CITATION: Ritchie v. Castlepoint Greybrook Sterling Inc., 2020 ONSC 3840
COURT FILE NO.: CV-18-00605531-00CP
DATE: 2020/06/26

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
LUCIE ANNE MARIE RITCHIE, (formerly Brunet), RAHUL JOSHI and ERIN LESLIE Plaintiffs	*Geoffrey D.E. Adair, Q.C.* for the Plaintiffs
- and -	
CASTLEPOINT GREYBROOK STERLING INC. Defendant	*Steve Tenai* and *Brian Chung* for the Defendant
Proceeding under the *Class Proceedings Act, 1992*	**HEARD**: June 4, 2020

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] The Defendant, Castlepoint Greybrook Sterling Inc., is a land developer, and in 2014-2016, it planned to develop a 10-storey residential condominium building known as Museum FLTS in the City of Toronto. Between 2015 and 2016, Castlepoint pre-sold 179 units. The Plaintiffs, Lucie Anne Marie Ritchie (formerly Brunet), Rahul Joshi, and Erin Leslie, respectively entered into pre-construction Agreements of Purchase and Sale. Castlepoint never began construction, and in late 2016, relying on an early termination provision in the agreements (Clauses 6 (f) and 28), Castlepoint terminated the agreements and returned the purchasers' deposits with interest.

[2] On September 20, 2018, pursuant to the *Class Proceedings Act, 1992* [1], Ms. Richie, Mr. Joshi, and Ms. Leslie sued Castlepoint for breach of contract. The theory of their action is that Castlepoint failed to meet its obligations under the Agreements of Purchase and Sale to take all commercially reasonable steps to satisfy the financing condition in the agreements, including the obtaining of municipal approvals. The Plaintiffs submit that Castlepoint breached Clauses 1 (a)

[1] S.O. 1992, c. 6.

and 6 (f) of the Tarion Delayed Occupancy Warranty, which is a part of the Agreements of Purchase and Sale.

[3] The Plaintiffs submit that the purchasers of condominium units in a dramatically rising market lost the opportunity to obtain a residential condominium at the bargained-for price. In their action, the Plaintiffs do not contest the termination of the Agreements of Purchase and Sale and they do not seek specific performance; rather, they submit that the termination of the Agreements of Purchase and Sale was a breach of contract, and they sue for damages for breach of contract.

[4] The Plaintiffs submit that Castlepoint cannot rely on Clause 28 of the Agreements of Purchase and Sale, which provides that the Vendor shall not be liable for any damages or costs whatsoever incurred resulting from the termination of the Agreement including, without limiting the generality of the foregoing, relocation costs, professional fees and disbursements, opportunity costs, loss of bargain or any other damages or costs incurred by the Purchaser, directly or indirectly.

[5] There are three motions before the court.

a. First, the Plaintiffs bring a motion to deliver an amended Statement of Claim with respect to the breach of contract claim. Castlepoint opposes leave being granted and it submits that a new cause of action is being pleaded after the limitation period, which is forbidden as statute barred.

b. Second, based on the original or the amended Statement of Claim, the Plaintiffs bring a motion to have their action certified as a class action.

c. Third, in response to the motion for certification, Castlepoint brings a cross-motion to have the Plaintiffs' action dismissed. Castlepoint contends that it did not breach the Agreements of Purchase and Sale, but, in any event, it submits that it is entitled to rely on Clause 28, the termination without damages clause. The Plaintiffs are suing for damages, and relying on Clause 28, Castlepoint submits it is exculpated from paying damages.

[6] In the event that its summary judgment motion should fail, Castlepoint concedes that the Plaintiffs' action should be certified as a class action, but it disputes some of the proposed common issues. Thus, the preeminent issue at the heart of all three motions is the enforceability of Clause 28.

[7] For the reasons that follow:

a. I grant leave to the Plaintiffs to deliver an amended Statement of Claim.

b. I grant Castlepoint's summary judgment motion, and

c. I dismiss the Plaintiffs' action.

d. Because the Plaintiffs' action is being dismissed, their certification motion is dismissed as moot.

B. Procedural Background

[8] On September 20, 2018, the Plaintiffs commenced this proposed class action. The proposed class consists of each individual who entered into an Agreement of Purchase and Sale with Castlepoint for the purchase of a Museum FLTS condominium unit.

[9] The Plaintiffs' Statement of Claim pleads a cause of action for breach of contract.

[10] In the original Statement of Claim, the Plaintiffs allege that the Defendant breached an implied term of the Agreement of Purchase and Sale that the Defendant would act in good faith in making every reasonable commercial effort to obtain construction financing satisfactory to Castlepoint if on terms that were commercially reasonable. The Plaintiffs allege that acting in good faith, Castlepoint had available to it construction financing on reasonable commercial terms. The Plaintiffs allege that Castlepoint did not proceed in good faith.

[11] In the proposed Amended Statement of Claim, the Plaintiffs submit that it was also an express and implied term of the agreements that Castlepoint act in good faith and take all reasonable steps to complete the construction to provide occupancy without delay. Further, the Plaintiffs rely on Ontario Regulation 165/08, which provides for statutory compensation for delayed occupancy of a condominium residence.

[12] For the purposes of the certification motion, the Plaintiffs propose the following revised list of common issues:

> 1 . Did Castlepoint breach its obligation under Clause 1 (a) of the Tarion Addendum to the Agreements of Purchase and Sale?
>
> 2. Did Castlepoint breach its obligations under Clause 6 (f) of the Tarion Addendum to the Agreements of Purchase and Sale? [no contest – former 3&4]
>
> 3. What is the appropriate date of the assessment of damages?
>
> 4. What is the measure of damages each class member sustained as of the date of termination of the Agreements of Purchase and Sale? [as of the appropriate date of assessment]
>
> 5. Are aggregate damages an appropriate remedy?
>
> 6. If the answer to Issue No. 5 is "Yes", then what is a fair and just quantum of aggregate damages?
>
> 7. Does Castlepoint's conduct merit an award of punitive damages?
>
> 8. If the answer to Issue No. 7 is "Yes", then what is a fair and just quantum of punitive damages?

[13] In December 2019, the Plaintiffs issued their Notice of Motion for Certification. Their motion for certification was supported by the affidavit of Ms. Ritchie dated August 14, 2019.

[14] In April 2020, Castlepoint delivered: (a) its Statement of Defence; (b) its composite Responding Motion Record for Certification; and (c) its Motion Record for Summary Judgment.

[15] The composite Motion Record included the affidavit of Alfredo Romano dated April 20, 2020. Mr. Romano is a director of Castlepoint.

[16] In May 2020, the Plaintiffs delivered their motion record for certification and responding material for the motion for summary judgment. The motion record included an affidavit from Mr. Joshi dated January 21, 2020 and an affidavit from Ms. Leslie dated January 21, 2020.

[17] After January 2020, the Plaintiffs responded to written interrogatories.

- Ms. Ritchie, who was one of the real estate sales agents employed to sell the condominium units, refused to answer how many sales she was involved with as a sales agent.
- Ms. Ritchie refused to answer what she had advised some of the proposed Class Members.
- Ms. Ritchie refused to answer whether before selling Museum FLTS units, she had worked as a sales agent on three other condominium projects developed by Castlepoint.
- Ms. Ritchie and Mr. Joshi refused to answer questions about any extensions of the cooling off period beyond the statutory period.
- Each of the Plaintiffs refused to answer whether they consulted with a lawyer about the terms of the agreements before signing and whether they discussed Clause 28 with a lawyer.
- Each of the Plaintiffs refused to answer whether at the time they signed the agreement or before the expiry of the period available to them to not proceed with the agreement, they were aware that pursuant to Clause 28, if Castlepoint terminated the Agreement of Purchase and Sale, Clause 28 provided that a purchaser would be entitled to his or her deposit plus interest but would not be entitled to claim damages or costs incurred as a result of Castlepoint's termination.
- Each of the Plaintiffs refused to answer whether they had previously come across clauses in real estate agreements that excluded or limited damages in the event of termination by the vendor and, if so, to provide particulars of the clauses.
- Each of the Plaintiffs refused to answer whether they had entered other Agreements of Purchase and Sale for a pre-construction condominium, particulars of those agreements, whether those agreements had been terminated, and whether any claims for damages were pursued.

[18] In May 2020, Castlepoint delivered a Supplemental Motion Record including the affidavit of Hilary Butten dated May 15, 2020. Ms. Butten is a legal assistant at Aird & Berlis LLP, the lawyers for Castlepoint.

[19] The Plaintiffs brought a motion to amend the Statement of Claim that was returnable at the hearing of the other two motions, which as noted above are a certification motion and a summary judgment motion.

C. The Motion to Amend the Statement of Claim

[20] A cause of action is a set of facts that entitles a person to obtain a judgment in his or her

favour from a court exercising its common law, equitable or statutory jurisdiction.[2] A cause of action identifies a factual matrix from which claims or complaints arise and it identifies the legal nature of those claims, which is the nominal or technical meaning of a cause of action.[3] In the immediate case, Castlepoint argues that the Plaintiffs' Amended Statement of Claim raises a new cause of action after the expiry of the limitation period.

[21] In the immediate case, the Plaintiffs, however, argue that the amended pleading is within the facts as originally pleaded or is just a better particularized pleading.[4] The Plaintiffs argue that a new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or if the pleading amounts simply to different legal conclusions drawn from the same set of facts, or if the pleading simply provides particulars of an allegation already pled or additional facts upon which the original right of action is based.[5]

[22] The case law supports the Plaintiffs' arguments. An amendment of a statement of claim to assert an alternative theory of liability or an additional remedy based on material facts that have already been pleaded in the statement of claim does not assert a new claim for purposes of section 4 of the *Limitations Act*.[6] The key is whether substantially all of the material facts of the tendered cause of action have already been pleaded, in which case, the amendment will be allowed, or whether new material facts are sought to be added to support the cause of action, in which case, the amendment will not be allowed or if already pleaded, it will be struck.[7]

[23] In the immediate case, I agree with the Plaintiffs' argument. I, therefore, grant leave for them to deliver the Amended Statement of Claim.

D. Facts

[24] Ms. Ritchie was a sales agent with the real estate agency retained by Castlepoint to sell the Museum FLTS Condominium units. Ms. Ritchie herself signed an agreement to purchase a unit for her, along with her spouse, and a corporation controlled by her father-in-law (Ritchie Engineering Consultants Ltd.). The purchase was an investment for them.

[25] Mr. Joshi is 39 years old and has been employed for over twelve years with CIBC and is currently a senior quality analyst. He is a graduate from Loyalist College with a diploma in

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[2] *1309489 Ontario Inc. v. BMO Bank of Montreal*, 2011 ONSC 5505 at paras. 18-28; *Ivany v. Financiere Telco Inc.*, 2011 ONSC 2785 at paras. 26-33.
[3] *1309489 Ontario Inc. v. BMO Bank of Montreal*, 2011 ONSC 5505 at paras. 18-28; *Ivany v. Financiere Telco Inc.* 2011 ONSC 2785 at paras. 26-33.
[4] The plaintiff succeed with this argument in *Ivany v. Financiere Telco Inc.*, 2011 ONSC 2785 and *1309489 Ontario Inc. v. BMO Bank of Montreal*, 2011 ONSC 5505.
[5] *Greenstone (Municipality) v. Marshall Macklin Monaghan Ltd.*, 2013 ONSC 7058 (Div. Ct.); *Shubaly v. Coachman Insurance*, [2012] O.J. No. 4951, (S.C.J.); *Dee Ferraro Ltd. v. Pellizzari*, 2012 ONCA 55; *Ascent Inc. v. Fox 40 International Inc.*, [2009] O.J. No. 2964 (Master).
[6] *United Food and Commercial Workers Canada, Local 175, Region 6 v. Quality Meat Packers Holdings Limited*, 2018 ONCA 671; *Lo Faso Estate v. Ferracuti*, 2018 ONSC 6303; *1100997 Ontario Ltd. v. North Elgin Centre Inc.*, 2016 ONCA 848; *Gendron v. Doug G. Thompson Ltd. (c.o.b. Thompson Fuels)*, 2016 ONSC 7056; *Dee Ferraro Ltd. v. Pellizzari*, 2012 ONCA 55.
[7] *Bank of Montreal v Morris*, 2013 ONSC 2884; *Timbers Estate v Bank of Nova Scotia*, 2011 ONSC 3639; *Dugal v. Manulife Financial Corporation*, 2011 ONSC 1764; *Ascent Inc. v. Fox 40 International Inc.*, [2009] O.J. No. 2964 (Master).

Networking Technology.

[26] Ms. Leslie is 56 years old. She is a graduate of the Ontario College of Art and Design and has been self-employed in the film production industry for many years.

[27] Castlepoint owns a parcel of land located at 158 Sterling Road in the City of Toronto in the area known as the Lower Junction Triangle. In 2014-2016, Castlepoint took steps to develop one of the blocks in the parcel as a 10-storey residential condominium building known as Museum FLTS.

[28] On July 6, 2015, Castlepoint through a related corporation announced the successful closing of a $22.4 million equity private placement to be used to fund the development of a mixed-use project. On August 19, 2015, another related corporation announced that final approval has been given for Castlepoint's redevelopment of the project lands including Museum FLTS.

[29] In the spring of 2016, Castlepoint began marketing the units and it entered into 179 agreements of purchase and sale. Some of the purchasers were individuals and some were institutional investors. Some of the purchasers were friends of Castlepoint employees or of the real estate agent retained by Castlepoint. Many, if not all the purchasers, were represented by legal counsel or a real estate agent in negotiating and signing the agreements of purchase and sale. Some purchasers negotiated changes to the agreements. Pursuant to s. 73 of the *Condominium Act, 1998,*[8]all of the purchasers had had a ten-day cooling off period, or longer, to withdraw from the agreement with no penalty.

[30] Castlepoint stated in each agreement that it had obtained zoning approval for the project and expected construction to start by July 7, 2017. The Tentative Occupancy date was scheduled for March 29, 2019.

[31] The Agreements of Purchase and Sale included the following terms:

> Paragraphs 3 through 74 and Schedules 'A', 'A1', 'B', 'C', 'D'. 'E', and __ as well as Tarion Warranty Corporation's Statement of Crucial Dates and Addendum to Agreement of Purchase and Sale (The "Addendum" or the "Tarion Addendum"), together with the appendix to the Addendum outlining permitted Early Termination Conditions are attached to this Agreement and form an integral part of this Agreement. The Purchaser confirm he has read and agreed to be bound by the Schedules, the Statement of Critical Dates, the Addendum, and the appendix to the Addendum outlining permitted Early Termination Conditions. […]
>
> […]
>
> ***6. Vendor's Condition***
>
> (1) The Purchaser acknowledges and agrees that the Vendor's obligation to complete the transaction of purchase and sale contemplated by this Agreement shall be conditional on the Vendor obtaining construction financing for the Condominium (on terms satisfactory to the Vendor) on or before 5:00 p.m. (EST) on December 28, 2018.
>
> (2) If the Vendor decides to avail itself on this condition and terminate this transaction, then the Vendor shall give notice in writing to the Purchaser on or before the time and date specified above. In this event, the Deposit shall be returned to the Purchaser with interest (if any) and without deduction and the parties shall have no further obligations with respect to this Agreement. In the event that the Vendor does not give notice in writing to the Purchaser prior to the time and date specified above, the Vendor shall be deemed to have waived this condition. The Purchaser

[8] S.O. 1998, c. 19.

acknowledges that this condition is for the benefit of the Vendor and may be waived by the Vendor in its sole discretion.

[…]

28. Termination

In the event that this Agreement is terminated through no fault of the Purchaser, the Deposit shall be returned to the Purchaser (with interest, if any, calculated at the rate prescribed by the *Condominium Act*) and without deduction (except as contemplated by the Occupancy Licence). The Purchaser acknowledges that the Vendor shall not be required to return any amount paid by the Purchaser to the Vendor as Occupancy Licence Fees. The Purchaser further acknowledges that the Vendor shall not be liable for any damages or costs whatsoever incurred by the Purchaser resulting from the termination of this Agreement including, without limiting the generality of the foregoing, relocation costs, professional fees and disbursements, opportunity costs, loss of bargain or any other damages or costs incurred by the Purchaser, directly or indirectly. The Purchaser acknowledges and agrees that this provision may be pleaded by the Vendor as a complete defence to any claim which may be made by the Purchaser against the Vendor.

[…]

General

63. The Vendor and the Purchaser agree that there Is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property or supported hereby other than as expressed herein in writing.

64. Time shall be of the essence with respect to all aspects of this Agreement. This Offer when accepted by the Vendor shall constitute a binding contract of purchase and sale subject only to the expiration of the initial statutory rescission period in the Act.

65. This Offer and its acceptance (s to be read with all changes of gender or number required by the context and the terms, provisions and conditions hereof shall be for the benefit of and be binding upon the Vendor and the Purchaser, and as the context of this Agreement permits, their respective heirs, estate trustees, successors and permitted assigns.

66. This Agreement shall be governed by and construed in accordance with the laws of the Province of Ontario.

[…]

[32] Pursuant to O. Reg 165/08 (Warranty for Delayed Closing or Delayed Occupancy), s. 8. pre-construction agreements of purchase and sale are required to incorporate prescribed addendums. The Tarion Addendum terms included the following provisions:

SETTING AND CHANGING CRITICAL DATES

1. Setting Tentative Occupancy Dates and the Firm Occupancy Date

(a) Completing Construction Without Delay: The Vendor shall take all reasonable steps to complete construction of the Building subject to all prescribed requirements, to provide Occupancy of the home without delay, and to register without delay the declaration and description in respect of the Building.

[…]

[…]

6. EARLY TERMINATION CONDITIONS

(a) The Vendor and Purchaser may include conditions in the Purchase Agreement that, if not satisfied, give rise to early termination of the Purchase Agreement, but only in the limited way described in this section.

(b) The Vendor is not permitted to include any conditions in the Purchase Agreement other than: the types of Early Termination Conditions listed in Schedule A; and/or the conditions referred to in paragraphs (i), (j) and (k) below.

[…]

(d) The obligation of each of the Purchaser and Vendor to complete this purchase and sale transaction is subject to satisfaction (or waiver, if applicable) of the following conditions and any such conditions set out in the appendix headed "Early Termination Conditions".

Condition #1 (if applicable)

Description of the Early Termination Condition:

The Purchase Agreement is conditional upon receipt by the Vendor of confirmation that financing for the construction of the Condominium has been arranged on terms satisfactory to the Vendor. This condition is for the benefit of the Vendor and may be waived by the Vendor in its sole discretion. The date by which this condition is to be satisfied or waived by the Vendor is noted below.

[…]

The date by which Condition #1 is to be satisfied is December 28, 2018.

[…]

(e) There are no Early Termination Conditions applicable to this Purchase Agreement other than those identified in subparagraph (d) above and any appendix listing additional Early Termination Conditions.

(f) The Vendor agrees to take all commercially reasonable steps within its power to satisfy the Early Termination Conditions identified in subparagraph (d) above.

[…]

(h) For conditions under paragraph 1(b) of Schedule A the following applies:

(i) conditions in paragraph 1(b) of Schedule A may be waived by the Vendor;

(ii) the Vendor shall provide written notice on or before the date specified for satisfaction of the condition that: (A) the condition has been satisfied or waived; or (B) the condition has not been satisfied nor waived, and that as a result the Purchase Agreement is terminated; and

(iii) if notice is not provided as required by subparagraph (ii) above then the condition is deemed satisfied or waived and the Purchase Agreement will continue to be binding on both parties.

[…]

11. Refund of Monies Paid on Termination

(a) If the Purchase Agreement is terminated (other than as a result of breach of contract by the Purchaser), then unless there is agreement to the contrary under paragraph 10(a), the Vendor shall refund all monies paid by the Purchaser including deposit(s) and monies for upgrades and extras, within 10 days of such termination, with interest from the date each amount was paid to the Vendor to the date of refund to the Purchaser. The Purchaser cannot be compelled by the Vendor to execute a release of the Vendor as a prerequisite to obtaining the refund of monies payable as a result of termination of the Purchase Agreement under this paragraph, although the Purchaser may be required to sign a written acknowledgement confirming the amount of monies refunded and termination of the purchase transaction. Nothing in this Addendum prevents the Vendor and Purchaser from entering into such other termination agreement and/or release as may be agreed to by the parties.

(b) The rate of Interest payable on the Purchaser's monies shall be calculated in accordance with the *Condominium Act, 1998*.

(c) Notwithstanding paragraphs(a) and (b) above, if either party initiates legal proceedings to contest termination of the Purchase Agreement or the refund of monies paid by the Purchaser, and obtains a legal determination, such amounts and Interest shall be payable as determined In those proceedings.

[…]

13. Addendum Prevails

The Addendum forms part of the Purchase Agreement. The Vendor and Purchaser agree that they shall not include any provision In the Purchase Agreement or any amendment to the Purchase Agreement or any other document (or indirectly do so through replacement of the Purchase Agreement) that derogates from, conflicts with or is inconsistent with the provisions of this Addendum, except where this Addendum expressly permits the parties to agree or consent to an alternative arrangement. The provisions of this Addendum prevail over any such provision.

[…]

SCHEDULE A

Types of Permitted Early Termination Conditions

1. The Vendor of a condominium home is permitted to make the Purchase Agreement conditional as follows:

[…]

(b) upon:

(i) receipt by the Vendor of confirmation that sales of condominium dwelling units have exceeded a specified threshold by a specified date;

(ii) receipt by the Vendor of confirmation that financing for the project on terms satisfactory to the Vendor has been arranged by a specified date;

(iii) receipt of Approval from an Approving Authority for a basement walkout; and/or (iv) confirmation by the Vendor that It Is satisfied the Purchaser has the financial resources to complete the transaction.

The above-noted conditions are for the benefit of the Vendor and may be waived by the Vendor in its sole discretion.

> […]
>
> 3. Each condition must:
>
> > (a) be set out separately;
> >
> > (b) be reasonably specific as to the type of Approval which is needed for the transaction; and
> >
> > (c) identify the Approving Authority by reference to the level of government and/or the identity of the governmental agency, Crown corporation or quasi-governmental authority.
>
> […]

[33] As noted above, for the Museum FLTS's condominiums, the first tentative occupancy date was March 29, 2019 and the outside occupancy date was March 29, 2022, which is three to six years after the agreements of purchase and sale were signed.

[34] As noted above, each of the purchasers of the Museum FLTS condominium units were protected by the cooling off provisions of s. 73(2) of the *Condominium Act, 1998*. Pursuant to s. 73(2), a Purchaser may rescind the agreement of purchase and sale by delivering a written notice of rescission within ten days of the later of: (a) the date that the purchaser receives the disclosure statement; and (b) the date that the purchaser receives a copy of the agreement of purchase and sale executed by the vendor.

[35] In the immediate case, each purchaser signed the following Acknowledgment:

> As prescribed by Section 73 of the *Condominium Act*, the Purchaser shall be entitled to rescind or terminate the Agreement of Purchase and Sale relating to the above noted property and obtain a full refund of the Deposit provided the Purchaser or the Purchaser's solicitor gives written notice of rescission to the Vendor or the Vendor's solicitor within 10 days after the later of:
>
> > the date that the Purchaser receives the Disclosure Statement; and
> >
> > the date that the Purchaser receives a fully executed copy of the Agreement of Purchase and Sale, duly executed by both Purchaser and Vendor.
>
> By executing this Acknowledgment, the Purchaser acknowledges having received both the Disclosure Statement and a fully executed copy of the Agreement of Purchase and Sale; consequently, the Purchaser's right of rescission commences on the date hereof and shall expire at 5:00 p.m. on that date which is 10 days thereafter.

[36] As appears from the contract provisions set out above, Clause 28 is an exculpatory clause. Castlepoint presented evidence that Clause 28 was typical of other exclusion clauses found in the pre-development condominium agreements of purchase and sale of other developers of residential condominium projects.

[37] Castlepoint never did start construction. Castlepoint alleges that by the late summer and early fall of 2017, rising construction costs made the condominium financially unviable. Castlepoint's financial projections indicated that the project would generate negative returns rather than the minimum level of profit required by project lenders to finance the construction of the condominium.

[38] Castlepoint terminated the project by letter to the Plaintiffs and other purchasers dated October 23, 2017. The letter stated:

> Dear Sirs:
>
> RE: VENDOR: Castlepoint Greybrook Sterling Inc.
> PURCHASER: -
> PROJECT: Museum FLTS
> LEGAL DESC.:
> ADDRESS:
>
> It is with great regret that we must confirm the cancellation of the Museum FLTS condominium. Following more than two years of intense engagement by our team in the design and approval process with community stakeholders and City of Toronto staff, it has become clear that we will not be in a position to obtain the necessary municipal approvals and permits required to build Museum FLTS in the foreseeable future. As such and with the passage of time, the now untenable project timetable has rendered the project commercially un-financeable. Therefore, the project as designed will unfortunately not proceed despite our development team's best intentions.
>
> While we share your disappointment with this news, our commitment to the Lower JCT project and the Junction Triangle community remains strong despite this setback. We remain confident that our long-term vision for a complete and vibrant community will ultimately be realized.
>
> In accordance with Section 6 of the Agreement of Purchase and Sale, this letter represents formal notice that the Agreement of Purchase and Sale is hereby terminated. Enclosed please find a cheque in the amount of $*, representing the return of your deposit paid in the amount of $*, plus accrued interest in the amount of $*. Should you remain interested in the Lower JCT project, we will be pleased to keep you informed of any new offering on the site should you choose to wait for this opportunity.
>
> Please do not hesitate to contact me at your convenience If you have any questions.
>
> Yours very truly,
>
> CASTLEPOINT GREYBROOK STERLING INC.
>
> Alfredo Romano, Co-President
>
> Encl.

[39] Castlepoint returned the deposits paid by Purchasers, plus interest to them in 2017.

E. The Availability of Summary Judgment

[40] Rule 20.04(2)(a) of the *Rules of Civil Procedure*[9] provides that the court shall grant summary judgment if: "the court is satisfied that there is no genuine issue requiring a trial with respect to a claim or defence." With amendments to Rule 20 introduced in 2010, the powers of the court to grant summary judgment have been enhanced. Rule 20.04 (2.1) states:

> 20.04 (2.1) In determining under clause (2)(a) whether there is a genuine issue requiring a trial, the court shall consider the evidence submitted by the parties and, if the determination is being made by a judge, the judge may exercise any of the following powers for the purpose, unless it is in the interest of justice for such powers to be exercised only at a trial:
>
> 1. Weighing the evidence.

[9] *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

2. Evaluating the credibility of a deponent.

3. Drawing any reasonable inference from the evidence.

[41] *Hryniak v. Mauldin* does not alter the principle that the court will assume that the parties have placed before it, in some form, all of the evidence that will be available for trial. The court is entitled to assume that the parties have advanced their best case and that the record contains all the evidence that the parties will present at trial.[10] Thus, if the moving party meets the evidentiary burden of producing evidence on which the court could conclude that there is no genuine issue of material fact requiring a trial, the responding party must either refute or counter the moving party's evidence or risk a summary judgment.[11]

[42] Under rule 20.02(1), the affidavits for a summary judgment motion may be made on information and belief, but on the hearing of the motion, the court may, if appropriate, draw an adverse inference from the failure of a party to provide the evidence of any person having personal knowledge of contested facts.

[43] The principles governing the admissibility of evidence are the same as apply at trial save for the limited exception of permitting an affidavit made on information and belief.[12] Where an affidavit relied upon in support of a motion for summary judgment does not state the source of the information and the fact of the deponent's belief, the court may nevertheless rely upon the substance of the exhibits to the affidavit in evaluating the merits of the case.[13]

[44] In *Hryniak v. Mauldin*[14] and *Bruno Appliance and Furniture, Inc. v. Hryniak*,[15] the Supreme Court of Canada held that on a motion for summary judgment under Rule 20, the court should first determine if there is a genuine issue requiring trial based only on the evidence in the motion record, without using the fact-finding powers introduced when Rule 20 was amended in 2010. The analysis of whether there is a genuine issue requiring a trial should be done by reviewing the factual record and granting a summary judgment if there is sufficient evidence to fairly and justly adjudicate the dispute and a summary judgment would be a timely, affordable and proportionate procedure.

[45] If, however, there appears to be a genuine issue requiring a trial, then the court should determine if the need for a trial can be avoided by using the powers under rules 20.04 (2.1) and (2.2). As a matter of discretion, the motions judge may use those powers, provided that their use is not against the interest of justice. Their use will not be against the interest of justice if their use will lead to a fair and just result and will serve the goals of timeliness, affordability, and proportionality in light of the litigation as a whole. To grant summary judgment, on a review of the record, the motions judge must be of the view that sufficient evidence has been presented on all relevant points to allow him or her to draw the inferences necessary to make dispositive findings

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[10] *Canada (Attorney General) v. Lameman*, [2008] 1 S.C.R. 372 at para. 11; *Dawson v. Rexcraft Storage & Warehouse Inc*., [1998] O.J. No. 3240 (C.A.); *Bluestone v. Enroute Restaurants Inc*. (1994), 18 O.R. (3d) 481 (C.A.).
[11] *Toronto-Dominion Bank v. 466888 Ontario Ltd.*, 2010 ONSC 3798.
[12] *Sanzone v. Schecter*, 2016 ONCA 566 at para. 15; *Caithesan v. Amjad*, 2016 ONSC 5720 at para. 24.
[13] *Carevest Capital Inc. v. North Tech Electronics Ltd.*, 2010 ONSC 1290 at para. 16 (Div. Ct.).
[14] 2014 SCC 7.
[15] 2014 SCC 8.

and to fairly and justly adjudicate the issues in the case.[16]

[46] If a judge is going to decide a matter summarily, then he or she must have confidence that he or she can reach a fair and just determination without a trial; this will be the case when the summary judgment process: (a) allows the judge to make the necessary findings of fact; (b) allows the judge to apply the law to the facts; and (c) is a proportionate, more expeditious and less expensive means to achieve a just result.[17] The motion judge is required to assess whether the attributes of the trial process are necessary to enable him or her to make a fair and just determination.[18]

[47] If the summary judgment motion is refused or granted only in part and the action is ordered to proceed to trial, pursuant to rule 25.05(2), the court has the authority: to schedule; to give directions; and to impose terms. Where a summary judgment is not granted, the court has substantial power to shape the nature of the trial that will follow to resolve the action. Pursuant to rule 20.05(1), where summary judgment is refused or is granted only in part, the court may make an order specifying what material facts are not in dispute and defining the issues to be tried, and order that the action proceed to trial expeditiously. Under rule 20.05(3), any facts specified shall be deemed to be established, unless the trial judge orders otherwise to prevent injustice.

[48] In the immediate case, the Plaintiffs did not submit that the case was unsuitable for a summary judgment. The Plaintiffs did not disagree with Castlepoint's submissions on the suitability of the case for a summary judgment motion, and I agree that the issue of the interpretation of the exculpatory clause in the purchase agreements (Clause 28) is not one that requires a trial to resolve.

[49] There is ample evidence to resolve that issue, and it is an issue that can be being fairly and proportionately resolved by a motion procedure. The case at bar is an appropriate one for a summary judgment.

F. Castlepoint's Submissions about the Application of Clause 28

[50] In a submission with which the Plaintiffs also agree, Castlepoint submits that Clause 28, which is an exculpatory clause, is subject to the ordinary and well-established principles of contract interpretation as set out in such cases as: *Sattva Capital Corp. v. Creston Moly Corp.*,[19] and *Ventas Inc. v. Sunrise Living Real Estate Investment Trust*.[20]

[51] With respect to exculpatory provisions, Castlepoint relies on the principles of contract interpretation as set out in *Hunter Engineering Company v. Syncrude Canada Ltd.*,[21] where Justice Wilson stated:

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[16] *Campana v. The City of Mississauga*, 2016 ONSC 3421; *Ghaeinizadeh (Litigation guardian of) v. Garfinkle Biderman LLP*, 2014 ONSC 4994, leave to appeal to Div. Ct. refused, 2015 ONSC 1953 (Div. Ct.); *Lavergne v. Dominion Citrus Ltd.*, 2014 ONSC 1836 at para. 38; *George Weston Ltd. v. Domtar Inc.*, 2012 ONSC 5001.
[17] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 49 and 50.
[18] *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 51-55; *Wise v. Abbott Laboratories, Ltd.*, 2016 ONSC 7275 at paras. 320-336; *Drywall Acoustic Lathing and Insulation Local 675 Pension Fund (Trustees of) v. SNC-Lavalin Group Inc.*, 2016 ONSC 5784 at paras. 122-131.
[19] 2014 SCC 53. See also: *ITO-Int'l Terminal Operators v. Miida Electronics*, [1986] 1 S.C.R. 752; *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888; *Canada Steamship Lines v. The King*, [1952] A.C. 192
[20] 2007 ONCA 205.
[21] [1989] 1 S.C.R. 426 at p. 508.

> [E]xclusion clauses, like all contractual provisions, should be given their natural and true construction. Great uncertainty and needless complications in the drafting of contracts will obviously result if courts give exclusion clauses strained and artificial interpretations in order, indirectly or obliquely, to avoid the impact of what seems to them *ex posto facto* to have been an unfair and unreasonable clause.

[52] With respect to the enforcement of exculpatory provisions, in another submission with which the Plaintiffs agree, Castlepoint submits that the governing case is the Supreme Court of Canada's decision in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation and Highways*.[22]

[53] In *Tercon,* discussed further below, the Supreme Court of Canada established a three-step approach to the application of exclusion clauses: (a) the first step is to determine whether as a matter of interpretation the exclusion clause applies to the circumstance of the case; (b) if the exclusion clause applies, the second step is to determine whether the clause was unconscionable at the time the agreement was made; and, (c) if the exclusion clause applies and it was not unconscionable, then the third step is to determine whether the court should refuse to enforce the cause because of the presence of an overriding public policy.

[54] Castlepoint argues that the language of Clause 28 indicates that the exculpatory provision was intended to apply on termination as occurred in the circumstances of the immediate case and that the language of Clause 28 precludes claims for damages and costs incurred by the purchasers. Applying the first stage of the *Tercon* analysis, Castlepoint submits that Clause 28 is enforceable and applying the second and third stages of a *Tercon* analysis, Castlepoint submits that there is no unconscionability and that the enforcement of Clause 28 would not be against public policy. Therefore, Castlepoint submits that Clause 28 should be enforced and that the Plaintiffs' action should be dismissed.

G. The Plaintiffs' Submissions about the Application of Clause 28

[55] The Plaintiffs submit that as a matter of contract interpretation, Clause 28 does not apply to the circumstances of the immediate case. They submit that the clause is ambiguous and that it does not expressly exclude liability for Castlepoint's own wrongdoing or mention the Early Termination Condition. The Plaintiffs point out that there is no mention in Clause 28 of a cause of action based upon the improper exercise of an Early Termination Condition being excluded. The Plaintiffs argue that while Clause 28 could be taken to absolve Castlepoint for a failure to take all reasonable steps to satisfy the financing condition, given the references to "return of deposit" and "occupancy fees, " the clause is intended to exclude only claims by purchasers following termination for a failure to meet the Outside Occupancy Date.

[56] As a matter of reading the whole contract in its factual nexus - which includes the statutory regime of the Tarion Addendum - the Plaintiffs argue that it is unlikely that the parties would on one hand agree to the imposition of important obligations like Clauses 1 (a) and 6 (f) on Castlepoint and then on the other hand, exclude all liability for breaches of the clauses.

[57] The Plaintiffs submit that upon a proper application of the canons of contract interpretation and bearing in mind both the circumstances giving rise to the contract in the immediate case and also the general organizing principles of contract law that entail a contracting party to perform its

[22] 2010 SCC 4.

obligations in good faith,[23] Clause 28 ought not to be interpreted so as to exclude Castlepoint's obligations to take all commercially reasonable steps within its power to satisfy the financing condition and to construct Museum FLT S without delay.

[58] As an alternative argument, if as a matter of contract interpretation, Clause 28 applies to the circumstances of the immediate case, the Plaintiffs argue that Clause 28 ought not to be enforced because it would be contrary to the public policy expressed by the Legislature in the statutory regime that includes the Tarion Addendum.

[59] The Plaintiffs submit that Clause 28 is contrary to public policy because it overrides the public policy expressed by the Legislature of Ontario to impose on developers an obligation to take all commercially reasonable steps to fulfill a financing condition and to take all reasonable steps to complete construction of the building to provide occupancy, and to register without delay the declaration and description in respect of the condominium building.

[60] It should be noted that the Plaintiffs do not rely on unconscionability or deficiencies in contract formation as an alternative reason not to enforce Clause 28. The Plaintiffs submit that the Defendant's argument should be rejected under the first and or third steps of the *Tercon Contractors* analysis.

H. The Enforcement of Exculpatory Clauses

[61] Exculpatory clauses, which are also called disclaimers, limitation of liability clauses, or exemption clauses, limit, qualify, reduce, and sometimes exclude a party's liability for non-performance of its contractual promises. The law has developed a variety of techniques to regulate or control exculpatory clauses.

[62] The primary technique to control exculpatory provisions is by employing the rules of contract interpretation. The goal of contractual interpretation is to determine the intent of the parties and the scope of their understanding giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.[24] The rules of contract interpretation direct a court to search for an interpretation from the whole of the contract that advances the intent of the parties at the time they signed the agreement.[25] Provisions should not be read in isolation but in harmony with the agreement as a whole.[26]

[63] As a matter of contract interpretation, an exculpatory provision is interpreted strictly to conform with the main purpose of the contract, and the burden is on the party relying on the clause

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[23] See *Bhasin v. Hrynew*, 2014 SCC 71.

[24] *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53 at para. 47; *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4 at paras. 64-65; *Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21 at para. 27.

[25] *Unique Broadband Systems Inc. (Re)*, 2014 ONCA 538 at paras.83-90; *Consolidated-Bathurst Export Ltd. v. Mutual Boiler & Machinery Insurance Co.*, [1980] 1 S.C.R. 888.

[26] *Scanlon v. Castlepoint Dev. Corp*. (1993), 11 O.R. (3d) 744 (C.A.); *Hillis Oil and Sales Limited v. Wynn's Canada*, [1986] 1 S.C.R. 57; *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6.

to prove that it is applicable in the circumstances of the particular case.[27]

[64] When there is an ambiguity or contradiction in an agreement that cannot be resolved by the other rules of construction resort, an exculpatory provision is interpreted *contra proferentem,* which is to say that the language of the contract will be construed against the party that inserted the exculpatory provision.[28]

[65] About sixty years ago, in several cases in England, Lord Denning attempted to advance the theory that as a rule of law, an exculpatory provision or disclaimer clause did not protect the party in default if he or she had "fundamentally breached" the contract.[29] By a fundamental breach, Lord Denning meant a breach that went to the root of the contract and that denied the innocent party of substantially the whole benefit of the bargain.

[66] However, the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale*[30] and in *Photo Production Ltd. v. Securicor Transport Ltd.*[31] and the Supreme Court of Canada in *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*,[32] *Beaufort Realties (1964) Inc. v. Chomedy Aluminum Co.*,[33] and *Hunter Engineering Co. v. Syncrude Canada Ltd.*[34] stated that there was no such rule of law.[35] The scope of an exculpatory provision was a matter of contract interpretation in every case. Thus, it was possible with sufficiently clear wording to exculpate even a so-called fundamental breach of contract.

[67] In *Hunter Engineering Co. v. Syncrude Canada Ltd.*, Chief Justice Dickson noted that there is a distinction between fundamental breach in the context of grounds to end a contract and as a possible tool to control exculpatory provisions.[36] In *Hunter Engineering*, the Supreme Court of Canada confirmed the interpretative approach to the law of exculpatory clauses adopted by the House of Lords in *Suisse Atlantique Société d'Armement Maritime SA v. NV Rotterdamsche Kolen Centrale*, and *Photo Production Ltd. v. Securicor Transport Ltd.*

[68] In *Hunter Engineering*, Chief Justice Dickson and Justice Wilson in separate judgments, attempted to find other legal tools to regulate exculpatory clauses. Later, in *Guarantee Co. of North America v. Gordon Capital Corp*[37], Justice Iacobucci and Bastarache described the outcome of

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[27] *Gendron v. Doug C. Thompson Ltd.* 2019 ONCA 293; *Braun Estate v. Zenair Ltd.*, [1998] O.J. No. 4841 (C.A.); *Bow Valley Husky Ltd. v. St. John Shipbuilding Ltd.*, [1997] 3 S.C.R. 1210; *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C. 79 (H.L.).

[28] *Shelanu Inc. v. Print Three Franchising Corp.*, (2003), 64 O.R. (3d) 533 (C.A.); *Hillis Oil and Sales Limited v. Wynn's Canada*, [1986] 1 S.C.R. 57; *McClelland and Stewart Ltd. v. Mutual Life Assurance Co. of Canada*, [1981] 2 S.C.R. 6; *Reliance Petroleum Limited v. Stevenson* [1956] S.C.R. 936.

[29] *Harbutt's "Plasticine" Ltd. v. Wayne Tank & Pump Co. Ltd.*, [1970] 1 Q.B. 447 (C.A.); *Karsales (Harrow) Ltd. v. Wallis*, [1956] 2 All E.R. 866 (C.A.).

[30] [1966] 2 All E.R. 61 (H.L.).

[31] [1980] A.C. 827 (H.L.).

[32] [1975] 2 S.C.R. 678.

[33] [1980] 2 S.C.R. 718.

[34] [1989] 1 S.C.R. 426.

[35] *B.G. Linton Construction Ltd. v. Canadian National Railway Co.*, [1975] 2 S.C.R. 678; *Beaufort Realties (1964) Inc. v. Chomedy Aluminum Co.*, [1980] 2 S.C.R. 718; *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426.

[36] Although the Supreme Court in *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4 laid to rest the doctrine of fundamental breach as it pertains to exclusion clauses, it remains entrenched in the law of contract as an available remedy to the innocent party for a breach of contract: *1723718 Ontario Corp. v. MacLeod*, 2010 ONSC 6665 at para. 72.

[37] [1999] 3 S.C.R. 423.

Hunter Engineering as follows:[38]

> [B]oth Dickson, C.J. and Wilson, J. affirmed that whether fundamental breach prevents the breaching party from continuing to rely on an exclusion clause is a matter of construction rather than a rule of law. The only limitation placed upon enforcing the contract as written in the event of a fundamental breach would be to refuse to enforce an exclusion of liability in circumstances where to do so would be unconscionable according to Chief Justice Dickson, or unfair, unreasonable or otherwise contrary to public policy according to Justice Wilson.

[69] After *Hunter* Engineering, the Supreme Court of Canada and other courts[39] attempted to develop a modern approach to regulating exculpatory provisions that does not depend upon Lord Denning's fundamental breach theory. The leading case about the enforcement of exculpatory provisions is now *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways).*[40] In this case, Tercon Contractors bid on a contract being tendered by the Province of British Columbia. The Province awarded the contract to another bidder, and Tercon sued the Province for breach of the terms of the bidding contract. The Province relied on an exculpatory provision in the bidding contract to avoid liability to Tercon Contractors.

[70] A 5-4 majority of the Supreme Court of Canada comprised of Justice Cromwell with Justices LeBel, Deschamps, Fish, and Charron concurring, concluded that the Province of British Columbia had breached the bidding contract and was not entitled to rely on an exemption clause or exculpatory provision contained in the bidding contract. The minority of the court, Justice Binnie with Chief Justice McLachlin and Justices Abella and Rothstein concurring, agreed that there had been a breach but concluded that the exemption clause applied, and the minority would have dismissed the action against the Province.

[71] In *Tercon*, although the majority disagreed with the minority's interpretation of the exemption clause as applying to exculpate the Province's liability for breach of contract, the Court was unanimous in adopting Justice Binnie's approach to the regulation of exculpatory provisions. Justice Binnie adopted a modified combination of the approaches suggested in the *Hunter Engineering* case by Chief Justice Dickson and Justice Wilson.

[72] Justice Binnie described the contemporary analytical approach to exculpatory provisions at paras. 121-123 of his judgment where he stated:

> 121. The present state of the law, in summary, requires a series of enquiries to be addressed when a plaintiff seeks to escape the effect of an exclusion clause or other contractual terms to which it had previously agreed.
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> 122. The first issue, of course, is whether as a matter of interpretation the exclusion clause even applies to the circumstances established in evidence. This will depend on the Court's assessment of the intention of the parties as expressed in the contract. If the exclusion clause does not apply, there is obviously no need to proceed further with this analysis. If the exclusion clause applies, the second issue is whether the exclusion clause was unconscionable at the time the contract was made, "as might arise from situations of unequal bargaining power between the parties" (*Hunter*, at p. 462). This second issue has to do with contract formation, not breach.
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> 123. If the exclusion clause is held to be valid and applicable, the Court may undertake a third enquiry, namely whether the Court should nevertheless refuse to enforce the valid exclusion clause

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[38] [1999] 3 S.C.R. 423 at para. 52.
[39] See, for example the decision of the Ontario Court of Appeal in *Shelanu Inc. v. Print Three Franchising Corp.* (2003), 64 O.R. (3d) 533 (C.A.).
[40] 2010 SCC 4.

> because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts.

[73] Thus, the contemporary approach to the enforcement of exculpatory provisions involves a three-stage analysis.

a. In the first stage, the court asks whether as a matter of interpretation, the exclusion clause applies to the circumstances. Exculpatory provisions are interpreted strictly, and clear words are necessary for the exclusion to apply.

b. In the second stage, if the exclusion clause does apply, then the court asks whether the exclusion clause was unconscionable at the time the contract was made. As a legal doctrine, unconscionability has three elements. The elements of unconscionability are: (1) pronounced inequality of bargaining power; (2) substantially improvident or unfair bargain; and (3) the defendant knowingly taking advantage of the vulnerable plaintiff.[41]

c. If the exclusion clause is held to be valid and applicable, in the third stage, the court asks whether the court should refuse to enforce the valid exclusion clause because of the existence of an overriding public policy, proof of which lies on the party seeking to avoid enforcement of the clause, that outweighs the very strong public interest in the enforcement of contracts. The residential power of the court to decline enforcement exists but will rarely be exercised.

[74] Justice Binnie framed the problem of the enforcement of exculpatory provisions in the opening two paragraphs of his judgment, where he stated that the party seeking to avoid an exculpatory provision must show a public policy reason to overcome the countervailing public policy that favours freedom of contract. Justice Binnie stated:

> 81. The important legal issue raised by this appeal is whether, and in what circumstances, a court will deny a defendant contract breaker the benefit of an exclusion of liability clause to which the innocent party, not being under any sort of disability, has agreed. Traditionally, this has involved consideration of what is known as the doctrine of fundamental breach, a doctrine which Dickson C.J. in *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] 1 S.C.R. 426, suggested should be laid to rest 21 years ago (p. 462).
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> 82. On this occasion we should again attempt to shut the coffin on the jargon associated with "fundamental breach". Categorizing a contract breach as "fundamental" or "immense" or "colossal" is not particularly helpful. Rather, the principle is that a court has no discretion to refuse to enforce a valid and applicable contractual exclusion clause unless the plaintiff (here the appellant Tercon) can point to some paramount consideration of public policy sufficient to override the public interest in freedom of contact and defeat what would otherwise be the contractual rights of the parties. Tercon points to the public interest in the transparency and integrity of the government tendering process (in this case, for a highway construction contract) but in my view such a concern, while important, did not render unenforceable the terms of the contract Tercon agreed to. There is nothing inherently unreasonable about exclusion clauses. Tercon is a large and sophisticated corporation. Unlike my colleague Justice Cromwell, I would hold that the respondent Ministry's conduct, while in breach of its contractual obligations, fell within the terms of the exclusion clause. In turn, there

[41] *Birch v. Union of Taxation Employees, Local 70030* (2008), 93 O.R. (3d) 1 (C.A.); *Titus v. William F. Cooke Enterprises Ltd.* 2007 ONCA 573; *Black v. Wilcox* (1976), 12 O.R. (2d) 759 (C.A.); *Mundinger v. Mundinger*, [1969] 1 O.R. 606 (C.A.); affd. [1970] S.C.R. vi; *Vanzant v. Coates* (1917), 40 O.L.R. 556 (C.A.); *Waters v. Donnelly* (1884), 9 O.R. 391 (Ch. Div.).

> is no reason why the clause should not be enforced. I would dismiss the appeal. [emphasis added]

[75] Justice Binnie reviewed how the case law had developed after *Hunter Engineering Co. v. Syncrude Canada Ltd.*, and he stated at paras. 113-117 of his judgment that the courts had a narrow jurisdiction to refuse to enforce an exculpatory provision on grounds of public policy but not a general after-the-fact discretion to refuse to do so on broad grounds of unfairness or unreasonableness. He stated at para. 117 that: "the residual power of a court to decline enforcement [on grounds of public policy] exists but, in the interest of certainty and stability of contractual relations, it will rarely be exercised." It was Justice Binnie's view that Tercon Contractors could not show a public policy reason not to be bound by the terms of the contract that it had signed. Justice Binnie stated at para. 120:

> 120. Conduct approaching serious criminality or egregious fraud are but examples of well-accepted and "substantially incontestable" considerations of public policy that may override the countervailing public policy that favours freedom of contract. Where this type of misconduct is reflected in the breach of contract, all of the circumstances should be examined very carefully by the court. Such misconduct may disable the defendant from hiding behind the exclusion clause. But a plaintiff who seeks to avoid the effect of an exclusion clause must identify the overriding public policy that it says outweighs the public interest in the enforcement of the contract. In the present case, for the reasons discussed below, I do not believe Tercon has identified a relevant public policy that fulfills this requirement.

I. The Enforcability of Clause 28: Analysis and Discussion

[76] Exclusively for the purposes of the summary judgment motion, Castlepoint conceded that it had breached Clauses 1 (a) and 6 (f) of the Agreements of Purchase of Sale. In other words, exclusively for the purposes of the summary judgment motion, questions 1 and 2 of the proposed common issues would be answered yes. On that basis, the next questions are about the assessment of damages. At this point in the analysis, Castlepoint interjects that Clause 28 states that "[Castlepoint] shall not be liable for any damages or costs whatsoever incurred by the Purchaser resulting from the termination of this Agreement." Castlepoint submits that there is no ambiguity here. It submits it terminated the Agreements of Purchase and Sale (whether by entitlement or by breach is of no moment) and in accordance with Clause 28, it shall not be liable for damages whatsoever.

[77] Put shortly, I agree with Castlepoint's argument. Clause 28 applies, and it provides a defence to the Plaintiff purchasers' claims for damages. Put shortly, I disagree with the Plaintiffs' counterarguments.

[78] To a large extent, the Plaintiffs' arguments are a reprise of the discarded fundamental breach argument. The Plaintiffs' argument is that interpreting all the relevant contract provisions in the context of the statutory regime makes it fundamental to the performance of the Agreements of Purchase and Sale that the vendor Castlepoint perform its obligations under Clauses 1 (a) and 6 (f) and therefore, properly interpreting the contract, Clause 28 cannot be used to exculpate Castlepoint for the breach of these fundamental terms. The Plaintiffs essentially repeat this argument as a public policy argument in the third step of the *Tercon* analysis.

[79] The fundamental breach argument to avoid the enforcement of an exculpatory provision, however, has been categorically rejected by the Supreme Court, and it is a matter of contract interpretation whether an exculpatory provision can apply to a fundamental breach. Accepting that a fundamental breach incurred in the immediate case, the language of Clause 28 applies to exclude

liability for damages, and damages is one of the law's remedies for a fundamental breach. Accepting that Clauses 1 (a) and 6 (f) have been fundamentally breached, Clause 28 applies.

[80] Lord Denning's doctrine of the fundamental breach responded to the common sense notion that it cannot be fair that a contracting party could make a fundamental promise while simultaneous securing the right to have no liability in the event that he or she did not perform the fundamental promise. However, restoring the interpretative approaching that existed before Lord Denning's invention of the fundamental breach, the highest courts in England and in Canada disavowed the fundamental breach doctrine. Exculpatory provisions are a matter of freedom of contract and like other contract provisions they allocate the benefits and the burdens and the risks of contracting. If the language is clear, then an exculpatory provision can apply to a breach of any of the terms of the contract including a fundamental term.

[81] In the immediate case, interpreting the Agreements of Purchase and Sale so that Clause 28 applies both (a) where Castlepoint acts in good faith and there has been compliance with the promises of Clauses 1 (a) and 6 (f), and also (b) where Castlepoint has breached Clauses 1 (a) and, or 6 (f), is not inconsistent with reading the contract as a whole or inconsistent with the paramountcy given to the provisions of the Tarion Addendum.

[82] The Tarion Addendum allocates the risk of there being a termination of the Agreements of Purchase and Sale. Just focusing on the Tarion Addendum terms, those terms permit an early termination condition. The parties allocated the risk that Castlepoint might rely on this condition by limiting its exposure to a return of the deposit plus interest. This allocation of risk was envisioned or achieved by paragraph 11 (Refund of Monies Paid on Termination), which is part of the Tarion Addendum terms. Paragraph 11 provides that if the Purchase Agreement is terminated without breach by the Purchaser, the Vendor shall refund all monies paid with interest. Paragraph 11 states that nothing in this Addendum prevents the Vendor and Purchaser from entering into such other termination agreement as may be agreed to by the parties.

[83] Clause 28 is in some respects a codification of paragraph 11 of the Addendum, but if paragraph 11 is a different termination provision, it is was agreed to by the parties and the parties agreed that the Vendor shall not be liable for any damages or costs whatsoever incurred by the Purchaser resulting from the termination of this Agreement.

[84] It may be the case that Castlepoint lawfully invoked these provisions, and if so, it is only for the purposes of the summary judgment motion that Castlepoint concedes a breach of the terms of the contract. But it is Castlepoint's argument, with which I agree, that Clause 28 in referring to damages was also meant to apply not only to the circumstance when there was compliance with Clauses 1 (a) and 6 (f) but also when these fundamental promises have been breached.

[85] I do not regard this interpretation as inconsistent with the statutory scheme that forms part of the contractual nexus. In a contract in which performance is in the future, there will be risks associated with non-performance. As a matter of freedom of contract, the contracting parties are free to allocate that risk as they may decide in accordance with their mutual intentions. The statutory regime recognizes this allocation of risk.

[86] Clause 28 in the immediate case is comparable in its exclusion of damages to the clause considered by the Court of Appeal in *Chuang v. Toyota Canada Inc.*[42]

[42] 2016 ONCA 584, aff'g, 2015 ONSC 885, leave to appeal to the S.C.C. ref'd, [2016] S.C.C.A. No. 568.

[87] In the *Chaung* case, Dr. Chuang and his corporations entered into an agreement with Toyota Canada Inc. to build and operate a Lexus dealership in downtown Toronto. Dr. Chuang did not meet deadlines, and Toyota terminated the agreement. Justice Spence, the trial judge, held that Toyota was required to act reasonably in exercising its rights of termination and had not done so. However, Justice Spence dismissed the action against Toyota for damages because of an exculpatory provision that exculpated Toyota from paying damages if there was a termination of the agreement. The exculpatory provision, quite similar to Clause 28 of the immediate case, stated:

> In the event of the termination of this LOC and/or the Lexus Dealer Agreement, Lexus and its directors, officers and employees shall not be liable for any losses, damages and/or expenses of any kind whatsoever suffered or incurred by you directly or indirectly in connection with this LOC and/or your Lexus Dealer Agreement.

[88] Dr. Chaung appealed the trial decision, and he argued that properly interpreted, the exclusion clause, could not protect Toyota against the consequences of an unreasonable termination of the agreement. In a decision written by Justice Doherty (MacPherson and Miller JJ.A concurring), the Court of Appeal dismissed the appeal.

[89] Justice Doherty rejected Dr. Chuang's argument that the exculpatory provision could not be read to negate Toyota's obligation to act reasonably when terminating the agreement. Justice Doherty stated:

> 32. This submission assumes that the amended LOC [Letter of Commitment] can only reasonably be read by placing the responsibility for a breach of the term of the agreement on the party breaching the agreement. That symmetry is no doubt a feature of many, if not most, agreements. However, parties to an agreement, particularly when they are sophisticated entities operating on a level playing field and engaged in a commercial relationship, are free to allocate risk as the parties see fit. Exclusion clauses are a means of allocating risk. The beneficiary of an exclusion clause contracts out of the obligation that would normally follow from the breach of the contract and places the risk of the breach on the other party to the contract. The extent to which the risk of breach is reallocated to the non-breaching party will depend on the language of the specific exclusion clause considered in the context of the entire agreement: see *Tercon*, per Binnie J., at paras. 96, 102. [my emphasis added]
>
> […]
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> 34. The clause is broadly written. The inclusion of the word "damages" is particularly telling. Damages occur as a consequence of a breach of an agreement. The exclusion of liability for "damages ... of any kind whatsoever, suffered or incurred" in addition to the exclusion of liability for "losses", or "expenses" indicates that the exclusion clause reaches beyond terminations that complied with the terms of s. 7. […]

[90] Viewing the enforcement of Clause 28 as a matter of interpretation or considering its application or non-application as a matter of public policy, in my opinion, enforcing the clause is not contrary to the existence of an overriding public policy.

[91] The policy of the Tarion Addendum is to allow the parties to agree that the parties may agree to terminations in which, in any event, the vendor shall refund all monies paid by the Purchaser including deposit(s) and monies for upgrades and extras with interest from the date each amount was paid to the Vendor to the date of refund to the Purchaser. The policy of the Tarion Addendum states that nothing in the Addendum prevents the parties from entering into other termination agreements. The policy of the Tarion Addendum does not preclude the parties agreeing that the right to terminate may be available when the Vendor has breached the agreement or when

the Vendor is not acting in good faith. The policy of the Tarion Addendum does not preclude the Vendor limiting its liability to exclude damages incidental on the termination of the contract.

[92] Notwithstanding the Plaintiffs' arguments, Clause 28 does not render Castlepoint's obligations under Clauses 1 (a) and 6 (f) meaningless. Castlepoint continues to have those obligations, and if Castlepoint breached the agreement, then Clause 28, in effect, provides the remedy of rescission for the anticipatory breach of the Agreement of Purchase and Sale. Rescission is a fair and reasonable remedy, particularly in the context of the fluidity of the market for real estate. In the immediate case, who's to say what the value of the condominium units will be on March 2022. The calculation of damages in the immediate case would have been very difficult. The Plaintiffs' action presupposes that they have missed the benefit of the bargain of buying early in a rising market. But real estate prices are volatile.

[93] I, therefore, conclude that as a matter of contract interpretation, Clause 28 applies to the circumstances of the immediate case and there is no public policy reason that would override the exculpatory provision that the parties contracted. It follows that Castlepoint has a complete defence to the claim for damages advanced by the Plaintiffs for themselves and for the putative Class Members.

[94] It further follows that Castlepoint's summary judgment motion should be granted and Plaintiffs' (uncertified) action should be dismissed.[43]

J. Certification

[95] For the reasons expressed above, I have concluded that Clause 28 is enforceable and therefore Castlepoint has a complete defence to the Plaintiffs' claim for damages. The Plaintiffs' action is therefore dismissed. In these circumstances, the Plaintiffs' motion for certification is moot and should be dismissed on the grounds of mootness.

[96] I do note for the record that had the outcome of the summary judgment been different, the action would have been certified, subject to resolving the list of common issues. With respect to the certification criteria, Castlepoint only contested some of the proposed common issues and conceded that the other certification criteria had been satisfied.

K. Conclusion

[97] For the above reasons, the certification motion is dismissed, the summary judgment motion is granted, and the Plaintiffs' action is dismissed.

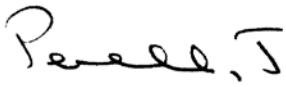
[98] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with the Castlepoint's submissions within twenty days from the release of these Reasons for Decision followed by the Plaintiffs' submissions within a further twenty days.

[99] In the circumstances of the Covid-19 emergency, these Reasons for Decision are deemed to be an Order of the court that is operative and enforceable without any need for a signed or entered, formal, typed order.

[100] The parties may submit formal orders for signing and entry once the court re-opens;

[43] Because the action was not certified, the summary judgment is not binding as against the putative Class Members.

however, these Reasons for Decision are an effective and binding Order from the time of release.



Perell, J.

Released: June 26, 2020

CITATION: Ritchie v. Castlepoint Greybrook Sterling Inc., 2020 ONSC 3840
COURT FILE NO.: CV-18-00605531-00CP
DATE: 2020/06/26

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

LUCIE ANNE MARIE RITCHIE, (formerly Brunet), RAHUL JOSHI and ERIN LESLIE

Plaintiffs

- and -

CASTLEPOINT GREYBROOK STERLING INC.

Defendant

REASONS FOR DECISION

PERELL J.

Released: June 26, 2020