

CITATION: Remington Georgetown Inc. v. Tarion Warranty Corporation, 2025 ONSC 1285
COURT FILE NO.: CV-23-00697810-0000
DATE: 20250226

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: REMINGTON GEORGETOWN INC., Applicant

– and –

TARION WARRANTY CORPORATION, Respondent

BEFORE: Justice E.M. Morgan

COUNSEL: *Paul Starkman and Calvin Zhang*, for the Applicant

Shalom Cumbo-Steinmetz and Kylie de Chastelain, for the Respondent

HEARD: February 20, 2025

REASONS FOR DECISION

I. The underlying arbitration

[1] The Applicant seeks to set aside the decision of arbitrator Deborah Anshell dated February 24, 2023 under the *Ontario New Home Warranties Plan Act*, RSO 1990, c. O.31 (the “Act”).

[2] The Applicant is a residential developer who arbitrated a finding by the Respondent, the regulator mandated with administering the Act, that there were “chargeable conciliations” – i.e. defects requiring the builder to remedy – in one of its houses. Following a two-day hearing, the arbitrator dismissed the Applicant’s challenge, issuing 19 pages of reasons for doing so.

[3] Counsel for the Applicant submits that the arbitration procedures under the Act are unfair but mandatory, leaving parties with no choice. However, arbitration is not exactly mandatory. In fact, the Act is silent on dispute resolution. As Respondent’s counsel points out, arbitration is a process offered by the Respondent as a convenience for builders if they desire to pursue it. It does not displace or prevent litigation if a builder decides to go that route.

[4] Under this arrangement, the courts are always open for disputing parties to use. Contrary to Applicant’s counsel’s submission, the chargeability decision by the Respondent was, although not a judicial-type decision, an exercise of a statutory power and potentially subject to

administrative law remedies: *Nicholson v. Haldimand-Norfolk Regional Police Commissioners*, [1979] 1 SCR 311. Judicial review was certainly an option.

[5] I do not say that a reviewing court would necessarily invoke its discretion to grant the remedy sought, or that it would determine that the public interest requires judicial intervention in the instant case: *Chippewas of Sarnia Band v. Canada (Attorney General)* (2000), 51 OR (3d) 641, at para 258 (CA). But given that the Applicant's challenge entails, *inter alia*, arguments about natural justice in the Respondent's wielding of statutory authority and allegations about the Respondent's bias in exercising that authority, arbitration was not the Applicant's only choice; judicial review was available as an avenue for it to consider: *2122157 Ontario Inc. v. Tarion Warranty Corporation*, 2016 ONSC 851 (Div Ct).

[6] The Applicant is an experienced builder and a veteran of previous arbitrations under the Act. It engaged in the process freely, was represented by counsel, and signed the arbitration agreement that underpins the process of its own accord and without coercion or duress. The arbitration agreement states that the arbitral award is final and binding. It provides for no appeal on any issue of fact or law.

[7] The Applicant challenges the award on four grounds: a) the arbitrator exceeded her jurisdiction; b) the Applicant was denied procedural fairness; c) the arbitrator was biased; and d) the arbitrator failed to state reasons for the decision.

[8] There is no merit to any of these grounds. I am compelled to agree with counsel for the Respondent, who characterizes this Application as a textbook example of an attempt at an appeal masquerading as a set-aside proceeding.

[9] For the reasons that follow, I dismiss the Application.

II. Standard of review

[10] Section 46 of the *Arbitration Act, 1991*, SO 1991, c. 17 provides a narrow set of grounds on which an arbitration award can be set aside. The set-aside remedy is essentially limited to cases of arbitrator's error of jurisdiction, arbitrator's bias, arbitrator's misconduct, or arbitrator's legal incapacity. Section 45 of the *Arbitration Act* further provides that appeals of an arbitral decision – whether on questions of fact, law, or mixed fact and law – are permitted only where specifically authorized in the governing arbitration agreement.

[11] A set-aside application such as this one does not call for a substantive review of the arbitral award. In fact, “[i]t requires that the court not interfere with the arbitrator’s award as long as the issue decided was properly before the arbitrator”: *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, at para. 5. The only task for the court under section 46 of the *Arbitration Act* is to determine whether a specific ground set out in that section is present. If a ground is present, the court can ask whether the matter is so prejudicial that it will exercise its discretion to set aside the award.

[12] The four allegations put forward by the Applicant are presented in a way that reflects grounds for setting aside an award as provided in section 46. Each will therefore be examined in order to determine whether they are actually present in the challenged award or in the arbitral process in which the parties engaged.

III. Excess of jurisdiction

[13] The Applicant submits that the arbitrator lost jurisdiction when she included as part of the warranty claim certain defects raised by the Respondent that the Applicant argues were not part of the original claim. As Applicant's counsel explains it, there are matters considered by the arbitrator in her decision that were raised for the first time at conciliation – i.e. subsequent to the Respondent's issuance of the original warranty claim – and which were therefore not chargeable to the Applicant.

[14] Since the arbitrator's authority flows from the arbitration agreement, which is premised on the issues raised by the original warranty claim as issued by the Respondent, inclusion of newly added claims could amount to an excess of the arbitrator's decision-making jurisdiction: *The Piazza Family Trust v. Veillette*, 2011 ONSC 2820, at para. 63 (Div Ct). Under section 46(1)(3) of the Act, exceeding jurisdiction by going outside of the four corners of the arbitration agreement would constitute a ground for setting aside the arbitral award: *Cricket Canada v. Bilal Syed*, 2017 ONSC 3301, at para. 31.

[15] Respondent's counsel points out that while deciding a matter outside of the basic agreement to arbitrate would indeed be a jurisdictional issue, the Applicant's complaint about the decision at issue refers to a matter squarely within the arbitrator's agree-upon jurisdiction. The Applicant itself raised this very question before the arbitrator. Its own "Request to Arbitrate" listed "re-introduced or new issue raised at the conciliation" as part of its request, and explained "We consider these to be new items not raised before the inspection date." The arbitrator duly addressed the question as raised by the Applicant, and concluded that the warranty claim defects put forward by the Respondent were indeed chargeable to the Applicant.

[16] The arbitrator's reasons for decision in this regard are thorough. She reviewed the evidence in the record before her and was attentive to each party's testimony in respect of the items challenged by the Applicant. For each challenged item, the arbitrator referred to the warranties in issue – the One-Year Workmanship and One-Year Materials Warranties – as well as to the Respondent's Construction Performance Guidelines. She then concluded each of the items were all properly warranted.

[17] The arbitrator also reviewed the descriptions of each of the items on the Pre-Delivery Inspection form, the 30-Day Form, and the Warranty Assessment Report, all of which were in the possession of, and were well known to, the Applicant. This review entailed a careful consideration of construction details described in those documents. The arbitrator determined that the disputed

items were consistently described in each document and that there were no new items introduced at conciliation or otherwise after the fact.

[18] The Applicant also contends that the arbitrator exceeded her jurisdiction by relying on the Builder Bulletins, a source published by the Respondent which is generally used to supplement the Ontario Builders Code. Applicant's counsel submit that these are non-binding advisory documents that were not agreed to under the arbitration agreement.

[19] In response, Respondent's counsel submits that this is simply not the case. The Builder Arbitration Form ("BAF") Rules that govern arbitrations under the Act provide that all arbitrations must be determined on the basis of the Act, the regulations thereunder, and the Builder Bulletins. There is nothing hidden or obscured in this agreement. By agreeing to the BAF Rules in the arbitration agreement, the Applicant agreed that the sources incorporated in the BAF Rules, including the Builders Bulletins, apply.

[20] The arbitrator therefore did nothing wrong or unexpected in applying the chargeability conditions found in a Builder Bulletin. In fact, she was required to apply those conditions because they are the conditions that the Applicant was obligated to follow.

[21] To put the matter at its most basic, "[i]f an arbitration agreement provides that an arbitrator shall resolve a particular question and the arbitrator does so, the court has no authority to set aside the award on the basis that the arbitrator's decision is unreasonable or incorrect": *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, at para. 26. 73 What the Applicant asks this Court to do is not to consider whether the arbitrator had jurisdiction over the several disputed construction items – that is the question asked of the arbitrator and answered by the arbitrator. Rather, what the Applicant seeks is for this Court to determine that the arbitrator was incorrect in her assessment of that question.

[22] That determination, however, would amount to interference with a conclusion that the arbitrator reached on issues that were directly within her jurisdiction. As the Court of Appeal put it in *Alectra*, at para. 41, "It was for the arbitrator, not the court, to interpret and apply the substantive provisions of the [arbitration agreement], and it is of no moment whether the arbitrator did so reasonably or unreasonably, correctly or incorrectly." The arbitrator's ruling in respect of the impugned items is not appealable, and her decision was properly within her jurisdiction.

IV. Procedural fairness

[23] The Applicant alleges two bases for finding that there was procedural unfairness in the arbitration process. The first is a complaint that its employee who was most knowledgeable about the house in issue, Jane Smith, was excluded from the pre-arbitral conciliation process at the request of the homeowner. Instead of Ms. Smith, the Applicant sent another one of its employees to discuss the building issues with the Respondent's representative. It is the Applicant's view that the exclusion of Ms. Smith was a procedural defect that should lead to the arbitration award being set aside.

[24] Counsel for the Respondent states that the Applicant has filed no evidence in the record from Ms. Smith explaining how the conduct of the arbitration resulted in a procedural unfairness. Indeed, Ms. Smith herself was a witness who testified at the arbitration hearing and the arbitrator expressly considered her evidence at the hearing. The Applicant apparently did not raise any objection to the procedural fairness of the arbitration with the arbitrator.

[25] It is apparent from the way Applicant's counsel has put this argument that the objection is not to the fairness of the arbitral proceeding. Rather, it is to the fairness of the conciliation process that preceded the arbitration. The arbitrator specifically considered that issue, and found that the Respondent is not in a position to order a homeowner to allow an individual into their home that the homeowner does not want in their home.

[26] In other words, the issue that the Applicant now raises is one that, again, was specifically asked of the arbitrator and answered by the arbitrator. It is not now subject to being re-considered in the guise of a procedural fairness point. The arbitrator herself engaged in no procedural unfairness. What the Applicant seeks is, essentially, an appeal of the arbitrator's decision on an issue of unfairness in the Respondent's investigative and conciliation process. That is not a tenable position, as no appeal is authorised under the Act.

[27] The other issue of supposed procedural irregularity raised by the Applicant is, once again, that the arbitrator unfairly relied on a Builders Bulletin in reaching her decision. As discussed above, the Applicant was obliged under its vendor agreement with the Applicant, and by the regulations under the Act, to comply with the Respondent's Builder Bulletins. It had notice under the arbitration agreement that the BAF Rules would apply, and it agreed to the application of those Rules.

[28] There is simply no discernable argument that the arbitrator's reliance on the provisions of a Builders Bulletin was unfair. The Applicant may not agree with the result that the arbitrator came to. But the arbitrator's conclusion, as opposed to the process, does not provide a basis to set the ruling aside.

V. Allegation of bias

[29] The Applicant alleges that the arbitrator was biased in reaching her decision. But it submits no evidence in support of this allegation. Rather, it seeks to have the court come to this conclusion based on the content of the arbitrator's reasons for decision.

[30] I fail to see how the arbitrator's reasons and conclusion create a reasonable apprehension of bias. To set aside an award for arbitrator bias, there is an onus on the Applicant to introduce evidence that is not only substantial, but that reveals a consistent pattern of bias by the arbitrator. As Justice Lax said in *A.T. Kearney Ltd. v. Harrison*, 2003 CanLII 32908, at para. 7, "The threshold for a finding of real or perceived bias is a high one since it calls into question both the personal integrity of the adjudicator and the integrity of the administration of justice."

[31] An apprehension of bias must be “measured by whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator”: *Calabrese v. Weekes*, 2003 CanLII 3311, citing *Jaffasweet Juices Ltd. v. Michael J. Firestone & Associates*, [1997] O.J. No. 4585, at para. 38 (Gen. Div.). Essentially, the Applicant’s argument is that the arbitrator was biased because she did not accept the arguments that Ms. Smith was improperly excluded from the conciliation and that the Respondent warranted items allegedly not included on the homeowners’ original 30-Day Form.

[32] In other words, the bias identified by the Applicant is precisely the substantive grounds on which it lost the case. But as Justice Himel observed pointedly in *Calabrese*, at para. 37, “The court does not have jurisdiction to set aside an award which is, in essence, an attempt to appeal the decision of the arbitrator, where no right of appeal exists.”

[33] The other ground of bias argued by the Applicant is that arbitrator Anschell is a member of the roster of approved BAF arbitrators and, by inference, this leads to an apprehension that she is pre-disposed to side with the Respondent. Again, the Applicant has introduced no evidence to support this contention other than the general observation that there is an approved list of arbitrators from which parties are invited to choose.

[34] The Applicant itself nominated arbitrator Anschell. It selected her from the roster list as its first choice. Further, it never asked her to recuse herself, nor did it object to her at the arbitration hearing. Moreover, the arbitrator signed the nomination form confirming that she had no conflict of interest in being appointed as arbitrator, and, to be clear, the Applicant alleges no particular conflict of interest. In other words, the Applicant takes issue with the general fact that the arbitrator is on the BAF roster – a fact that would pertain to every available arbitrator.

[35] The Respondent points out, and it is certainly the case, that arbitrator rosters are commonplace. It is self-evident that there are perfectly valid reasons for this specialized process to employ a roster of approved arbitrators. Builder Bulletin 41 explains that the purpose of the roster is to ensure that arbitrators and mediators are independent, have relevant experience, are familiar with the issues in new home construction, and have an understanding of how the Act works.

[36] To ask whether familiarity with the subject area and knowledge of the applicable law reflects improper bias is to answer its own question. There is no bias made out here. The arbitrator is an approved name on the roster of arbitrators precisely because she can be counted on to be insightful and objective in regard to the subject matter at hand.

VI. Failure to provide reasons

[37] Section 38(1) of the *Arbitration Act*, 1991, SO 1991, c. 17, requires arbitrators to provide reasons for decision. It is well established that the written reasons need not review each and every argument raised by the parties, and need not recite each and every statute or judicial decision referenced by the parties. “Rather, the reasons must show, when read in context of the record and

the submissions, that the trier has “seized the substance of the matter”. The degree of detail in any particular case may vary with the circumstances”: *Farmer v. Farmer*, 2021 ONSC 5913, at para. 113.

[38] In fact, the adequacy or inadequacy of reasons is not generally a sufficient ground for quashing an otherwise valid decision. The Supreme Court of Canada has explained that the purpose of reasons is to demonstrate “justification, transparency and intelligibility”: *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190, at para. 47. The Supreme Court has gone on to explain that, “[I]f the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met”: *Newfoundland and Labrador Nurses’ Union v. Newfoundland and Labrador (Treasury Board)*, [2011] 3 SCR 708, at para. 16.

[39] I find that there is no basis here to challenge the arbitrator’s reasons. As indicated at the outset, arbitrator Anschell provided 19 pages of reasons. In the course of those reasons, she discussed the evidentiary record, engaged in appropriate fact finding, addressed the grounds set out in the Request for Arbitration, and considered the Applicant’s various arguments.

[40] In short, the arbitrator’s reasons provided a logical and transparent basis for her decision. The Applicant has failed to identify anything in particular that is lacking in those reasons. It is apparent that it is the conclusion, and not the reasons, that the Applicant dislikes. But as already explained, disagreement with the arbitrator’s conclusion is not a proper basis for setting aside the decision.

VII. Admissibility

[41] The Respondent has sought to adduce evidence of the context in which it operates and in which chargeable conciliations such as those in dispute between the parties arise. That evidence is presented by way of an affidavit of Shannon Hayman, the official at the Respondent responsible for administering the BAF process. The Applicant objects to the admissibility of this affidavit, arguing that Ms. Hayman’s testimony amounts to a usurpation of the court’s role as fact finder and decision maker.

[42] Given the way the matter has unfolded, I do not need Ms. Hayman’s evidence. As a general matter, however, I will say that it was not improper for the Respondent to seek to introduce affidavit evidence from the statutory administrator as to how the Act works.

[43] The Act operates in a specialized and somewhat technical field in which a “non-argumentative orienting statement” about the statutory scheme may be helpful: *Bernard v. Canada Revenue Agency*, 2015 FCA 263, at para. 21. To the extent that this kind of context evidence provides a neutral summary of steps and procedures, it can be admitted without it threatening to unduly interfere with the Court’s decision or to transform the Application into a hearing *de novo*: *Scott v. Toronto (City)*, 2021 ONSC 858, at para. 19 (Div Ct).

[44] On the other hand, an affidavit submitted for the purpose of providing context for the parties' arguments should not contain 'spin' and should not paint one side's view of the process in a positive light and the other's in a negative light. Likewise, it should not contain legal analysis or superfluous explanations about routes of appeal/review or other such matters within the court's basic competence. There do appear to be some of these types of statements in Ms. Hayman's affidavit, which I would excise if I were admitting it into the record.

[45] Under the circumstances, I see no need to admit Ms. Hayman's affidavit into the record. The Respondent's case stands on its own without this proposed evidence. I have not relied on it in reaching my decision.

VIII. Disposition

[46] The Application is dismissed.

[47] The parties may make written submissions on costs.

[48] I would ask counsel for the Respondent to provide me with brief submissions by emailing them to my assistant, and serving them on the Applicant, within two weeks of today. I would also ask counsel for the Applicant to provide me with equally brief submissions by emailing them to my assistant, and serving them on the Respondent, within two weeks after receiving the Respondent's submissions.

Date: February 26, 2025

Morgan J.