CITATION: Remington Georgetown Inc. v. Tarion Warranty Corporation, 2025 ONSC 1999
COURT FILE NO.: CV-23-00697810-0000
DATE: 20250331

2025 ONSC 1999 (CanLII)

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: Cost submissions in writing

COSTS ENDORSEMENT

[1] The Applicant was unsuccessful in seeking to set aside the decision of arbitrator Deborah Anschell under the *Ontario New Home Warranties Plan Act*, RSO 1990, c. O.31 (the "Act").

[2] At the same time, the Applicant brought an application under Rule 14 of the *Rules of Civil Procedure* challenging the validity of the Builder Arbitration Form ("BAF") Rules that govern arbitrations under the Act and the Builders Bulletins that interpret the warranty rules. The Respondent served a responding affidavit and record to the Rule 14 application. Once receiving the responding materials, the Applicant abandoned its application.

[3] The Respondent deserves its costs of both proceedings.

[4] The Respondent seeks to recover costs on a full indemnity basis, in the all-inclusive amount of $ $212,106.26.

[5] Both applications lacked merit. As I explained in my reasons for decision, they challenged an arbitration arrangement that is essentially voluntary; the Act does not require arbitration, and the Applicant could have opted for a different procedural route: *Remington Georgetown Inc. v. Tarion Warranty Corporation*, 2025 ONSC 1285, at paras. 3-4.

[6] That said, the two applications entailed challenges to the BAF Rules, and therefore to the Tarion warranty system itself and the adjudications that the system entails. They therefore required a robust response.

[7] Counsel for the Respondent point out that it is a condition of the Applicant's registration as a vendor of new homes that it indemnify the Respondent for the costs of unsuccessful proceedings that it brings under the Act. The Applicant has entered into a Vendor Agreement with the Respondent that includes a broadly worded indemnity provision that expressly covers "costs." Article 2.1 of the Vendor Agreement provides:

> The Registrant shall diligently perform the obligations heretofore or hereafter imposed upon the Registrant by the Act, the Regulations, this Agreement and/or the Bulletins and shall indemnify and save Tarion harmless from and against all losses, claims, ***costs***, damages and/or liabilities whatsoever heretofore or hereafter suffered or incurred by Tarion resulting from (or arising out of) any non-performance or inadequate performance of such obligations, in whole or in part, at the times, (and in the manner) as may be provided or contemplated by the Act, the Regulations, this Agreement, and/or the Bulletins, provided written notice of a claim against the Registrant, or relating to any homes in respect of which the Registrant acted as Vendor (or that were controlled by the Registrant) has been given to Tarion within the relevant warranty period(s). [Emphasis added].

[8] The broad indemnity in the Vendor Agreement is engaged by the present claim. The Respondent found construction defects at a home built by the Applicant. The Respondent then determined them to be covered by the Act's warranties, making the repair of those defects chargeable. The Applicant unsuccessfully challenged that determination in a BAF arbitration, which was subsequently upheld by this Court.

[9] Counsel for the Respondent submits that the Respondent's legal fees are "costs", and that they are "resulting from" the Applicant's "non-performance or inadequate performance" of "obligations imposed upon [the Applicant] by the Act, the Regulations, this Agreement and/or the Bulletins.". I agree; the wording of the Vendor Agreement is clear. On a "straightforward and purposive reading of the contractual language", the Applicant is obliged to reimburse the Respondent its full costs: *Nadarajalingam v. Zhao*, 2018 ONSC 1618, at para. 19.

[10] Moreover, the costs of the abandoned application are in the nature of costs thrown away. The courts have repeatedly held that, "Costs thrown away are generally payable on a full recovery basis": *Caldwell v. Caldwell*, 2015 ONSC 7715, at para. 11, citing *Pittiglio v. Pittiglio,* 2015 ONSC 3603 at para. 5; *Milone v. Delorme,* 2010 ONSC 4162, at para. 12; *Straume v. Battarbee Estate,* 2001 CarswellOnt 6225, at paras. 2-3; *Middleton v. Jaggee Transport Ltd.*, 2014 ONSC 3041, at para. 5.

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[11] The Applicant waited until the Respondent had gone to the time and expense of producing a responding record before abandoning its Rule 14 application. That timing justifies the Respondent's request for full indemnification of its costs thrown away.

[12] Finally, I feel compelled to mention that a substantial part of the Applicant's set aside application was devoted to an attack on the arbitrator for bias. The Applicant strenuously pursued a line of argument asserting that because the arbitrator is on the Respondent's roster of arbitrators she was inclined to find against the Applicant and for the Respondent. That is not just an impugning of the arbitrator, but is a form of wholesale attack on the arbitration system that is designed to make the application much more concerning, and costly, for the Respondent to address.

[13] More than that, alleging bias against an adjudicator is an argument that any experienced litigator should know is not to be lightly put forward. Here, there was not a scintilla of evidence that the arbitrator was biased or that her decision was anything other than an objective and fair one. The Applicant simply used the arbitrator's personal reputation as fodder for putting the Respondent through more of a litigation ordeal than the case would otherwise have presented. That is not a tactic that the court condones.

[14] The arbitrator did not deserve to be unfairly maligned. The Respondent properly rose to the challenge, and the Applicant should be made to pay.

[15] Rounding the figure off for the sake of convenience, the Applicant shall pay the Respondent costs in the all-inclusive amount of $212,000.00.

Date: March 31, 2025

Morgan J.