

TARION BYPASSES BUILDERS

Introduction

The vast majority of builders of new homes in the Province of Ontario are small builders, building between one and ten homes per year.

They are required to register with Tarion and enroll all new homes built in the province.

Tarion determines the terms and conditions of registration of these builders and will pay deficiency claims to homeowners in circumstances where the builder is unable or unwilling to do such work.

However, it is the registered builder who provides the warranty, not Tarion.

More and more these days, Tarion appears to be unilaterally concluding builders are unable and unwilling to make repairs and, to that end, Tarion conducts conciliations without the presence of the builder, cash settles findings of breach of warranty, and thereafter invoices the builder.

These procedures give rise to a host of problems for builders. They do not have the opportunity to attend at the conciliation or be given appropriate notice of deficiencies or time to remedy them or even challenge the warranty assessment report by way of an appeal to the Builders Arbitration Forum (BAF). They are left to defend their registration when Tarion proposes to revoke for breach of warranty or failure to indemnify, which the whole BAF process was designed to avoid. In addition if Tarion has a contractor actually do the work, it doesn't notify the building department of the problem so that it can be inspected!

The Homeowners

New homeowners have exploited this trend. They advise Tarion they cannot work with the builder or do not want him present on site or doing repairs despite the owner making a claim to the builder and to Tarion listing his deficiencies. The builder is denied the right to attend the conciliation, he loses the right to mitigate his damages by effecting appropriate repairs where required as well as the right to challenge these warranty decisions if he disagrees with Tarion's assessment.

The homeowner ends up with a cash windfall which is rarely used to effect repairs. This leaves supposed repairs for the next homeowner who may know nothing about the deficiencies which, in turn, exposes this subsequent homeowner, the local building department and the registrant to continuing liability and damages.

There should be no circumstances under which Tarion cash settles with the homeowner unless the

builder is actually unable or unwilling to effect the repairs. Tarion has taken to characterizing any builder about whom a homeowner complains as being unable or unwilling to effect repairs and has thereby removed the ability of many builders to effectively deliver after sales service.

There are very few circumstances where Tarion should be allowed to short circuit the system and settle with the homeowners. Rather, if Tarion pays, it should compel the owners to use the money to remedy the deficiencies.

In other words, Tarion should obtain quotations with respect to remedial work it says must be done and only pay contractors it retains, once the work has been completed.

No funds should go directly to the homeowner.

I have been acting for builders and vendors for more than 15 years in dealings with Tarion and this problem is now a major concern with many builders for whom I act. It goes to the heart of the warranty mechanism set out in the legislation. The Act provides for the right of builders to mitigate losses in the circumstances where appropriate deficiencies need to be addressed. The builder should be allowed every opportunity to resolve legitimate deficiencies and challenge those it refutes. More and more, the procedure of excluding the builder in the conciliation process denies due process to the builder.

The following are two further examples of facts situations which I see more and more frequently in builders dealing with Tarion.

- (i) A registered builder seeks to enroll homes during his period of registration, in addition to the homes already enrolled.

Tarion accepts the enrollment and cashes the cheque, but refuses to provide the enrollment number to the builder.

Enrollment numbers are critical to the builder so he can provide the number to the buyer who needs it to obtain institutional financing for his mortgage.

Without the enrollment number the institutional financing is not forthcoming and the buyer cannot comply with the purchase agreement.

The buyer terminates the contract and goes to another builder.

The builder not only loses the contract and the profit that goes with it, but because enrollment numbers are being withheld, the builder cannot enter into future purchase agreements because he cannot guarantee that an enrollment number will be provided by Tarion.

This brings the builders business to a halt and effectively deregisters the builder without Tarion having to issue a notice of proposal or explain why it refuses to provide enrollment numbers. The builder is effectively denied due process.

- (ii) The builder disagrees with a conciliation undertaken by Tarion. If Tarion has decided to deal directly with the owner then the conciliation often happens without the builder.

The builder was not at the conciliation because it was held without notice to him and therefore he cannot appeal to the builders arbitration forum. Tarion then proposes to revoke the builder for breaches of warranty, notifies Equifax of unpaid invoices sent to the builder in circum-

stances where the builder was not even present at the conciliation and had no input.

Tarion may have security from the builder as a term and condition of initial registration.

The builder needs a clear Equifax rating to continue with financing and building additional homes as its credit rating is crucial to its ongoing business credibility.

Tarion has nullified the builder financially, without the benefit of due process.

What Are The Builder's Options And Remedies Against Tarion

These are just some of the problems facing registered builders in their dealings with Tarion.

Tarion continues to impose early settlement of complaints which involves carrying out conciliations without the presence of the builder and cash settling claims unilaterally.

Tarion is an administrator of the Act and a guarantor of the builder's warranty. It does not build the home or provide the warranty. Such actions by Tarion should only occur as a last resort if the builder is actually unable or unwilling to do the repairs.

My clients are frequently characterized as unable and unwilling to repair before being given a chance to inspect and repair deficiencies.

All builders must collectively resist this tendency on the part of Tarion to short circuit the statutory framework to accommodate homeowners who have no intention of using the cash settlement to repair alleged deficiencies.

It leads to higher costs of administering the plan because Tarion is paying exorbitant settlements. It leads to builders losing their credit rating. It leads to homeowner windfalls and it places the builders in jeopardy of being unable to continue to build, or they are faced with unfavourable credit ratings and proposals to revoke.

In situations where Tarion has security, Tarion should never notify Equifax concerning an unpaid invoice as it can be paid from such security and the builder's credit rating can remain unaffected. Currently, Tarion's first recourse is to notify Equifax and thereby destroy the builder's credit rating.

Tarion should not refuse to provide enrollment numbers when a registered builder applies for an enrollment number and provides the enrollment form and fee to Tarion.

Tarion should not cash settle claims, unless the builder is insolvent or unwilling to carry out the remedial work.

Unilateral cash settlements that are not used by the owners to remedy deficiencies goes against the provisions of the Act and the builder warranty, not to mention the builder's right to carry out remedial work and mitigate its damages, and its right to challenge a Tarion assessment.

Tarion is not an insurance company.

Conclusion

The Act provides a scheme whereby the builder provides statutory warranties. In addition, when disputes arise, there is a statutory process for providing notice, time periods to inspect, attendances at conciliation and time limits to repair thereafter. In many instances, Tarion ignores these procedures, and jeopardizes the builder's rights under the Act, and thereafter the builder's ability to maintain its registration.

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