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Buyers protected - Court backs purchasers in delayed closings

It happens with great regularity. A client calls and tells me that his or her builder is running behind schedule with the house or condominium, and has requested that an agreement be signed to extend the closing date.

I explain that if the extension is signed, the clock starts running all over again as if the extended date is the original proposed closing date. As well, I point out that an amendment to change the closing date may amount to a waiver of the right to compensation, which the Tarion warranty program mandates for consumers.

Invariably, the client refuses to sign the extension agreement.

This same scenario was the subject of a court case last year involving a purchaser named Keith Markey, and the builder 1353464 Ontario Inc., which is owned by Intracorp Developments and Dundee Realty.

Back in 2001, Markey signed an agreement to buy a condominium unit in the Pantages Tower in downtown Toronto. It provided for a tentative closing date of Nov. 30, 2002.

The builder later sent letters to Markey extending the closing date to Jan. 14, 2003, March 4, 2003, April 30, 2003, May 21, 2003, and then July 22, 2003. At least one of these notices was not given within the time limits required under the Tarion rules, and the buyer was entitled to make a compensation claim as a result of the short notice.

On Aug. 1, 2003, the parties signed an agreement extending the closing date to Aug. 5, 2003. At that time, no discussion took place about the purchaser's entitlement to compensation at the rate of up to $100 per day, and the issue was not mentioned in the extension agreement.

About a year after closing, Markey requested compensation of $4,920 for the delay. The builder turned down the request on the basis that the agreement amending the closing date constituted a waiver of the right to compensation.

The refusal of compensation was upheld by Tarion Warranty Corp. and Markey appealed to the Ontario Licence Appeal Tribunal. At the hearing, the builder's representative testified that she knew by signing the amending agreement, the buyer was waiving his right to compensation, but she did not recall whether she discussed this with him at the time of signing.

Markey testified that he did not know that by signing the amendment of the closing date, he was releasing his right to almost $5,000 in compensation.

The Licence Appeal Tribunal released its decision in June, 2005. Vice-chair Alan Garbe ruled that the act of signing an amendment for the extension of an occupancy date should not automatically be treated as a waiver of a claim for delay.

This, he wrote, would allow a builder to ignore the requirements for the giving of notice under the Tarion regulation if the builder could get the purchaser to sign an amendment extending the closing date. In those circumstances, the builder would not even have to raise the issue of compensation with the purchaser.

"This approach," ruled Garbe, "would be contrary to the intent of the act, which is for the protection of consumers."

Garbe ruled that the buyer had a legitimate compensation claim, but ordered it reduced from $4,920 to $3,710.

Neither Markey nor the builder appealed the tribunal's order, but the warranty program itself launched an appeal for the purpose of denying Markey his compensation. In response, Markey cross-appealed to raise the compensation back up to the full $4,920.

Last July, the Tarion appeal was heard by a three-judge panel of the Divisional Court. Not only did the court rule that the tribunal was correct, but it gave Markey his full compensation of $4,920 plus costs of $8,700.

The Divisional Court has now made it clear that where a builder has given short notice of delayed closing to a purchaser, and the purchaser is entitled to compensation as a result, "it should be incumbent on the builder to obtain an acknowledgment in writing from the purchaser when signing an amendment for the extension of an occupancy date that it is understood the purchaser is waiving his or her right to compensation."

Without a waiver, the buyer gets his money.

What I find particularly puzzling in this whole case is that Tarion took the position that Markey forfeited the right to compensation when he signed the extension agreement without full disclosure of his entitlement to the money.

If the vice-chair of the Licence Appeal Tribunal was correct that the mandate of Tarion is the protection of consumers, I would have expected Tarion to have supported Markey's bid for compensation.

The law is now clear. If a builder of a new home or condominium wants to extend an occupancy or closing date by amending a purchase agreement, it must disclose and obtain a written waiver from the buyer to any delayed occupancy claims.

The Divisional Court has clearly pronounced that the law governing the Tarion program is "consumer protection legislation and should be given broad and liberal interpretation."

This is good news for other consumers in the same boat as Markey. If the warranty period has not expired, consumers who have already closed but signed an amendment moving the closing date may still be able to apply for delayed closing compensation.

***Bob Aaron** is a Toronto real estate lawyer. www.aaron.ca ©Aaron & Aaron. All Rights Reserved.*

Licence Appeal Tribunal

2624-ONHWPA-CLAIM

APPEAL FROM A DECISION OF THE TARION WARRANTY CORPORATION TO DISALLOW A CLAIM

TRIBUNAL: E. ALAN GARBE, Vice-Chair

APPEARANCES: MICHAEL GWYNNE, Student-at-law, representing the Applicant,
KAREN JONES, Counsel, representing Tarion Warranty Corporation
KORI EASSON, representing 1353464 Ontario Inc., the Added Party

DATE OF HEARING: January 18, 2005 Toronto

REASONS FOR DECISION AND ORDER

BACKGROUND:

This is an appeal to the Licence Appeal Tribunal (the "Tribunal") from a written decision of Tarion Warranty Corporation (the "Respondent") dated September 3, 2004, which disallowed the Applicant's claim made pursuant to the Ontario New Home Warranty Program (the "Program"). This appeal is based upon the provisions of ss. 13(1)(c) and 14(3)(b) of the Ontario New Home Warranties Plan Act, R.S.O. 1990, c. O.31, as amended, (the "Act") and Regulation 892, Part VI, s. 17.

APPLICANT'S POSITION:

It is the Applicant' s position that he is entitled to compensation for the costs which he incurred as a result of the delay in his obtaining possession of a newly constructed condominium home because the builder, the Added Party, failed to give notice of the extended occupancy dates in accordance with the agreement of purchase and sale and the Act.

RESPONDENT'S POSITION:

The Respondent takes the position that, although the Applicant may have been entitled to compensation for delay, he waived that entitlement when he executed an agreement amending the original agreement of purchase and sale.

PRELIMINARY MATTERS:

The Respondent's Book of Documents was tendered by the Respondent and entered as Exhibit 3 in these proceedings, with the consent of the parties.

SUMMARY OF EVENTS:

At the commencement of the hearing, the parties agreed to the following:

1. The agreement of purchase and sale in this matter, signed on April 23, 2001, (the "Agreement") provided for a tentative closing date of November 30, 2002.
2. By letter dated August 29, 2002, the tentative closing date was extended to January 14, 2003.
3. By registered letter dated November 8, 2002, the Applicant was advised that the confirmed occupancy date was changed to March 4, 2003.
4. By letter dated January 10, 2003 the confirmed occupancy date was extended to April 30, 2003.
5. By registered letter dated February 19, 2003, the confirmed occupancy date was further extended to May 21, 2003.
6. By registered letter dated April 21, 2003, the confirmed occupancy date was again extended to July 22, 2003.
7. An amendment to the Agreement was signed by the Applicant on August 1, 2003, deleting the occupancy date of July 22, 2003 and inserting the occupancy date of August 5, 2003 and included a statement that the unadjusted balance due on closing was $55,000.00.

THE EVIDENCE:

The Applicant testified that he was a professional photographer. He stated that he had several discussions with Kori Easson regarding delays in possession of the condominium unit and that by the time he received notice of the extension to April 30, 2003, he understood that he was entitled to compensation for delay. At the time of the discussion regarding the April 30, 2003, extension, he was told that he was eligible for compensation and that the builder had to take responsibility for the delay.

The witness testified that when he was advised of the change of the confirmed occupancy date to July 22, 2003, he contacted the builder and advised that the July date would not work, as the Applicant was leaving that day for Winnipeg. It was the Applicant=s understanding that the amendment to the agreement, which appears at tab 9 of Exhibit 3, was simply a document issued to change the occupancy date from July 22, 2003 to August 5, 2003 and that he was not waiving any of his rights under the agreement of purchase and sale.

On cross-examination, the Applicant testified that the only person he dealt with was Kori Easson and confirmed that the Agreement which appears at tab 1 of Exhibit 3 was signed on April 23, 2001. The Applicant did not recall whether or not he had a lawyer prior to signing the Agreement. At the time that he received the letter from the Added Party dated August 29, 2002, he did not have a lawyer acting on his behalf and could not recall whether or not he had retained a lawyer at the time of receipt of the letter dated November 8, 2002.

The witness testified that the lawyer who issued the reporting letter on the sale of the Applicant's house in Rexdale, (the "House") dated December 17, 2002, appearing in tab 5 of Exhibit 3, was the same lawyer who acted on the purchase of the condominium unit under the Agreement. This lawyer,

however, was not actually retained until 2003 when the Applicant had obtained the condominium papers.

The witness stated that at the time he considered selling the House, he anticipated a closing in the fall of 2002 and the move to the condominium in November 2002. The Applicant acknowledged that by August of 2002, when he received the letter from the Added Party, he knew that the closing for the condominium unit would not take place until January 14, 2003.

The witness testified that the purchaser of the House wanted to complete the purchase by December 2002. The Applicant acknowledged that, as a result of the November 8, 2002 notice, he knew that the closing of the condominium unit would not take place until March 4, 2003. The Applicant acknowledged that the date of November 30, 2002, set forth in the Agreement, was a tentative possession date and was subject to the general terms and conditions of Schedule A to the Agreement.
The Applicant testified that he felt he could not own two properties at the same time and it was the sales representative who originally advised him that occupancy date would be November 30, 2002.

The Applicant could not remember exactly when the House was sold, but believed it took place in October 2002. He acknowledges that it might possibly have sold after November 8, 2002.

The witness testified that he was certain that he did not know at the time the House was sold, that the date for occupation of the condominium unit had been extended to March 4, 2003.

The Applicant stated that at the time he received the letter of August 29, 2002 from the Added Party, he realized he could not rely on the date of January 14, 2003 as an occupation date.

The witness stated that he did not have any conversations with anyone as to when the tentative occupancy date would be confirmed. The witness could not recall having any discussion with his lawyer regarding tentative and confirmed occupancy dates.

The Applicant testified that he did rely on the registered letter dated November 8, 2002 and believed that the occupancy date of March 4, 2003 had been confirmed.

The Applicant stated that he had conversations with the Added Party about the confirmed occupancy date after receipt of the April 21, 2003, registered letter and had a telephone conversation with Kori Easson to discuss the April, 2003 date and his out of pocket expenses.

The witness stated that he spoke to Ms. Easson at Colours and Concepts where she worked before moving to Intracorp Developments Ltd. (Intracorp) and continued to deal with her after her change of position. The Applicant stated that, based on the information from Ms. Easson, he understood he was entitled to compensation of $100.00 per day up to a maximum amount of $5,000.00, which he had to claim through the Program.

It was the witness's understanding that sometime about April 30, or May 1 he could make his claim for compensation. When asked about the affect of the letter dated April 21, 2003, appearing at tab 8 of Exhibit 3, the Applicant stated that it was his understanding that this letter did not affect his claim for compensation and Ms. Easson told him to keep his receipts and explained what was necessary and how to go about making a claim for compensation. The Applicant was sure that he had a discussion with Ms. Easson between May and June of 2003 about compensation.

The Applicant stated that the proposal to extend the occupancy date to July 22, 2003, would not work, as he would be leaving for Winnipeg that day and would not be available. The Applicant stated that he had conversations with the Added Party advising that he was not able to take occupancy on July 22 because he would not be in the city and it was agreed that the occupancy date would be changed.

The Applicant acknowledged that he had a lawyer at the time he received the amendment to the Agreement and could have asked the lawyer about the ramifications of signing, however he had agreed to the change of date set forth in the amendment which was sent to him by facsimile a day or so after his telephone conversation with Ms. Easson. The Applicant stated that he could not recall the date that he received the amendment, but did recall that, initially, the date was changed to July 30, 2003, but that after another conversation the date was changed to August 5, 2003,

The Applicant acknowledged that he could have sent a copy of the amendment to the Agreement he received from Ms. Easson to his lawyer by facsimile, however he did not have the opportunity to do so. The Applicant acknowledged that he signed the amendment on August 1, 2003. The witness testified that there was a further telephone conversation with Ms. Easson to change the closing date from August 5 to August 8, 2003. It was the Applicant's recollection that Ms. Easson called and left a message that the date had been changed to August 8, however he could not recall having a conversation with Ms. Easson specifically about the August 8 date. It was his understanding that there was a verbal agreement that he would take possession on August 8, 2003.

The Applicant testified that there were no conversations after April regarding the compensation claim and did not think that Ms Easson said anything more about making a compensation claim.

When asked why it took approximately a year for him to submit his claim, the Applicant stated that he had a lot of things on the go and was trying to put his life back together after the move.

The Applicant stated that his claim was for $4,920.00, comprised of the costs for alternative accommodations of $750.00 per month for four months plus the cost of storage and for moving his possessions to storage.

Kori Easson, who was called as a witness for the Respondent, testified that she was a senior project coordinator for Intracorp, a position she had held for two and half years, and was involved with the sales part of the business. In August of 2002, Ms. Easson was hired by Intracorp as a colour consultant to help buyers choose colours and other items such as plumbing fixtures for their units. She stated that, in this role, she meets with buyers and in the present situation she did assist the Applicant in booking appointments for work to be done by trades in the condominium unit. Prior to working for Colours and Concepts, the witness had worked for Brookfield Homes as a sales administrator.

Ms. Easson testified that she was familiar with the Program from the builder=s point of view, including delays in closing and delay claims and had worked in this field for approximately 7 years. The witness stated that Wendy Chan, whose name appears on various letters in Exhibit 3, was an administrator in the offices of the Added Party.

Ms. Easson stated that she was familiar with the Pantages Tower, which was the name of the building where the condominium unit purchased by the Applicant was located.

The witness testified that by the summer of 2002 the exterior structure of the building had been erected, but the building had not been enclosed and that the builder would have had a clearer understanding of the work to be done by the trades and the possibility of delays after having reached that stage of construction.

Ms. Easson stated that a vendor had ninety days in which to extend a tentative deadline and that, generally speaking, occupancy was approximately eighteen months after the roof was poured.

The witness testified that a tentative possession date was given until the builder could establish an actual date for occupancy for a particular unit and, in the present situation, occupancy for all the units on the floor on which the condominium unit purchased by the Applicant was located was being extended.

Ms. Easson testified that she had conversations with the Applicant on April 21, as a part of phoning various purchasers to advise them that they would be receiving a notice of further delay. Ms. Easson testified that it was her practice to keep in touch with purchasers during the period from signing an agreement of purchase and sale to closing.

Ms. Easson stated that she did not keep a day journal of telephone conversations, but did make notes of voice messages that were left for her. Ms. Easson explained that the general policy was to keep maintain contact with the purchasers so they would not be surprised to receive a notice of extension.

The witness testified that out of the 400 units in this building, 80% were not owner-occupied. Ms. Easson stated that as the time of the actual closing became closer, the purchaser would be given a telephone call on a "heads up basis".

Ms. Easson stated that, if asked about delayed claims, she would discuss the basis for the claim with a purchaser, but did not recall if she had such a discussion with the Applicant, although she knew the Applicant was entitled to make a delay claim.

The witness stated that, if she knew a purchaser was entitled to make a delay claim she would so advise, and inform the purchaser that they were entitled to $100.00 per day, $75.00 per day with receipts and $25.00 per day without receipts.

The witness testified that in certain situations there was flexibility in establishing occupancy dates and if a date was inconvenient, a change could be made to a later date. Ms. Easson stated that the signing of an amending agreement was an expression of the mutual agreement to the change rather then a unilateral change by the vendor. The witness testified that it was her practice to tell a purchaser when signing an amending agreement that by so signing they "dissolve" their right to a compensation claim. The witness testified that it was not her wish to mislead a potential purchaser, but that it was a general policy that where a purchaser requested a postponement an amending agreement would be signed.

Ms. Easson did not have a record of a voice message from the Applicant in her day journal for May or June and had no recollection of a conversation with the Applicant in May or June 2003. The witness testified that there was a message on or about July 3, 2003, regarding the change of the occupancy date to July 22, 2003. The witness stated that on or about July 10, she had a voice message indicating that the Applicant would be out of town between July 22 and July 30, 2003

The witness testified, that according to her file, on July 11 she transmitted by facsimile an amending agreement with the new date of July 31st, but could not recall whether she spoke to the Applicant at that time. Ms. Easson stated that their practice is that they do not send a document by facsimile without calling the recipient in advanced. The witness stated that she sent a revised amending agreement changing the date for the closing from July 31st to August 5th to the Applicant by facsimile and assumed that she had previously spoken to the Applicant and it was as a result of that conversation that the date was changed to August 5, 2003.

The witness testified that a purchaser of a condominium unit need not be available on the occupancy closing as that date is just for the exchange of documents and the key could be picked up at a later date. Ms. Easson testified that she would have spoken to the Applicant to see if the change in the date was acceptable and would not have changed the date without such a discussion.

Under cross-examination, Ms. Easson testified that she was aware that the Applicant would lose his rights to claim compensation if he signed the amendment to the Agreement. The witness testified that where a vendor is able to change the occupancy date by notice they do so, but where there may have been breaches of the regulation regarding notice giving rise to a delay claim they will make the change to the occupancy date by way of an amendment to correct the breach and "restart the clock".

When asked about the letter dated April 21, 2003, (Exhibit 3, tab 8) which makes reference to a conversation between the witness and the Applicant, Ms. Easson testified that she could not recall the conversation and had no record of the conversation, but trusted that if the administrator stated such a conversation took place it did occur.

Ms. Easson acknowledged that there was a difference between a letter, which is not a legal document and an amendment, which is a legal document.
The witness repeated that she believed that by signing the amendment the Applicant waived his right to compensation, but could not recall if she so advised the Applicant or if there had been a specific discussion with the Applicant about the delay claim at this time.

The witness testified that there was some confusion about the actual date of closing on the statement of adjustments with respect to the transaction, but that the parties had agreed that August 8th was acceptable.

LAW

Section 13 (1)(c) of the Act states: 13(1) Every vendor of a home warrants to the owner,

(c) such other warranties as are prescribed by the regulations.

Section 14 (3)(b) of the Act states: 14(3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if, ...

(b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from a breach of warranty.

ISSUE

The issue before the Tribunal is whether or not the claim made by the Applicant has or has not been waived by the signing of the amending agreement.

FACTS FOUND PROVEN

The following facts have been found to be proven:

1. The Agreement provided for a tentative occupation date, described as a tentative date to occupy or the "Tentative Possession Date" of November 30, 2002.
2. The notice dated August 29, 2003, was given more than 90 days prior to the tentative closing date of November 30, 2003, thereby establishing a new tentative occupancy date of January 14, 2003.
3. The notice dated November 8, 2002, was given less than 90 days before the new tentative occupancy date of January 14, 2003 and therefore the January 14, 2003 date became the confirmed occupancy date.
4. As the notice dated November 8, 2002 was given more than 65 days prior to January 14, 2003, the vendor was entitled to a major extension of the confirmed occupancy date by a maximum of 120 days, and therefore the January 14, 2003 confirmed occupancy date was extended to March 4, 2003.
5. The notice dated February 19, 2003 extending the confirmed occupancy closing to May 21, 2003 was given less than 65 days but more than 35 days before the confirmed occupancy date of March 5, 2003 and therefore the vendor was entitled to a minor extension of 15 days such that the confirmed occupancy closing could only be extended to March 19, 2003, not May 21, 2003.
6. The Applicant signed an amendment to the Agreement on August 1, 2003, pursuant to which the confirmed occupancy closing was changed to August 5, 2003.

DECISION AND ORDER

The provisions of the regulation to the Act with respect to extending tentative and confirmed occupancy dates are of a technical nature and the parties agree that, if the Applicant is entitled to compensation for delay, the period for which compensation is to be calculated is 151 days.

The issue to be resolved, as previously stated, is whether or not the Applicant gave up his right to compensation by signing the amendment to the Agreement.

Counsel for the Respondent referred the Tribunal to the decision of Weaver and the Ontario New Home Warranty Program [1998] O.C.R.A.T No. 246, a decision of Mr. G. Kent McClure, then Chair of the Tribunal, in which the Tribunal found that the Applicants, who had, on two separate occasions agreed to amended the agreement of purchase and sale, had thereby waived their right to claim compensation for delay.

There are several facts which distinguish the Weaver case from the present fact situation.

1. The applicants in the Weaver matter acknowledged that changes they requested to be made to the condominium unit they were purchasing would require more time and that the closing had to be extended.
2. The possibility of delay claim was never raised in discussions between the Weavers and representatives of the builder.
3. The second amendment to the agreement of purchase and sale contained an expressed indemnity by the Weavers of the builder from any claims as a result of the "aforementioned delay/extension of the closing date".
4. The Applicants paid to the builder an amount in excess of $5,000.00 for upgrades to the unit without mentioning the possibility of set off for a delay claim.

In the present matter, there were discussions between the parties about a possible delay claim; the extensions were always at the behest of the Added Party, with the only exception being the last extension when the Added Party proposed to extend the confirmed occupancy date to July 22, 2003 and the Applicant request that it be changed to a more convenient date after July 31, 2003 as he would be out of the province on the proposed date and the date of August 5, 2003 was inserted into the amendment to the Agreement.

The Applicant has clearly stated that he knew he had a delay claim and did not understand that by signing the amendment he was waiving any rights to that delay claim. Further, the evidence supports the Applicant's testimony that the effect of signing the amendment, as it related to the delay claim, was never explained to him.

There are no other matters resolved between the parties in the amendment other than the new occupancy date. There is reference to the "unadjusted amount due on closing $55,000.00", but no clear explanation was given as to why this notation was included in the amendment.

The Applicant has argued that as the notice extending the occupancy date to July 22, 2003 was contrary to the regulation, the amendment further changing that date cannot not be relied upon to divest the Applicant of his right to compensation. This is not a compelling argument. If it is clear from the terms of the amendment, as in the Weaver case, or through other evidence, that an purchaser knew that there was a connection between the signing of the amendment and the right to claim for delay and, being aware of this relationship the purchaser proceeds to signs the amendment, it would be reasonable to conclude that the purchaser consider the possibility of losing the claim and chose to waive such claim and sign the amendment. In such circumstances, a waiver of claim would be operative regardless of any previous contravention of the regulation as it applies to the extension of occupancy dates.

To find that the act of signing an amendment for the extension of an occupancy date would automatically create a waiver of a claim for delay would allow a builder to ignore the requirements for the giving of notice under the regulation, provided the builder obtained an signed amendment with respect to the last extension, regardless of whether or not the issue of delay had ever been raised with the purchaser. This approach would be contrary to the intent of the Act, which is for the protection of consumers.
The Tribunal therefore finds that the Applicant does have a claim under the Act. The Applicant claimed:

Storage costs -	$1260.03
Moving costs -	$ 520.63
Living Expenses	$2450.00
Transportation -	$ 690.00
Total	$4920.00

The claims for the costs of moving to storage and transportation costs are disallowed and therefore the Applicant is entitled to compensation in the amount of $3,710.00

Accordingly, for the reasons stated above and pursuant to the authority vested in it by s. 16(3) of the Act, the Tribunal directs that the Respondent allow the Applicant's claim in the amount of $3,710.00.

LICENCE APPEAL TRIBUNAL

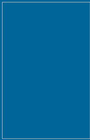
E. Alan Garbe Vice-Chair

Released: June 9, 2005

Filename: 2624.onhwpa.claim

The Applicant s name does not appear in the decision nor does the name if any witnesses or other third parties (unless they took part in the hearing in a professional capacity or as a regulator).

APPEAL



Markey v. Tarion Warranty Corp.

Between
Markey, (Respondent), and
Tarion Warranty Corporation, (Appellant), and
1353464 Ontario Inc., (Respondent)

Court File No. 265/05

Ontario Superior Court of Justice
Divisional Court
T.M. Dunnet, S.E. Greer and P.G. Jarvis JJ.

July 11, 2006.

No counsel mentioned.

The following judgment was delivered by

¶ 1 **THE COURT**:— Tarion appeals from the decision of the Licence Appeal Tribunal directing Tarion to allow Markey's claim for costs incurred: of $3,710 as a result of the delay in his obtaining possession of his condominium unit. In his cross-appeal, Markey asks that the decision be varied, granting his claim in its entirety in the amount of $4,920.

¶ 2 The issue is whether or not Markey waived his right to compensation for delay by signing an amendment to the Agreement of Purchase and Sale.

¶ 3 Counsel for the appellant does not dispute the Tribunal's findings of fact. The tentative closing date was November 30, 2002. The builder was unable to provide occupancy and gave several notices to Markey extending the occupancy dates. When the builder proposed to extend the confirmed occupancy date to July 22, 2003, Markey requested a more convenient date, because he would be out of the province. Markey signed an amendment for the extension of the occupancy date to August 5, 2003.

¶ 4 In our view, there was evidence to support the finding of the Tribunal that Markey knew he had a delay claim and did not understand that by signing the amendment, he was waiving his rights to that claim.

¶ 5 The *New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 is consumer protection legislation and should be given a broad and liberal interpretation. We agree with the finding of the Tribunal that it would be contrary to the intent of the Act to allow developers to rectify their breach of the legislation by having a purchaser sign an amendment after the breach, thereby waiving their rights. The Tribunal held:

¶ 6 To find that the act of signing an amendment for the extension of an occupancy date would automatically create a waiver of a claim for delay would allow a builder to ignore the requirements for the giving of notice under the regulation, provided the builder obtained a signed amendment with respect to the last extension, regardless of whether or not the issue of delay had ever been raised with the purchaser.

¶ 7 The Tribunal's factual findings are entitled to substantial deference. The appropriate standard of review is reasonableness. Even on a standard of correctness, we are of the view that the decision of the Tribunal was correct and the appeal should be dismissed.

¶ 8 Counsel for the appellant indicated at the outset of the appeal that, given the uncertainty on this issue, some direction from the Court would be desirable. Where, as here, the right to compensation for delay has been established by the circumstances, it should be incumbent on the builder to obtain an acknowledgement in writing from the purchaser when signing an amendment for the extension of an occupancy date that it is understood the purchaser is waiving his or her entitlement to compensation under section 17 of regulation 892.

¶ 9 The appellant submits that since the amount of the costs of delay had been agreed to at the commencement of the hearing before the Tribunal, the cross-appeal should be allowed. Accordingly, the decision of the Tribunal is varied and the appellant is entitled to compensation in the amount of $4,920.

¶ 10 Costs to the respondent Markey fixed in the amount of $7,500 plus disbursements of $734.31 and GST.

***Bob Aaron** is a Toronto real estate lawyer.* *©Aaron & Aaron. All Rights Reserved.*