ave., Thorold, Ontario.

- [10] The respondent’s evidence consists of the affidavit of a law clerk, to which the agreement and the statutory declaration are attached. There is no evidence, beyond the bald statement in the statutory declaration, that the increased costs “arose as a result of changes to the Ontario Building Code or other federal, provincial, municipal, or other government or utility authority requirement or obligation, and in particular governmental requirements and obligations arising out of the governmental response to the COVID-19 Pandemic.” Nowhere in the evidence does the respondent identify the specific changes to legislation or to government requirements or obligations that increased costs.
- [11] The applicant’s position is that the added costs adjustment applies only to costs added because of changes to the legislation or other government requirements that have to do with building, zoning, workplace safety and so on.
- [12] The respondent’s position is that the applicants agreed to be bound by the statutory declaration. If they dispute the statutory declaration, there is an issue of fact to be decided and the Application should be converted to an action.
- [13] I turn first to the interpretation of the contract. Contracts should be interpreted with a view to determining the intention of the parties as stated in the contract taking into account the plain meaning of the words used in the context of the entire contract and the factual matrix.
- [14] The plain words of the contract suggest that the builder vendor is entitled to add costs that were not contemplated at the time of the agreement if they “arise as a result of and/or caused by changes to the Ontario Building Code or any other federal, provincial, municipal or other governmental or utility authority requirement or obligation.”

[15] This interpretation makes sense in the context of the contract as a whole. Clause 3(g) is found in paragraph 3 of schedule B to the agreement. Schedule B deals with general provisions. Paragraph 3 contains 7 clauses, (a) to (g). Clauses (a) to (f) all deal with expenses caused by government action. I conclude that so does clause 3(g).

[16] Furthermore, the context, especially the reference to the Building Code, suggests that the governmental requirements or obligations in view are those that are directly associated with building, zoning and so on. The general prohibitions against normal activity imposed by governments in response to the SARS-Cov2 pandemic, which may have indirectly led to increased costs, were not intended to be covered by clause 3(g). By December 21, 2020 the pandemic was underway. If the parties had contemplated increased costs caused by the government response to the pandemic, they would have known to mention them.

[17] As to the procedural question, it is first necessary to determine to what extent the purchaser agreed to be bound by the statutory declaration. The clause again:

The amount of the Added Cost shall be determined by a Statutory Declaration sworn on the part of the Vendor, which the Purchaser agrees to accept as the sole and absolute proof thereof and to which the Purchaser agrees to be bound.

[18] On the words of the sentence just quoted the purchaser agrees to be bound by the statutory declaration as to the amount of the added cost. “Amount” is the antecedent to “thereof.” I do not interpret this sentence as an agreement by the purchaser to be bound by the statutory declaration as to the fact that costs were increased because of relevant government action. In other words, I conclude that only if there is an added cost caused by a change in legislation or government requirements, the purchaser must accept the amount given by the vendor in a statutory declaration. The builder is in a position to quantify the costs imposed upon it by legislation or government authorities. The parties agreed that the purchaser would not dispute those costs. Such costs would be a matter of public record. They would be readily ascertainable and therefore not a reasonable subject for dispute. It would be absurd, however, for the purchaser to have given the vendor *carte blanche* to set the quantum of increased costs due indirectly to government action unrelated to construction. Such costs would be difficult to ascertain. The respondent admits in oral argument that determining such costs would involve expert evidence and a voluminous record.

[19] On my interpretation of the contract, the matter can be decided on an application. The respondent, in its letter of March 9, 2022 has already admitted that the increased costs were caused by supply issues related to the pandemic. I have ruled that those issues, even if caused by the government response to the pandemic, were not contemplated by clause 3(g).

[20] Finally, the Tarion warranty decides the matter adversely to the respondent.

[21] Paragraph 8 of the Tarion warranty, which forms part of the agreement of purchase and sale, provides:

Only the items set out In Schedule B [of the Tarion warranty] (or an amendment to Schedule B), shall be the subject of adjustment or change to the purchase price or the balance due on Closing.

[22] The schedule lists various adjustments mentioned in the agreement of purchase and sale. Item 10 of Part II of the Tarion schedule refers to “increased construction costs” in clause “3(f)” of the agreement of purchase and sale. Clause 3(f) has to do with increased levies. Clause 3(g) is not mentioned in the schedule. The respondent argues that this is a drafting error. The Tarion schedule was meant to refer to clause 3(g) of the contract, which is allegedly apparent because an increased levy is not a construction cost. I do not agree. A levy would reasonably be taken by a home buyer to be a cost of construction. The respondent drafted the contract and the Tarion schedule. The applicant was entitled to rely on the words chosen by the respondent.

[23] For these reasons I made the order requested in terms of the draft submitted by the applicants, declaring that the respondents are not entitled to the adjustment on closing that they claimed.

J.A. Ramsay J.

Date: 2023-03-09