

Case Name:
Gomori v. Greenvilla Development Group Inc.

Between
Gabriel Gomori and Marissa Gomori, Plaintiffs, and
Greenvilla Development Group Inc., 1437639 Ontario
Ltd., Amadeo Picano, Mediterranean Carpentry Inc.,
Medi Group Inc., K.O. & Partners Ltd., John Kwan,
Venditti Engineering Ltd., Joseph Michael Venditti,
Tarion Warranty Corporation, and the Corporation of
the Town of Ajax, Defendants

[2007] O.J. No. 3744

64 C.L.R. (3d) 254

162 A.C.W.S. (3d) 78

2007 CarswellOnt 6227

Court File No. 42452/06

Ontario Superior Court of Justice

D.S. Ferguson J.

Heard: September 14, 2007.

Judgment: October 1, 2007.

(167 paras.)

Civil procedure -- Estoppel -- Estoppel by record (res judicata) -- Issue estoppel -- Res judicata as a bar to subsequent proceedings -- Finality of judgment or order -- Identities of parties and issues -- Motion by defendant to strike amended statement of claim allowed -- Plaintiff had made complaints under statutory warranty process in Ontario New Home Warranties Plan Act, which complaints were decided -- Court found those issues were barred by issue estoppel -- Prior decisions had been final since they were not pursued further as permitted under Act -- Parties to prior decisions were the same or their privies, whose interests had been represented before decider -- It was not unjust to enforce issue estoppel, with leave to plaintiff to deliver fresh statement of claim particularizing claims which were not barred.

Civil procedure -- Pleadings -- Striking out pleadings or allegations -- Grounds -- Res judicata -- Motion by defendant to strike amended statement of claim allowed -- Plaintiff had made complaints under statutory warranty process in Ontario New Home Warranties Plan Act, which complaints were decided -- Court found those issues were barred by issue estoppel -- Prior decisions had been final since they were not pursued further as permitted under Act -- Parties to prior decisions were the same or their privies, whose interests had been represented before decider -- It was not unjust to enforce issue estoppel, with leave to plaintiff to deliver fresh statement of claim particularizing claims which were not barred.

Motion by defendant, Greenvilla Development, to strike amended statement of claim -- Under statutory warranty process contained in Ontario New Home Warranties Plan Act, plaintiff made various complaints about defects to Tarion Warranty Corporation, which was responsible for establishing and maintaining a guarantee fund -- Warranty Assessment Report was issued, and Decision Letters were issued by Tarion -- Plaintiff appealed Decision Letters to Licence Appeal Tribunal, which released its decision on April 24, 2007 -- Act provided that every agreement between a vendor and prospective owner was deemed to contain written agreement to submit differences to arbitration -- Greenvilla argued that plaintiff could not pursue arbitration or a law suit because of issue estoppel -- HELD: Motion allowed and amended statement of claim was struck with leave to plaintiff to deliver fresh statement of claim particularizing issues he proposed to pursue -- Given terms of Act, plaintiff would have to proceed by way of arbitration for any claims arising directly out of express or implied terms of agreement between it and builder -- Prerequisites for issue estoppel were established because; 1) prior decisions were judicial decision, 2) decisions were final since they were not pursued further as permitted under Act, and 3) parties to prior decisions were the same or their privies, as parties to prior decisions included plaintiff, Tarion and Greenvilla -- Other parties who were subcontractors, service providers and/or parents or subsidiaries of Greenvilla were privies to Greenvilla because all were under same duty to do work or provide services, and Greenvilla had represented their interests before decider -- Court had discretion to apply issue estoppel or to refuse to apply it if result would be unjust -- However, it was reasonable for persons who would be liable for breach of warranty to be protected from a proceeding in another forum with respect to a claim that had been pursued against fund under statutory process -- Further, applying issue estoppel to decisions made in statutory process would foster aims of statute -- There was no lack of natural justice, procedural justice or any evidence that decision makers lacked expertise -- Given cumulative effect of all factors, there was no injustice in enforcing estoppel -- Plaintiff was to particularize claims in fresh

statement of claim to determine which were barred by issues estoppel by virtue of decisions made in statutory process -- Plaintiff had also failed to plead with sufficient precision to enable defendants to know which claims required responses from which defendants, which also warranted striking claim.

Statutes, Regulations and Rules Cited:

Ontario New Home Warranties Plan Act, R.S.O. 1990, Chap. O.31, s. 13, s. 17(2), s. 17(4)

Regulation 892, Administration of Ontario New Home Warranties Plan Act, R.R.O. 1990, s. 4

Counsel:

Gabriel Gomori in person.

Marissa Gomori did not appear.

Paul H. Starkman for Greenvilla, 1437639 Ontario Ltd. and Picano.

Matthew Vella for Medi Group.

Claudia Scherman for K.O and Kwan.

Barry Cox for Venditti Engineering and Joseph Venditti.

Brent Arnold for Tarion.

Matt Maurer for Ajax.

1 D.S. FERGUSON J.: -- This matter has been before me on previous occasions. I am the case management judge assigned to hear all motions.

2 There are two motions before me at this point:

- (a) The motion by Greenvilla to strike the amended statement of claim.
- (b) The motion by Mr. Gomori for an adjournment and other various relief.

3 I gave all parties leave to rely on the materials filed late.

4 A full day was set aside to hear the first motion - the second motion was launched recently.

5 I did not have time to hear submissions on all the issues. Further, some of the issues are pending before the Court of Appeal in *Radewych v. Brookfield Homes (Ontario) Ltd.*, [2007] O.J. No. 2483 (S.C.J.) which is to be heard in October, 2007.

6 In order not to waste the day set aside I heard submissions on some issues and am now giving my reasons on them. I reserve the right to amend these reasons on request of any party after the release of the Court of Appeal's decision in *Radewych*.

7 I make three observations at the outset.

8 First, I have twice indicated to all parties that enormous expense is being incurred in dealing with these matters and that they should consider a compromise to finally resolve the disputes. Heavy costs are a potential outcome of this protracted litigation. Mr. Gomori has acknowledged this risk.

9 Second, this matter is incredibly complicated both in terms of the facts and the law. I cannot possibly attempt to address all issues and will focus on those which appear to me to be feasible at this stage and which may be determinative of the main issues.

10 Third, I am alive to the importance of the doctrine of stare decisis and recognize that some of the issues before me have been decided differently by other judges of this court. I find it impractical to make my decisions in accordance with stare decisis because the decisions of my colleagues are not consistent and do not take into account all the matters raised in the submissions in this case.

11 As mentioned, some of these issues are also about to be considered by our Court of Appeal. I propose to try to avoid dealing with the issues directly in issue in the matter pending before the Court of Appeal but in any event will, if requested, amend these reasons to accord with the rulings of that court which will take place before I hear further submissions.

SUMMARY OF HISTORY OF PROCEEDINGS UNDER THE *ONTARIO NEW HOME WARRANTIES PLAN ACT*

12 The plaintiff made various complaints to Tarion.

13 A Warranty Assessment Report was issued August 26, 2004.

14 Decision Letters were issued by Tarion dated April 18, 2005, September 2, 2005, January 31, 2006 and December 5, 2006.

15 The Licence Appeal Tribunal ruled on a motion for access to the house and released its decision on January 9, 2006.

16 The plaintiff appealed all the Decision Letters to the Licence Appeal Tribunal which held a hearing in January 2007 and released a decision dated April 24, 2007.

RULING ON MOTION OF MR. GOMORI

17 I heard submissions on this motion.

18 Mr. Gomori sought an adjournment of Greenvilla's motion until after the release of the decision of the Professional Engineers of Ontario concerning Mr. Gomori's complaints against the defendants, Venditti Engineering Ltd. and Joseph Michael Venditti, and the complaints against Gerald R. Genge and his firm, Arbitech Inc.

19 As the issues before me on Greenvilla's motion do not relate to the merits of any of the subjects of those complaints there is no reason to await the decision of the PEO.

20 I refused the adjournment.

21 As the motion material indicates that Mr. Gomori wishes to await the outcome of his complaint about Genge and Arbitech before proceeding against them, I dismiss his motion to add them as defendants without prejudice to his right to bring another such motion at a later time.

22 He also asked for an order "confirming the validity of reasons for having included 1437639 Ontario Ltd. as a defendant". I do not understand that request and dismiss that part of his motion.

23 In the result, other than permitting him to rely on his late materials, I dismiss his motion without costs.

REASONS ON MOTION OF GREENVILLA

How the warranty scheme under the *ONHWP Act* works

24 In order to address the specific legal issues I think one must first consider the nature of the statutory scheme established under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, Chap. 0.31.

25 I shall address only the scheme relating to the enforcement of statutory warranties.

26 The Act provides that a designated Corporation, Tarion Warranty Corporation, shall establish and manage a guarantee fund.

27 The Act creates statutory warranties which apply to every agreement between a builder and a purchaser of a home. The statutory warranties are set out in s. 13.

28 I note that ss. 13(6) provides that the statutory warranties are "in addition to any other rights the owner may have and to any other warranty agreed upon".

29 An unhappy new home purchaser may apply to the guarantee fund for damages resulting from a breach of a statutory warranty if, inter alia, "the person has a cause of action against the vendor or the builder ... for damages resulting from the breach of warranty." (s. 14(3))

30 Such a claim is only available with respect to a warranty created by the Act because warranty' is defined in s. 1 as meaning "a warranty set out in section 13".

31 The procedure for making a claim against the guarantee fund is set out in the Act and in Regulation 892 as amended: R.R.O. 1990, Regulation 892, Administration of the Plan.

32 The procedure requires the following:

- (c) The purchaser must make a written claim to Tarion (Reg. 892, s. 4)
- (d) The Regulation calls this process a request for a conciliation but what happens in practice is that Tarion sends out an inspector who prepares a Warranty Assessment Report. Section 17 of the Act states that a purchaser may request Tarion to conciliate a dispute. In my view the extent to which the process involves a conciliation process is irrelevant to the issues before me since it is not an arbitration or a quasi-judicial decision making process.
- (e) If the purchaser is not happy with the Report (which might or might not direct the builder to remedy a problem) the purchaser can ask Tarion to issue a Decision Letter. That process is not spelled out in the Act or Regulation. Section 14 of the Act contemplates Tarion making a decision on the claim against the fund by making a decision which Tarion does by issuing a Decision Letter.
- (f) If the purchaser is not happy with the Decision Letter, the purchaser has a right under s. 16 to an appeal by way of a de novo hearing before the Licence Appeal Tribunal.
- (g) Normally, the parties to the hearing are the purchaser and Tarion but under ss. 16(4), the LAT may add other parties. In this case, the LAT added the builder, Greenvilla, as a party.
- (h) If the purchaser is not satisfied with the decision of the LAT he or she has a right of appeal under the *Statutory Powers and Procedures Act*.

The restrictions imposed by the *ONWHP Act* on the right of a purchaser to pursue a remedy against a builder

33 The Act contains a number of provisions in this regard.

34 Subsection 17(2) states:

- (2) Where there is a dispute between a vendor and an owner arising out of the contract, neither party shall commence any proceeding in respect thereof until after fifteen days after the party notifies the Corporation [which is Tarion] of the dispute for the purpose of giving the Corporation an opportunity to effect conciliation. [my underlining and brackets]

35 That provision is relevant here only to the extent it assists in interpreting other provisions of the Act.

36 Subsection 17(4) states:

- (4) Every agreement between a vendor and prospective owner shall be deemed to contain a written agreement to submit present or future differences to arbitration, subject to appeal to the Divisional Court, and the *Arbitrations Act* applies.

Analysis of the restrictions imposed by the Act

37 I note that the Act does not prevent a builder and purchaser from agreeing to rights and warranties in addition to the warranties set out in s. 13. That is made clear by ss. 13(6).

38 Also, the Act restricts claims against the guarantee fund to those which arise from a breach of warranty which is defined in s. 1 as a warranty under s. 13.

39 The Act does not require a purchaser to make a claim to Tarion for compensation from the fund or to pursue a conciliation or the process involving a report, decision letter or appeal. That is voluntary. Subsection 14(3) provides that a person who meets the criteria is entitled to a payment from the fund but it does not say the person must apply.

40 The provisions of ss. 17(2) require a pause period before a purchaser commences any proceeding to seek a remedy but does not say what proceeding is available. I recognize that the use of the term "any" proceeding might be taken to suggest that there may be more than one kind

available but in my view subsection (4) makes clear that there is only one kind of proceeding available where the claim arises "out of the contract".

41 Subsection 17(4) does restrict the kind of proceeding a purchaser may commence to seek relief relating to a dispute "arising out of the contract". It restricts the proceeding to an arbitration. However, it is important to consider what kinds of claims are governed by that provision.

42 It specifies that "present or future differences" must be submitted to arbitration.

43 In my view, the process under the Act for making a claim against the guarantee fund is not an arbitration. Nor, in my view, is any stage of that process including an appeal to the LAT an arbitration.

44 I respectfully disagree with the decision in *Griffin v. T & R Brown Construction Ltd.*, [2006] O.J. No. 4724 (S.C.J.) at para. 13 ff. for the following reason.

45 Subsection 17(4) states that the *Arbitrations Act* shall apply to the arbitration and the process in the Act is not consistent with the *Arbitration Act, 1991*, S.O. 1991 Ch. 17.

46 Section 45 of the *Arbitrations Act* provides a procedure for appeals which is different from the appeal procedure specified for claims against the guarantee fund.

47 Returning to the kinds of claims which ss. 17(4) requires to be arbitrated I note that it is silent as to the scope of such claims. However, I make to observations.

48 First, ss.17(2) refers to disputes "arising out of the contract". One would expect that ss. 17(2) and ss. 17(4) would be referring to the same kinds of disputes or differences.

49 Second, I note the case law has established that the words "arising out of" are broader than the words "arising under": *Mantini v. Smith Lyons LLP et al.*, [2003] O.J. No. 1831 (C.A.) at para. 19. I also note that in *Radewych v. Brookfield Homes (Ontario) Limited et al.*, *op.cit.* the court did not discuss the distinction between "arising under" and "arising out of".

50 Considering these factors one might think that all disputes between the builder and purchaser arising out of the building of the home have to be arbitrated.

51 However, I note that there are numerous decisions to the contrary: *Griffin v. T & R Brown Construction Ltd.*, *op.cit.*; *Radewych v. Brookfield Homes (Ontario) Limited et al.*, *op.cit.*

52 Subject to the decision of the Court of Appeal in the upcoming appeal in *Radewych*, I conclude that ss. 17(4) only requires the arbitration of claims

directly arising out of the agreement between the builder and the purchaser which would include claims based on specified contractual terms or warranties and claims based on any implied terms.

53 Therefore, I conclude that if the plaintiff wishes to pursue Greenvilla for any claims arising directly out of the express or implied terms of the agreement with Greenvilla, it can do so only by way of arbitration.

54 The plaintiffs wish to argue that the court should not issue a stay of their action even if they are obliged to arbitrate some or all of their claims. They rely on the discretion afforded the court under ss. 7(2) and (5) of the *Arbitration Act*. I am making no decision on that issue at this time.

55 I shall now turn to the issue of whether the right of the plaintiffs to pursue arbitration or litigation is barred by issue estoppel.

Estoppel Relating to the Claims of Defects in the Home

1. Does Issue Estoppel Apply?

56 The defendants contend that the plaintiff cannot pursue arbitration or a law suit because of the doctrine of issue estoppel. There are a number of issues pleaded in the statement of claim. At this point I shall consider only the claims relating to defects in the home.

57 The law of issue estoppel was analyzed in *Danyluk v. Ainsworth Technologies Inc.* (2001), 2 S.C.R. 460 (S.C.C.) and the court laid down a two step process for making a decision.

58 I must determine first if the moving party has established the preconditions to the operation of issue estoppel, and if so, must then determine whether as a matter of discretion issue estoppel ought to be applied: *Danyluk* at para. 33.

Step one

59 The preconditions to issue estoppel are:

- (a) That the same question has been decided;
- (b) That it was decided by a judicial decision which is final;
and
- (c) That the parties to the decision or their privies were the same persons as the parties or their privies to the new proceeding in which estoppel is raised. *Danyluk* at para. 25

60 What is the same question? Issue estoppel applies where any right, question or fact distinctly put in issue and directly determined has been

previously determined: *Danyluk*, para. 24. It extends to material facts, conclusions of law and of mixed fact and law that were necessarily determined: *Danyluk* at para. 24, 54.

61 The questions decided relating to the deficiencies the plaintiff complained about under the statutory warranty process were:

- (a) Whether there was a defect or flaw;
- (b) If so, whether it constituted a breach of the warranties imposed by the Act;
- (c) And, if so, whether the breach of warranty resulted in damages.

62 Those elements are the prerequisites to a successful claim against the fund: ss. 17(3).

63 I point out to the plaintiffs that finding that a defect resulted in no damages may also be a bar to any successful action grounded on that defect since if there is no damage there will be no remedy awarded in the action.

64 The questions decided are the same as some of the questions raised in this law suit. Further, those questions were necessarily determined in the previous decisions in order to determine if a payment should be made from the fund.

65 I note the analysis in *Radewych, op. cit.* where the judge concluded that claims in negligence and claims for punitive damages were outside the agreement. As result, he found that that those claims did not have to be arbitrated. I appreciate that this issue is pending before the Court of Appeal but I shall address it.

66 I believe there is some confusion in the reasoning in *Radewych*.

67 First, in my view the issue of whether the claim arises from the contract does not depend on whether the plaintiff seeks to rely on the law of negligence or breach of contract. If the plaintiff bases his claim on a breach of duty imposed by the contract then the claim is governed by the law of contract. Further, if the builder had a duty under the contract and failed to fulfill that duty it does not matter why he did so - he is still liable under the contract. For instance, if there is a warranty that the roof will not leak and it does leak, it does not matter whether it leaks because of a defect in material or because the installer did negligent work. In either case the claim arises under the contract and the builder is liable.

68 Further, the fact that the plaintiff in the law suit before me may want to allege that the flaw in the house was caused by negligence does not mean that the question in the law suit is different from that in the decision letters or the decision of the LAT. Those decisions necessarily determined whether there was a flaw, and if so, whether it was a breach of warranty. If those

decisions concluded that there was no flaw or that there was no breach of warranty, or that there was a problem but no damages, then those decisions were necessarily made and are the same questions which must be decided in the law suit.

69 Further, the *Radewych* decision ruled that a claim for punitive damages cannot be encompassed in the contract. Although the plaintiff in the present case does not advance a claim for punitive damages, I would respectfully note that I think there is some confusion in the reasoning in *Radewych*.

70 Punitive damages is a remedy not a cause of action.

71 If the plaintiff seeks a remedy of punitive damages for a breach of a duty arising under the contract then the issue is governed by the law of contract - ie. does the law of contract permit the awarding of punitive damages for the particular claim? If the claim is based on a duty imposed by the contract then the claim arises from the contract. Whether or not punitive damages is an available remedy is a quite separate question but must be determined by the law of contract. One cannot frame the claim in negligence and avoid the law of contract.

72 To invoke the doctrine of issue estoppel the decision must be a judicial decision. It is well established that in some cases the decision of an administrative officer or tribunal can be a judicial decision: *Danyluk* at para. 21.

73 To determine if a decision was judicial I must consider three factors:

- (a) Is the decider making the decision capable of receiving and exercising adjudicative authority?
- (b) Was the decider required to make the decision in a judicial manner?
- (c) Was the decision made in a judicial manner?

74 Having regard to the provisions of the *OHWP Act* I am satisfied that the first two factors are satisfied with respect to Tarion's issuance of a Decision Letter and to the decision of the LAT.

75 In both cases the decider was under a duty to ascertain facts and apply the law embodied in the *OHWP Act* to those facts and make a decision which is binding on the parties: *Danyluk* at para. 38. The standard applied was whether the subject complained of constituted a breach of the warranties created by the Act.

76 There was no issue raised before me as to whether the decisions were made in a judicial manner. It is clear from the decision letters that the decider was informed of the plaintiff's complaint and position and of the facts. The LAT held a hearing to which the plaintiff, Tarion and the builder

were parties. In the decision letters and the LAT decision, the decider applied the criteria established in the Act to the facts they found. I find that the decisions were made in a judicial manner.

77 Was the previous decision final? I shall not at this stage consider what, if any, decision was made in respect to each claim advanced in this action, but at this point I shall consider the "decisions" which were made in this case.

78 There were two kinds of decisions made in this case: the issuance of a decision letter and a decision of the LAT.

79 For the purposes of the Act, each is final if not pursued further as permitted under the Act. As noted in *Danyluk*, if there is a review process provided in the statute and the complainant does not pursue it, then the first decision is final for the purpose of the statutory scheme: at para. 57.

80 The last precondition to issue estoppel is that the parties to the second proceeding be the same or the privies of the parties to the prior decision.

81 The parties to the decision letter decisions were the plaintiff and the defendant, Greenvilla. Since the decision letter decided whether or not Tarion had to pay money out of the guarantee fund, for our purposes, I conclude that Tarion was also a party to the decisions in the decision letters. When the matter was appealed to the LAT, the obligation of Tarion to pay damages out of the guarantee fund was at issue and so Tarion was a party to that decision. In addition, the LAT added Greenvilla as a party. Therefore the parties to the LAT decision included the plaintiff, Greenvilla and Tarion.

82 There are other parties to the law suit so I must consider if they were privies of Greenvilla.

83 Who is a privy must be made on a case-by-case basis: *Danyluk* at para. 60.

84 I find the analysis in *Rasanen v. Rosemount Instruments Ltd.* (1994), 17 O.R. (3d) 267 (C.A.) to be helpful.

85 The defendants who were the subcontractors of, or who were retained to provide services to, Greenvilla were of the same interest as Greenvilla because both were under a duty to do the work warranted or to provide services with respect to that work. Greenvilla represented that interest before the decider. If the decision went against Greenvilla, the subcontractor would inevitably be required to remedy the defect or reimburse Greenvilla for doing so. If a service provided erred with respect to an alleged deficiency that provider would be bound by any finding of the decider on the questions listed above. So conversely, the subcontractors and service providers should

be entitled to be protected from litigating the same complaint again if the plaintiff lost in the prior proceeding.

86 The purpose of the requirement that the former proceeding involved the same parties or their privies is to ensure mutuality - would the defendants in the action who were not parties to the earlier decisions be bound by the result if they made a claim as to the same question? *Danyluk* at para. 59.

87 As explained in the reasons of Carthy J.A. in *Rasanen*, in determining if the parties in the law suit were privies to the parties in the prior decision the court must consider the public policy issue of preventing an abuse of process and consider in all the circumstances whether issue estoppel should apply to the subcontractors even though they were not parties to the earlier decisions. I have done so.

88 The amended statement of claim alleges (in paras. 4, 31, 35) that 1437639 Ontario Limited was a parent or subsidiary of Greenvilla, and, as I understand it, alleges it acted in concert with Greenvilla. Therefore I find it was a privy of Greenvilla.

89 The amended statement of claim alleges (in paras. 6, 33, 34) that Mediterranean Carpentry Inc. was a contractor on the project and I infer it is alleged it was a subcontractor of Greenvilla.

90 The amended statement of claim alleges (in paras. 7, 54 and 61) that Medi Group Inc. was a masonry contractor on the project and I infer it is alleged it was a subcontractor of Greenvilla.

91 The amended statement of claim alleges (in paras. 8, 24-26) that K.O. & Partners Ltd. and John Kwan provided engineering services to Greenvilla on the project.

92 The amended statement of claim alleges (in paras. 10, 11) that Venditti Engineering Limited and Joseph Venditti provided engineering services to Medi Group on the project.

93 The amended statement of claim makes a variety of allegations against the Corporation of the Town of Ajax. Some of them relate to alleged defects (in paras. 18, 23, 28, 30, 70-71). In the context of the statutory scheme and all the circumstances I find that it is a privy of Greenvilla.

94 I conclude that all the above named defendants were privies of Greenvilla with respect to the questions listed in para. 61 of these reasons.

95 For the above reasons I conclude that the pre-requisites to issue estoppel have been established.

Step two

96 I must now consider whether I should exercise my discretion to apply issue estoppel in this case.

97 The question I must consider is whether there is something in the circumstances of this case which would make it an injustice to apply issue estoppel: *Danyluk* at para. 63.

98 *Danyluk* held that I must consider the factors for and against exercising a discretion not to apply issue estoppel: at para. 66.

99 In the end, having considered all these factors, I must decide if the operation of issue estoppel will promote the orderly administration of justice rather than cause a real injustice: *Danyluk* at para. 67.

100 A number of the factors relate to the statutory scheme under the *ONHWP Act*.

101 The list of factors is undefined: *Danyluk* at para. 67. I find the factors considered in *Danyluk* to be relevant and shall consider them:

- (a) The wording of the statute from which the power to issue the decision derives

102 The *ONHWP Act* does not contemplate that the statutory warranties are the sole remedy available to a home purchaser: s. 13(6). What it does do is establish a process for the determination of claims which the statute makes eligible for payment out of the guarantee fund. I note that the eligible claims are subject to a limitation period and a maximum payout: s. 14(4); also *Reg. 892*, s. 6.

103 I also note, as Tarion's counsel pointed out, a claimant is not required to make a claim against the guarantee fund. There is nothing in the Act preventing a claimant from electing to forego a claim against the fund and, instead, seek a civil remedy.

104 Further, the *ONHWP Act* does not say that a claimant cannot seek a civil remedy even after pursuing a claim unsuccessfully against the fund.

105 However, I conclude it is generally reasonable for persons who would be liable for a breach of warranty to be protected from a proceeding in another forum with respect to a claim which is pursued against the fund under the statutory process. I note in this regard that a builder has no choice but to provide the statutory warranties and to abide by the statutory decision if a claim is made successfully against the fund: s. 12.

106 Unlike the situation in *Danyluk*, the plaintiff here did not pursue a remedy in another forum until after he received a decision on his claim under the statutory process.

- (b) The purpose of the legislation

107 In my view, the statutory scheme here, unlike that in *Danyluk*, is not intended to be a relatively quick and cheap means of resolving minor claims.

108 The process involves several layers of review, permits claims for substantial sums, involves a detailed inspection and assessment of the work done, and can take a long time.

109 As noted by Medi Group's counsel, the *LAT* appeal pursued by the plaintiff involved an 8 day *de novo* hearing.

110 Finding that the decisions of the statutory process should give rise to issue estoppel would not likely encourage claimants to invest more heavily in the claims process.

111 It appears to me that one purpose of the statute was to provide a thorough, expert, accessible and reasonably speedy process by which home owners could pursue claims against builders without getting tied up in the procedural requirements of litigation like that now contemplated by the plaintiff.

112 In my view, applying issue estoppel to decisions made in the statutory process would foster the aims of the statute.

(c) The availability of an appeal

113 Under the *ONHWP Act* the plaintiff had a right to seek a review by way of a Decision Letter and a right to an appeal by way of a hearing before the *LAT*. These opportunities for a review of the decision favour applying issue estoppel.

(d) The safeguards available to the parties in the statutory procedure

114 There is no evidence that those involved in preparing the report or the decision letters lacked expertise or failed to adequately consider all relevant evidence.

115 There was no lack of natural justice.

116 This factor favours applying issue estoppel.

(e) The expertise of the decision maker

117 There is no evidence before me as to the expertise of those who made the decisions under the statutory scheme.

118 However, a reading of the report, the decision letters and the reasons of the *LAT* gives me the strong impression that the decision-makers were informed about the subject of the warranties, were thorough in their

reviews of the evidence and were quite capable of dealing with the complex of issues involved.

119 This factor favours applying issue estoppel.

(f) The circumstances giving rise to the prior decisions

120 There is no suggestion that the plaintiff was personally vulnerable at any stage of the statutory process.

121 The limits on the amount of claims in s. 6 of Regulation 892 indicate that the statutory scheme is intended to deal with substantial and complex matters.

122 The plaintiff pursued the claims through the statutory scheme in a very thorough manner - as evidence by the number of claims and the length of the processes utilized. As noted, the *LAT* hearing lasted 8 days.

123 These factors favour applying issue estoppel.

(g) The potential injustice

124 The plaintiff has not complained of any procedural injustice.

125 I see none.

126 The plaintiff contends that the various claims made in the statement of claim require an apportionment of fault and that this could not be done unless all the claims proceed in this action. I disagree.

127 If the statutory decision upheld the plaintiff's complaint, he has a remedy and is not concerned with how Greenvilla pays for it. If the decision found the claim related to a statutory warranty but dismissed his complaint then there is nothing to apportion.

128 In light of the exhaustive process pursued to date with respect to the deficiencies, I see every reason not to allow it to be repeated.

129 Having considered all the circumstances of this case I see no potential injustice in applying issue estoppel.

130 On considering the cumulative effect of these factors I conclude it is appropriate to exercise my discretion to enforce issue estoppel.

2. *To Which Claims in the Statement of Claim does Issue Estoppel Apply?*

131 During submissions, counsel for Tarion submitted a chart showing the status of some 107 alleged defects raised by the plaintiff during the

statutory process under the *ONHWP Act*. At least some of those items are pleaded in paragraph 15 of the statement of claim. However, I find I cannot determine whether the claims in paragraph 15 of the statement of claim raise issues which are barred by issue estoppel because they were wholly or partly decided in the statutory process. The particularity of the alleged defects in paragraph 15 is not sufficient to permit such an analysis.

132 In my endorsement of I ordered the plaintiff to provide the particulars of any further defects he relies on because paragraph 15 states that the list there only includes "some" of the defects complained of in the action.

133 The plaintiff filed a list of all the claims he made to Tarion but has not responded to my direction to specify what claims he is pursuing in the action in addition to those in paragraph 15 of the amended statement of claim.

134 There are further difficulties in determining which issues raised elsewhere in the amended statement of claim are barred by issue estoppel because of the manner in which the plaintiff has framed his allegations.

135 In paragraphs 16-19 it is alleged that Ajax, Greenvilla and Tarion received notice about unspecified deficiencies and variously allegedly failed to respond, provided incorrect information, failed to recognize the deficiencies and attempted to cover them up. If the decisions listed in paragraph 61 relate to the unspecified deficiencies mentioned in paragraph 16 then those decisions create an issue estoppel.

136 In paragraph 23 there is another allegation of unspecified deficiencies ("the failures of Greenvilla").

137 In paragraphs 23-25 there are allegations regarding a report by K.O. & Partners but I do not have the report and so cannot determine if the decisions listed in paragraph 61 of these reasons created an issue estoppel.

138 In paragraph 28 of the statement of claim there is an allegation that Ajax approved work which was not in compliance with the Ontario Building Code. Again, the defects are not particularized and so I cannot determine if issue estoppel applies.

139 There is a similar lack of particularity in the allegations of defects and problems in paragraphs 29, 30, 31, 33, 34, 36, 46, 47, 48, 50, 51, 52, 53, 54, 55, 56, 57, 59, 61, 62, 63, 64, 66, 69, 70, and 71.

140 The lack of particularity in the phrase "major renovation-like repairs" in paragraph 72 presents the same problem.

141 I appreciate that it may not be practical to determine the scope of claims barred by issue estoppel until a full exploration at trial. However, in my view the matter should be dealt with before trial to the extent possible.

142 Therefore I am going to strike the statement of claim and require the plaintiff to particularize these issues if he proposes to pursue them. I am hopeful that with the assistance of the various lists prepared by the other parties, Mr. Gomori will be able to eliminate the claims relating to issues which are barred by issue estoppel because of the decisions made in the statutory process.

Other Problems with the Amended Statement of Claim

143 The lack of particularity of the defects and problems mentioned above also makes it difficult or impossible for the various defendants to plead in response.

144 In paragraphs 74 and 75 there is claim against "Greenvilla et al". That is not acceptable as it is not clear which defendants are alleged to be responsible for the allegations in those paragraphs.

145 In paragraph 78 the plaintiff refers to the "foregoing relief first aforementioned" and this is not acceptable. If there is an allegation of joint or several liability the defendants are entitled to know which allegations are relied on so they can consider cross-claims.

146 For the same reasons, it is not possible for the defendants to respond to those allegations.

147 In its motion, Greenvilla argued that the pleading of conspiracy against Greenvilla and other parties was not adequately pleaded. I agree. For the plaintiff's benefit I note the legal authorities discussed in Greenvilla's Fresh as Amended Factum dated July 17, 2006 at paras. 36-43.

148 These deficiencies also warrant striking the statement of claim.

The Determination of the Scope of Required Arbitration is Premature

149 I have earlier given my conclusions about the extent to which the plaintiff's claims must be pursued in an arbitration rather than in this law suit.

150 However, because of the case pending before the Court of Appeal and the uncertainty as to which claims are barred by issue estoppel and as to what claims are being advanced in this action, it is not appropriate to make a ruling on this at this time.

151 If the plaintiff delivers a fresh statement of claim it will be open to the defendants to move for a ruling on whether those claims must go to arbitration.

Who is the Proper Plaintiff in this Action?

152 The named plaintiffs are Mr. Gomori and his spouse. She has not appeared on the motions.

153 The amended statement of claim alleges that she is a joint purchaser.

154 However, I note that only Mr. Gomori was named as a purchaser in the agreement of purchase and sale.

155 It appears to me that Mr. Gomori's spouse should not be a plaintiff with respect to any contractual claims.

156 I grant Mr. Gomori leave to discontinue the action on her behalf without costs.

157 If she is to remain a plaintiff, her role must be specified in the statement of claim and she will be potentially liable for costs in the proceeding.

Next Steps in this Proceeding

158 It is important that Mr. Gomori be informed of any decision of the Court of Appeal which relates to the issues on these motions. Therefore, I order counsel for Greenvilla to provide Mr. Gomori with a copy of the reasons of the Court of Appeal in the pending appeal in the *Radewych* case when they are released.

159 It could be unproductive for the plaintiff to deliver a fresh statement of claim before those reasons are available and therefore the deadline for a fresh statement of defence should be after their release.

160 If the plaintiff decides to deliver a fresh statement of claim it will be open to the defendants to bring a further motion to strike all or part of it.

161 I recognize that Greenvilla has already raised matters in their pending motion which I have not decided but this matter is becoming much too complex to simply continue that motion on additional material at a later date. To simplify the proceeding I am going to dismiss the remainder of their motion without prejudice to their bringing a new motion raising matters I have not decided.

162 I would suggest the defendants consider the feasibility of determining before trial the extent to which issue estoppel applies or of determining which claims can be pursued only by way of arbitration. I note that the latter issue may require a determination of the scope of the contract. Consequently, I suggest the defendants consider whether it is more appropriate to plead issue estoppel or the bar arising from the arbitration clause rather than pursuing the matter by a motion.

163 On the most recent hearing of Greenvilla's motion counsel for numerous other parties appeared. None of them served a notice of motion. They all took the position that they supported Greenvilla's motion to dismiss the action against all defendants.

164 In my endorsement of July 27, 2006 I ordered that any party who wished to participate in the hearing of Greenville's motion should file certain material. Only Greenville, Medi Group and Tarion filed material.

165 Subject to further submissions it appears only Greenville, Medi Group and Tarion should be entitled to claim costs relating to Greenville's motion.

Summary of Orders

166 This matter is complicated and consequently I am setting a timetable with longer than usual deadlines.

167 I make the following orders:

- (a) Apart from granting leave to rely on late material, the plaintiff's motion is dismissed without costs.
- (b) The amended statement of claim is struck.
- (c) Marissa Gomori may discontinue her action without costs if she wishes to do so.
- (d) The counsel for Greenville shall deliver to Mr. Gomori and all defendants a copy of the reasons of the Court of Appeal in *Radewych v. Brookfield Homes (Ontario) Ltd.* within 10 days of the release of those reasons.
- (e) The counsel for Greenville shall file an affidavit verifying the service of those reasons.
- (f) The plaintiffs or Mr. Gomori may deliver a fresh amended statement of claim within 60 days of the delivery to him of the reasons in *Radewych*, failing which the action shall be dismissed with costs to be determined by me on motion by the defendants with notice to the plaintiffs.
- (g) If the plaintiffs or Mr. Gomori deliver a fresh amended statement of claim it shall state with respect to each alleged wrong:
 - (i) Whether or not the claim is based on a term of the Agreement of Purchase and Sale.
 - (ii) If it is based on a term of the Agreement of Purchase and Sale, under what specific or implied term. If an implied term is relied on the wording of the alleged implied term shall be set out in the statement of claim.
 - (iii) Whether or not the claim is based on a statutory duty and, if so, the statement of claim shall specify the duty and the statutory section relied on.

- (h) If the plaintiffs or Mr. Gomori deliver a fresh amended statement of claim it shall comply with subrule 25.06(9).
- (i) If a fresh amended statement of claim is delivered within the time prescribed above, the defendants shall have 30 days to deliver a statement of defence or to serve a motion to strike the statement of claim. Any defendant who fails to deliver one or the other shall be noted in default.
- (j) If any defendant delivers a notice of motion to strike, the motion shall be returnable on a date to be fixed by the trial co-ordinator on my direction.
- (k) The supporting material for any notice of motion need not be served with the notice of motion. It shall be served in accordance with a timetable I shall set later.
- (l) If any party wishes me to revisit any of these issues on the ground that the Court of Appeal in *Radewych* has reached a different conclusion, that party shall send me a letter with that request within 10 days of the release of the decision in *Radewych*. A copy of the letter shall be sent to all other parties.
 - (iv) Greenvilla, Medi Group, Tarion, and any other defendant and the plaintiffs may send me written submissions on the issue of the costs of Greenvilla's motion in accordance with a timetable I shall set after the expiry of the last deadline above.

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