Re Sunforest Investment Corp et al. and Ontario New Home Warranty Program *

[Indexed as: Sunforest Investment Corp. v. Ontario New Home Warranty Program]

32 O.R. (3d) 59
[1997] O.J. No. 128
Court File No. C23797

Court of Appeal for Ontario,
Morden A.C.J.O., McKinlay and Laskin JJ.A.

January 21, 1997

* Application for leave to appeal to the Supreme Court of Canada dismissed with costs July 10, 1997 (La Forest, Gonthier and Major JJ.). S.C.C. File No. 25897. S.C.C. Bulletin, 1997, p. 1366.

Sale of land — New Home Warranty Program — Purchasers buying condominium units for investment purposes and with intention of renting the units — Purchasers entitled to coverage under warranty program for deposits paid and damages incurred as a consequence of vendor's default — Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

The appellant PW in his own name and the appellant S Corp. as trustee for eight individual investors signed agreements to purchase condominium units. The appellants purchased the units for investment purposes and intended to rent them when they became available for occupancy. The agreements were not completed, and the appellants sought compensation under the Ontario New Home Warranties Plan Act for deposits paid and damages incurred as a consequence of the vendor's default. The administrators of the warranty program and the Commercial Registration Appeal Tribunal denied the appellants' claims. The Tribunal held that the appellants were not covered by the Act's warranty plan. Alternatively, the Tribunal denied the appellants' claims on factual findings that it was the appellants who had breached the agreements with the vendor by not qualifying for mortgage financing or, in the further alternative that the appellants had failed to prove their payment of deposits. On appeal, the Divisional Court affirmed the decision of the Tribunal. Leave having been granted, the appellants appealed to the Court of Appeal.

Held, the appeal should be allowed.

The Tribunal wrongly held that since the units were acquired to be rented, the appellants did not qualify as an "owner", which is defined under the Act to be a "person who first acquires a home from its vendor for occupancy". However, even when a

condominium unit is purchased for a tax shelter, it is purchased for occupancy and therefore the purchaser is protected by the provisions of the Act, and the vendor must register under the Act and pay premiums. In the immediate case, the vendor was required to register and to pay premiums, and the appellants as purchasers were entitled to coverage. As to the findings of facts by the Tribunal, there was sufficient and uncontradicted evidence that the appellants did all that was required with respect to mortgage financing and no doubt that they had paid the deposits. Accordingly, the appeal should be allowed.

Cases referred to

Brownstones East Limited Partnership v. Ontario New Home Warranty Program (1992), 8 O.R. (3d) 545, 93 D.L.R. (4th) 400 (C.A.); Ontario New Home Warranty Program v. Marchant Building Corp. (1991), 1 O.R. (3d) 513, 15 R.P.R. (2d) 113, 44 O.A.C. 395 (C.A.), leave to appeal to S.C.C. refused October 17, 1991; Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd. (1988), 65 O.R. (2d) 362, 50 R.P.R. 186 (H.C.J.)

Statutes referred to

Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, ss. 1 "vendor", 14(1)(a)

APPEAL from a judgment of the Divisional Court dismissing an appeal from a decision of the Commercial Registration Appeal Tribunal that denied claims under the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31.

Larry J. Levine, Q.C., and Kevin D. Sherkin, for appellants.
Brian M. Campbell, for respondent.
Michael A. Spears, for intervenor, Durham Condominium Corp. No. 120.

The judgment of the court was delivered by

MCKINLAY J.A.: — This is an appeal, with leave, from a decision of the Divisional Court dismissing an appeal from the decision of the Commercial Registration Appeal Tribunal denying claims by the appellants for compensation pursuant to the provisions of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, for deposits paid and damages incurred on account of agreements to purchase condominium units, which agreements the appellants state were not completed because of default by the vendor developer.

The appellant, Sunforest Investment Corporation in trust, as trustee for eight individual investors, entered in agreements to purchase eight residential condominium units from the vendor, The Markan Group. The appellant, Paul Wing, agreed in his own name to purchase one unit.

The appellants acknowledge that they entered into the agreements for investment purposes, intending to rent the units when they became available for occupancy. The vendor represented to the purchasers that the units were covered by the Ontario New Home Warranty Program and that registration fees had been paid. Registration and enrolment numbers were provided for each condominium purchased.

There were three areas of dispute before the Appeal Tribunal:

(i) that the purchases, being made for investment purposes only, were not covered by the provisions of the Ontario New Home Warranties Plan Act;
(ii) that the appellants, rather than the developer, failed to perform the contract by failing to apply for mortgage financing and failing to provide the vendor with financial information as required by the agreements of purchase and sale for the purpose of obtaining mortgage financing for each unit; and
(iii) that there was no evidence that the purchasers actually paid the deposit moneys as alleged.

(i) Application of the Ontario New Home Warranty Plan Act

The Appeal Tribunal dismissed the appellants' appeal on the basis that the appellants' purchases were not covered by the Warranty Program and the Divisional Court agreed with the reasons of the tribunal.

The Divisional Court relied on a portion of the reasons of the tribunal in which the tribunal quoted the reasons of Carthy J.A. in the decision of this court in Ontario New Home Warranty Program v. Marchant Building Corp. (1991), 1 O.R. (3d) 513, 15 R.P.R. (2d) 113 (C.A.), leave to appeal to the Supreme Court of Canada refused October 17, 1991, where he said at p. 519:

> . . . there is an apparent lack of harmony between the nature of these transactions and this protection afforded by the Act.

The Marchant case, and the decision of this court in Brownstones East Limited Partnership v. Ontario New Home Warranty Program (1992), 8 O.R. (3d) 545, 93 D.L.R. (4th) 400, which followed it, both involved investments in limited partnerships which held all of the units in large condominium projects. The investments were similar to a share interest in a corporation. It was in this context that the decisions were made, and to which the reasons were addressed. Both cases involved the question of whether the agreements of purchase and sale of interests in the partnerships resulted in the vendor under the agreement being a "vendor" within the terms of the Act, thereby requiring registration under the Act and the payment of premiums to the Warranty Program. Avoiding the requirement to pay premiums in both cases resulted in savings of very substantial amounts of money to the developers involved.

The relevant provision of the Act is s. 14(1)(a), which reads:

14(1) Where

(a) a person who has entered into a contract with a vendor for the provision of a home has a cause of action in damages against the vendor for financial loss resulting from the bankruptcy of the vendor or the vendor's failure to perform the contract,

the person or owner is entitled to be paid out of the guarantee fund the amount of such damage subject to such limits as are fixed by the regulations.

For recovery under s. 14(1)(a), it is necessary that the vendor under the agreement of purchase and sale be a "vendor" within the definition of "vendor" in s. 1 of the Act, which reads

. . . a person who sells on his . . . own behalf a home not previously occupied to an owner . . .

The Marchant and Brownstone decisions were based primarily on the uncontested fact that there was no sale of a "home" involved in either case, but rather the sale of a partnership interest. The result, as detailed above, was that the vendors of the partnership interests did not have to register under the Act, and did not have to pay premiums to the Program.

This case is quite different. The purchases involved units each of which was a "home not previously occupied" within the above definition. The definition also requires that the home be sold to an "owner", who is defined in s. 1 as "a person who first acquires a home from its vendor for occupancy". The tribunal held that since these units were acquired for rental purposes, they were not acquired "for occupancy", because such occupancy must be that of the purchaser. It is obvious that the Act does not specifically say that, but the respondent takes the position that the words of Carthy J.A. in Marchant that "there is an apparent lack of harmony between the nature of [the transactions in that case] and protection afforded by the Act" supports its view that "occupancy" must be occupancy by the purchaser. In my view, had the legislature intended such a result, it could have said so in clear terms.

I agree with Holland J. in Ontario New Home Warranty Program v. Meadows of White Oaks II Ltd. (1988), 65 O.R. (2d) 362, 50 R.P.R. 186 (H.C.J.), that even where condominiums are purchased for tax shelters, they are purchased for occupancy and, therefore, the vendor of a condominium which has not been previously occupied must be registered and pay premiums under the Act. If that is so, the purchaser is protected by the provisions of the Act. In this case, the administrators of the Warranty Program required coverage, and accepted premiums pursuant to the provisions of the Act, but now wish to decline payment of the appellants' claims. They cannot have it both ways. Either the units are covered, in which case premiums must be paid and appropriate claims honoured, or the units are not covered, in which case premiums need not be paid and no claims may properly be made.

It follows that I would allow the appeal, subject to satisfactory resolution of the other two areas of dispute between the parties. The tribunal seems to have assumed the correctness of its decision on the applicability of the Act to the agreements in this case and thus did not deal with the other two disputes which were argued before us.

(ii) Failure to Perform Contract by not Qualifying for Mortgage Financing

The Program denied the claims of the appellants on the alternative basis that they had failed to qualify for assumption of the first mortgage against the property, and thus the agreement became null and void. As stated by the tribunal, counsel for the appellants argued that it would be an abuse of process to hear evidence on this point since Corbett J., on a motion for summary judgment in an action brought by them against the vendor, gave judgment in their favour for the total amount claimed. He was of the view that the doctrines of issue estoppel or res judicata should be applied by the tribunal.

The tribunal did not consider it appropriate to apply either doctrine in this case, since the tribunal was not a party to the proceedings before Corbett J., although it was notified of the proceedings when commenced. I agree. However, at the hearing before the tribunal, there was in fact substantial evidence adduced on this point. On the uncontradicted evidence of counsel acting for the appellants on the original transactions, it is clear that the appellants did all that was required by the agreements with respect to mortgage financing. The vendor at no time purported to declare the agreements null and void and forfeit the deposits, and neither did it at any time do all that was required of it to close the transaction. There was more than sufficient evidence adduced by the appellants before the tribunal to support their position that the vendor was in default under the agreements. No evidence was adduced by the Warranty Program. That being the case, there is nothing to be gained by sending the matter back for a determination of this issue.

(iii) Failure to Prove Payment of Deposits

It was the position of the Warranty Program that the payment of deposits under the agreements was not proven before the tribunal. On this issue also the Program adduced no evidence. However, there was substantial evidence by the appellants as to payment of the deposits. Indeed, the tribunal, in dealing with the issue of application of the Act to these agreements, stated that deposits were paid by the individual investors. Given the correspondence between solicitors for the parties, and the oral evidence before the tribunal, there can be no doubt on this issue. However, I am of the view that damages in excess of the deposits were not proven.

Result

I would allow the appeal, with costs, set aside the order of the Divisional Court, and grant judgment in favour of the appellants for all amounts paid as deposits on account of the agreements involved, plus interest on those amounts. I would award costs to the appellants before the Divisional Court and on the motion for leave to appeal to this court.

Appeal allowed.