In the Provincial Court of Alberta

Citation: Kary v. 1147237 Alberta Ltd., 2011 ABPC 178

Date: 20110603
Docket: P0990106076
Registry: Calgary

Between:

Ryan Kary and Olga Kyselyova

Plaintiffs
(Respondents)

- and -

1147237 Alberta Ltd. and Knightsbridge Homes Ltd.

Defendants
(Applicants)

Reasons for Judgment of the Honourable Judge B.K. O'Ferrall

Introduction

[1] This chambers application concerns whether purchasers of a condominium unit are prevented from seeking relief in this court because their agreement with the condominium developer and its agent contemplated arbitration. A secondary issue is whether the purchasers filed their claim in time. In the unique circumstances of this case, the purchasers' action may proceed in this court.

[2] 1147237 Alberta Ltd. and Knightsbridge Homes Ltd. ("Defendants") applied pursuant to the *Arbitration Act*, RSA 2000, c A-43, s 7(1) for a stay of Ryan Kary and Olga Kyselyova ("Plaintiffs") Civil Claim ("Claim") because it concerns matters the parties agreed would be submitted to arbitration.

[3] The Defendants also sought summary dismissal of the Claim because they were entitled to immunity from liability by the *Limitations Act*, RSA 2000, c L-12, s 3(1) and the *Arbitration Act*, s 5(1).

[4] The Claim was filed November 30, 2009. The Defendants allege that the Plaintiffs knew or ought to have known of the facts giving rise to the Claim on or about November 24, 2007 when a pre-possession inspection ("Inspection") of the condominium unit the Plaintiffs were buying from the Defendants ("Unit") when most of the deficiencies in respect of which the Plaintiffs have sued were said to be apparent.

[5] If granted, the effect of the stay and the summary dismissal applications would be to leave the Plaintiffs without a remedy.

Claim

[6] The Claim appears, for the most part, to allege breach of contract, although there may be an implicit claim for negligent misrepresentation. The contractual breaches include the Defendants' failure to: (a) remedy certain deficiencies in the construction and finishing of the Unit; (b) construct or finish the Unit in accordance with specifications provided; and (c) deliver possession of the Unit on time. The misrepresentations were with respect to kitchen and other cabinetry, recessed lighting and the Unit's anticipated completion date. Other claims appear to have been abandoned.

[7] For the purposes of this decision, it is sufficient to set out the following relief sought:

(a) $5,000 to remedy deficiencies in the construction and finishing of the Unit;
(b) $17,000 to replace cabinetry and install recessed lighting in accordance with the specifications provided; and
(c) $3,000 in higher borrowing costs incurred due to the delay in possession.

Affidavit Evidence

[8] An affidavit filed in support of the Defendants' application appended the parties' purchase and sale agreement ("Sale Agreement"). It incorporated by reference a number of documents, including what was referred to as the "Alberta New Home Warranty Program (Condo)" which contains three different arbitration clauses. The affidavit describes the documentation attached to Sale Agreement. It also states that a pre-possession walk-through of the Unit conducted for the agreed-upon purpose of identifying deficiencies occurred November 24, 2007 ("Inspection"). It also deposed that, following the Inspection, the Plaintiffs signed a certificate of possession containing yet another agreement to arbitrate.

[9] The Plaintiffs' affidavit set out facts surrounding the purchase of the Unit, the Inspection, their efforts to get deficiencies corrected and the problems they encountered with the Alberta New Home Warranty Program.

[10] There were no examinations on the affidavits. By consent, I was provided with a binder of materials ("Disclosure Package") which the Defendants provided to the Plaintiffs around the time when the Sale Agreement was executed.

Sale Agreement

[11] On June 24, 2006 the Sale Agreement was executed by the Plaintiffs, as purchasers, and the Defendant numbered company by its agent, the Defendant Knightsbridge Homes Ltd., as vendors or builders.

[12] The Defendants agreed to provide materials and labour to complete the Unit in conformity with certain specifications documented in an attached schedule, subject to their right to make changes if they involved the use of comparable materials: Article 11.01.

[13] The Disclosure Package included the Unit's specifications. The cabinetry specifications indicated a two-textured lacquer finish with a choice of two maple or oak door styles, with matching valances and crown mouldings. With respect to lighting, the specifications were silent on whether the fixtures would be recessed and simply stated that the lighting fixture package would be "as per developer's interior design selection".

[14] There was no completion date in the Sale Agreement. The "Closing Date" was defined as 30 days following written notice to the purchasers that the vendor would have an occupancy permit: Articles 1.05 and 1.15. The purchasers had the right to terminate the Sale Agreement if they had not received such notice on or before February 28, 2008: Article 8.02(b).

[15] With respect to deficiencies, the Sale Agreement required the parties to meet prior to possession to inspect the Unit to list those items remaining to be completed, as well as to identify mutually agreed-upon deficiencies. A deficiency list was to be executed after the inspection and constituted the vendor's only undertaking with respect to incomplete or deficient work.

[16] The Inspection took place November 24, 2007 and was conducted pursuant to Article 11.02, the relevant portions of which provided (emphasis added):

> The Purchaser agrees to meet ... the Vendor's representative ... prior to the Possession Date to inspect the Condominium Unit and to list all items remaining uncompleted at the time of such inspection together with all <u>mutually agreed</u> deficiencies with respect to the Condominium Unit. This list (hereinafter called the "Deficiency List") shall be executed by both the Purchaser ... and the Vendor's representative forthwith after such inspection and the Deficiency List shall constitute the Vendor's only undertaking with respect to incomplete or deficient work...

[17] Article 11.03 stated that, subject to the foregoing, the purchasers' possession and occupancy of the unit constituted "a complete and absolute acceptance ... of all construction matters, and the quality and sufficiency thereof."

[18] There was also an "entire agreement" clause which stated that there were no representations, warranties, collateral terms or conditions affecting the purchase and sale of the condominium unit for which the vendor could be held responsible, even if such representations, etc. were contained in the Defendant's sales materials or in anything said by a sales representative or agent: Article 15.10.

Arbitration Provisions

[19] The Sale Agreement contained no arbitration clauses or builder warranties but included the following definition:

> 1.12 "**Disclosure Package"** means the package of materials provided by the Vendor to the Purchaser which package includes copies of the ... (vi) Alberta New Home Warranty Program (Condo) ... all in compliance with S. 13 of the Act, which documents shall be deemed incorporated and form part of this Agreement.

[20] "S. 13 of the Act" refers to the *Condominium Property Act*, RSA 2000, c C-22, s 13 which requires developers to include in their purchase agreements certain information, including notice of the purchaser's rescission rights, a description, drawing or photograph of certain features of the condominium building, the condominium unit's unit factor and the estimated monthly condo fees payable in respect of the unit being purchased.

[21] Included in the Disclosure Package were instructions given to builders by the Alberta New Home Warranty Program ("Instructions"). To quote from those Instructions (italics added for emphasis):

> ... as a Condominium Developer, *you must incorporate the use of five clauses in your agreement*, namely ..., Warranty, Arbitration, ..., and copies of the relevant ... Condominium Warranty Certificates. These are provided on an attachment entitled:
>
> The Alberta New Home Warranty Program
> MANDATORY CLAUSES
> For All Sales Contracts for CONDOMINIUM Residential Housing
>
> Please Note: TO EXPEDITE YOUR CONTRACT YOU MAY REFERENCE THIS DOCUMENT TO YOUR CONTRACT AS AN APPENDIX

[22] Although condominium developers were told to incorporate the mandatory clauses, they were not included in Sale Agreement. They were purported to be incorporated by reference in the Definitions section of the Sale Agreement where Disclosure Package was defined to include a package of materials containing, among other things, a copy of the Alberta New Home Warranty Program (Condo). This Disclosure Package was deemed to be incorporated in the Sale Agreement.

[23] However, the Disclosure Package did not, in fact, include the Alberta New Home Warranty Program (Condo) documents. Rather, it only contained the"Instructions (see para 21, above) which told builders to incorporate the Alberta New Home Warranty Program so-called mandatory clauses in the Sale Agreement.

[24] The Defendants failed to follow those instructions. A failure to incorporate the arbitration clause would, of course, mean there was no agreement to arbitrate. However, an examination of the Disclosure Package indicates the Defendants' intention to incorporate these clauses. And the Plaintiffs conducted themselves as if they had been incorporated. Indeed, they sued on the warranty apparently contained in the Alberta New Home Warranty Program. Furthermore, they sought the assistance of the Alberta New Home Warranty Program in their disputes with the Defendants. Accordingly, this application will be decided on the basis that the mandatory clauses were incorporated in the Sale Agreement.

[25] One of those mandatory clauses provided:

> **ARBITRATION**
>
> If any dispute arises between the builder and the purchaser(s) with respect to any matter in relation to this Agreement, the dispute shall be settled through binding arbitration in accordance with arbitration rules adopted by The Alberta New Home Warranty Program, provided that, where the dispute is in relation to the Builder Warranty, the dispute shall not be referred to arbitration until it has first been referred to and reported on, under the conciliation procedure provided by The Alberta New Home Warranty Program. A copy of the Arbitration rules as adopted by The Alberta New Home Warranty Program shall be furnished to both parties for the commencement of an arbitration, the selection of an agreed single arbitrator and the arbitration hearing. It is expressly agreed that the arbitration by the single arbitrator shall be final and binding on both parties.

In short, there was a binding arbitration clause for disputes arising from the Sale Agreement. If the dispute related to a warranty claim, it could not go to arbitration until the results of conciliation were "reported on".

[26] As provided in the builder warranty certificate's arbitration clause (cl. 9), "[i]f any issue, with respect to anything ... contained in a Conciliation report, is disputed, it shall be settled by Arbitration". The homeowner, the builder or, curiously, the Alberta New Home Warranty Program could initiate arbitration following conciliation and the application to arbitrate had to be commenced no later than 30 days from the conciliator's report.

[27] The Builder Warranty referred to in the arbitration clause was another mandatory clause condominium developers were instructed to incorporate into their purchase and sale agreements. The builder's minimum warranty obligations were set out in this mandatory warranty clause and in a certain warranty certificates referred to in the mandatory warranty clause. Warranty coverage given by the builder beyond that contained in those two documents would not be backstopped by the Alberta New Home Warranty Program. The mandatory warranty clause provided:

> **WARRANTY**
>
> The builder agrees to provide the Builder Warranty set forth in the detail in the sample Condominium Warranty Certificate ... as the minimum requirement on the part of the builder. The builder may provide warranty coverage in addition to the minimum required in the said warranty and in such event, the additional warranty coverage shall be contained in an addendum in writing signed by the builder and attached to this Agreement. Additional coverage is provided solely by the builder and The Alberta New Home Warranty Program does not warrant the home beyond the terms, provisions, conditions and limits contained in the sample Condominium Warranty Certificates appearing in Enclosures III and IV.

There were no Enclosures III and IV; but there was a Condominium Warranty Certificate in the Disclosure Package.

[28] The Condominium Warranty Certificate contained the substance of the builder's warranty and its covenants with respect to repairing or replacing defects. It also prescribed the procedure for settling disputes with respect to the builder's warranty and its repair/replacement covenants. The specifics of the builder's warranty and the builders covenants were contained in Article 2 of the Warranty Certificate which provides in part: "(b) The Builder agrees to repair or replace Defects or Structural Defects in the Home where written notice has been given to the Builder in accordance with paragraphs 4(a) and 4(b) below."

Additional Facts

[29] The Plaintiffs signed the Sale Agreement on June 24, 2006 and took possession of the Unit on November 30, 2007.

[30] The Plaintiffs' evidence was that the Inspection was somewhat hurried (lasting about 20 minutes) and was one-sided in the sense that they were not permitted to mark deficiencies with the green stickers which the Defendants' representative used to mark deficiencies. In any event, it is common ground that there were a significant number of outstanding deficiencies.

[31] Following the Inspection, the Plaintiffs signed a certificate of possession which included yet another agreement to arbitrate any dispute with respect to the Sale Agreement. Its terms were similar to those contained in the arbitration clause.

[32] Attached to the certificate were two lengthy lists of deficiencies prepared by the Defendants' representative following the Inspection; one dated November 24 and the other November 30 ("Deficiencies"). All of the Deficiencies were described as being warranty items required to be rectified by the builder and/or the builder's contractors.

[33] When the Plaintiffs took possession, many of the Deficiencies had not yet been rectified. Indeed, it took months for some of them to be rectified. The evidence was that Defendants deferred remedying many of the Deficiencies until the Alberta New Home Warranty Program's one-year walk-through, even though some of them were contractual commitments that had nothing to do with warranty items.

[34] Further deficiencies were discovered by the Plaintiffs on taking possession. Some were acknowledged by the Defendants who agreed that they were deficiencies and required rectification. The Plaintiffs also discovered that the Unit's cabinetry and lighting were not as they allege the Defendants represented they would be. Instead of the promised maple or oak cabinets, they were apparently painted particle board. Instead of recessed lighting, which the Plaintiffs allege they were promised, the Unit had track lighting. The Plaintiffs complained and were given explanations by the Defendant which may or may not have been valid. But, for the purposes of this application, it is important to note that the cabinetry and the lighting were matters of dispute between the parties and now form the basis of the Claim.

[35] There were other problems which were only discovered after the Plaintiffs moved in. When walking on the carpets, the Plaintiffs heard 'crunching' sounds under their feet. It turned out that the wrong-sized tacks had been used and they were popping out or coming unfastened. The Defendants acknowledged the problem and undertook to remedy it.

[36] After the one-year walk-through, the Plaintiffs still had deficiency complaints, including the crunching carpets. The Plaintiffs then invoked the conciliation procedure. The Alberta New Home Warranty Program appointed a conciliator/inspector, Brian McDonald, to conduct the procedure. The Plaintiffs allege that he was unqualified and biased.

[37] In any event, a conciliation inspection of the Unit occurred on February 13, 2009. Both Plaintiffs attended, as did Jakob Winkler of the Defendant numbered company. Following the inspection, the Plaintiffs provided the conciliator with further information in the form of an e-mail exchange between themselves and Karla McGregor, the Defendant Knightsbridge Homes Ltd.'s area sales manager. There appears to be evidence that the Defendants acknowledged that the wrong sized tacks had been used and that the crunching was from scores of tacks which had come undone.

[38] On or about February 25, 2009, the inspector/conciliator issued his report. Among other things, he decided that the carpet problem required no action by the Defendants. It was this finding which formed one of the bases of the Plaintiffs' allegation that he was biased. At this point the Plaintiffs lost confidence in the process because even the Defendants had acknowledged the problem existed.

[39] The conciliation report directed the Defendants to take action on five other items and there was one conciliation issue on which the conciliator postponed a decision. That issue involved the Plaintiffs' complaint that water was pooling on their deck notwithstanding the Defendants' repairs. The conciliator's decision was that the Program would re-inspect the deck when weather permitted and that an addendum report would be issued at that time. That inspection never took place, and no addendum report ever issued.

[40] The Defendants allege that the reason this follow-up never took place was that the Plaintiffs refused to permit the inspection. The Plaintiffs deny this but what is clear is that they failed to arrange the inspection within the deadline imposed by the conciliator. The Plaintiffs explained that they wanted a new conciliator appointed before they would permit the deck inspection, but the Alberta New Home Warranty Program refused or failed to appoint a new conciliator.

[41] When the deck inspection did not take place, the conciliator sent the Plaintiffs a letter informing them that the five items which the conciliation report directed the Defendants to address had been "voided". That letter, dated June 28, 2009, merits reproduction (emphasis added):

> The Program gave you a deadline of June 25, 2009 to schedule the seasonal reinspection to review your concerns with pooling water on the deck. As of the date of this letter we have had no response on your part.

> As stated in the June 10, 2009 letter the Program has closed its file. Please note that the remaining items in the Conciliation Report have been voided and the Program no longer requires Knightsbridge Homes to complete the work.

[42] A letter from the Defendant Knightsbridge Homes Ltd. dated September 30, 2009 was sent to the Plaintiffs advising them the builder's warranty had been voided (emphasis added):

> This letter is a follow-up to our recent email correspondence in which I advised you that Knightsbridge Homes Ltd. has met its warranty requirements and is no longer responsible for any outstanding issues.
>
> Please note the enclosed letter from the Alberta New Home Warranty Program sent to you on June 29, 2009 which illustrates that your inability to respond to them within the set deadline had voided your warranty with Knightsbridge.

In summary, the Defendants took the position that the Plaintiffs' dispute with the Alberta New Home Warranty Program voided their new home warranty. The Alberta New Home Warranty Program took the position that the Defendants were not required to address deficiencies which its conciliator had directed it to rectify.

[43] No one referred the dispute over the conciliation to arbitration as required by the arbitration clause.

[44] Two months later the Plaintiffs commenced their Claim.

Relevant Legislation

A. *Arbitration Act*

[45] The relevant provisions begin with these definitions:

> 1(1) In this Act,
>
> (a) "arbitration agreement" means ..., subject to subsections (2) ..., an agreement or part of an agreement by which 2 or more persons agree to submit a matter in dispute to arbitration; ...
>
> (c) "court" means,
>
> (i) in sections 6 and 7, ... the Provincial Court ...
>
> (2) If the parties to an arbitration agreement make a further agreement in connection with the arbitration, it is deemed to form part of the arbitration agreement. ...

[46] Court intervention in matters in respect of which there are arbitration agreements is limited:

> 6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards.

[47] Finally, if a party to an arbitration agreement commences an action in court, the court must stay the action except in certain limited circumstances: section 7. One of the limited circumstances is when "the arbitration agreement is invalid": ss 7(2)(b).

[48] Subsection 7(6) states that there "is no appeal from the court's decision under this section". Notwithstanding that subsection, there have been several appeals of Court of Queen's Bench stay decisions pursuant to section 7, i.e., when an arbitration agreement is said to govern. An example is *Babcock and Wilcox Canada Ltd v Agrium Inc*, 2005 ABCA 82, 363 AR 103. It contains no discussion of the 'no appeal' provision in subsection 7(6).

[49] The Act also includes a limitations provision, section 51, discussed below.

B. *Limitations Act*

[50] The Defendants also submit the Plaintiffs' action is statute-barred. The relevant provision is subsection 3(1)(a) which provides that a defendant is entitled to immunity from liability in respect of the claim if the claimant does not seek a remedial order within:

> (a) 2 years after the date on which the claimant first knew, or in the circumstances ought to have known,
>
> (i) that the injury for which the claimant seeks a remedial order had occurred,
>
> (ii) that the injury was attributable to conduct of the defendant, and
>
> (iii) that the injury, assuming liability on the part of the defendant, warrants bringing a proceeding ...

[51] Remedial order is defined to include "a judgment or an order made by a court in a civil proceeding requiring a defendant to comply with a duty or to pay damages for the violation of a right": s 1(i). Injury is defined to include "non-performance of an obligation": s 1(e)(iv).

[52] The *Arbitration Act* imports the *Limitations Act* limitation periods: "[t]he law with respect to limitation periods applies to an arbitration as if the arbitration were an action and a matter in dispute in the arbitration were a cause of action": s 51(1).

C. *Condominium Property Act*

[53] The *Condominium Property Act* may impact this application. Section 67 provides for court-ordered remedies in cases of "improper conduct" by condominium developers. When a court is satisfied that improper conduct has taken place, it may do a number of things to cause that improper conduct to cease and to compensate for any losses which might be incurred as a result of the improper conduct. The court which is granted these powers is the Court of Queen's Bench, not the Provincial Court; but for these purposes, it is enough to know that such regulatory scheme exists. Indeed, many of the Disclosure Package materials purported compliance with at least part of this Act.

D. *Fair Trading Act*

[54] The *Fair Trading Act*, RSA 2000, c F-2 also appears to provide a regulatory regime whereby consumers may commence actions in Provincial Court for remedies, including damages, against suppliers of new residential dwellings if those suppliers have engaged in unfair practices. Unfair practices are very broadly defined in section 6. Among other things, it is an unfair practise to include in a consumer transaction terms or conditions which are excessively one-sided or to do anything that might reasonably mislead a consumer.

Analysis

A. Limitations Issue

[55] Since the Defendant's limitations argument would be dispositive of the Claim, it is discussed first. As set out above, subsection 3(1) requires claimants to seek a remedial order within two years of the date when they knew or ought to have known that the injury occurred, was attributable to the conduct of the defendant; and warranted bringing a proceeding.

[56] The Defendants assert that the Plaintiffs' injuries were known when they discovered the shortfalls during the Inspection on November 24, 2007 and their Claim is statute-barred because it was not filed until November 30, 2009.

[57] However, the deficiencies or uncompleted work could not constitute non-performance of an obligation until the Defendants had been given an opportunity to remedy the identified deficiencies or to finish incomplete work. Injury or non-performance occurs when it becomes apparent that the

obligation will not be performed. Given the evidence of the Defendant's procrastination until the end of the first year to remedy many of the more difficult deficiencies, I am satisfied that any limitation period which might have begun with the occurrence of the injury or the non-performance of the obligation commenced after November 30, 2007.

[58] And this does not even address the issue of when such injury or non-performance warranted "bringing a proceeding" which may not have occurred until it became apparent, in September 2009, almost two years after possession, that the Defendants were not going to be responsible for any outstanding issues.

[59] The evidence simply does not support an entitlement to immunity on the basis of an expired limitation period.

B. Arbitration Issue

[60] The Court of Appeal of Alberta in *Babcock* made it clear that parties who agree to arbitrate their differences will be held to those agreements except in the limited circumstances set out in subsection 7(2) of the *Arbitration Act*. In such cases the court has the discretion to refuse to stay litigation of matters which the parties have agreed to arbitrate. In the absence of one or more of the five circumstances, the Court ruled that litigation must be stayed. See also *International Resource Management (Canada) Ltd v Kappa Energy (Yemen) Inc*, 2001 ABCA 146 at para 12, 281 AR 373; *New Era Nutrition Inc v Balance Bar Company*, 2004 ABCA 280 at para 36, 357 AR 184.

[61] To quote from *Epcor Power LP v Petrobank Energy and Resources Ltd*, 2010 ABCA 378 at para 16 (available on CanLII):

> As a matter of law and policy, the role of the courts in relation to arbitration has been one of non-intervention. The objective of arbitration legislation and the jurisprudence interpreting it is to promote adherence to agreements, efficiency and fairness and to lend credibility to an important dispute resolution process. Courts are instructed to be mindful of this overarching purpose in any exercise of discretion. ....

[62] Having said that, the Legislature has also made it clear that the court "may refuse to stay proceedings if the arbitration agreement is invalid": ss 7(2)(b) *Arbitration Act* with emphasis.

[63] In determining whether the arbitration agreement in this case was valid, I started with the proposition that an arbitration agreement is a contract and must meet the same tests as any other contract. There must be offer and acceptance in circumstances which the parties are *ad idem*. There must be an element of voluntariness. When the contract is one of adhesion, the terms cannot be unduly harsh, oppressive or excessively one-sided: *Fair Trading Act*, ss 1(3)(a).

[64] The arbitration clause deemed to be incorporated into the Sale Agreement was a contract of adhesion because if one wishes to purchase a condominium from a builder enrolled in the Alberta New Home Warranty Program (with its conciliation and arbitration processes), the option to opt-out

does not appear to exist. According to the Instructions, the arbitration clauses are mandatory for all sales contracts (see above at paras 23-24).

[65] In *Arbitration Law of Canada* at page 73, paragraph 3.9, J. Brian Casey states:

> While there is a preference to refer parties to arbitration in clearly commercial matters, the courts are struggling with the harder issue as to whether to refer parties to arbitration where the inclusion of an arbitration clause is not necessarily the result of the bargaining of the parties, but has been included as a technique by the party with the stronger bargaining position to avoid some of the consequences of litigation.

In other words, it is all very well to say that parties are to be held to their agreements to arbitrate. But what if those agreements are involuntary?

[66] However, notwithstanding my reservations about the voluntariness of adhesion to these arbitration clauses, this application will be decided on the assumption that there was a voluntary agreement to arbitrate. It will also be decided on the basis that the mandatory arbitration clauses were adequately incorporated by reference and agreed to by the parties involved, keeping in mind that on a chambers application the evidence is limited.

[67] Two issues which the Plaintiffs' response to the Defendants' application to stay nevertheless give rise to are:

(i) Did the arbitration clauses become invalid due to the Defendants' conduct?

(ii) If not, do the arbitration clauses oust this court's jurisdiction?

It is convenient to begin the analysis with the second issue.

ii. Do the Arbitration Clauses Oust this Court's Jurisdiction?

[68] In *Seidel v TELUS Communications Inc*, 2011 SCC 15, 329 DLR (4th) 577, the Supreme Court held that a valid agreement to arbitrate did not preclude a class action to enforce a provision in British Columbia's *Business Practices and Consumer Protection Act*, SBC 2004, c 2. That legislation is remarkably analogous to the Alberta *Fair Trading Act*. In *Seidel*, TELUS had obtained a stay of a class action proceeding pursuant to provisions of British Columbia's *Commercial Arbitration Act* which are similar to those in Alberta's *Arbitration Act*. The Supreme Court allowed Seidel's appeal of that stay, holding that to the extent that her claim sought remedies in respect of rights, benefits or protections conferred by the *Business Practices and Consumer Protection Act*, the court action should be allowed to proceed notwithstanding the arbitration clause.

[69] While *Seidel* involved a class action, Alberta's *Fair Trading Act* and *Condominium Property Act* provide similar consumer protection remedies to those provided by British Columbia's legislation. For example, the Alberta *Fair Trading Act* (which applies to the supply of "new

residential dwellings") also makes it an actionable offence for a supplier to include harsh, oppressive or excessively one-sided consumer transaction terms or conditions.

[70] A few of the allegations in the Claim and the affidavit in support may be characterized as suggesting that some of the Alberta New Home Warranty Program's terms are harsh, oppressive or one-sided.

[71] Like the British Columbia legislation, section 13 of the *Fair Trading Act* confers a statutory cause of action on consumers for damages or loss against a supplier which has engaged or acquiesced in an unfair practise that has caused damage or loss. There is, admittedly, an arbitration exception in section 16 but it only applies if the "arbitration agreement governing the arbitration has been approved by the Minister" responsible for the *Fair Trading Act*. And, like the legislation in *Seidel*, the *Fair Trading Act* has provisions for advertising judicial decisions (s 160) and its protections cannot be avoided (see generally Part 1 - General Principles).

[72] Without deciding whether there has been an unfair practise or whether the Plaintiffs are entitled to a remedy under the *Fair Trading Act*, the point is that the substance of the Plaintiffs' complaints could constitute any one of a number of statutorily-defined unfair practises; and the Supreme Court held in *Seidel* that an agreement to arbitrate does not result in a stay of a court action based on such practices.

i. Did the Arbitration Clauses Lose their Validity?

[73] Quite apart from the *Fair Trading Act*'s protections and *Seidel* (which confirmed the general principle that courts will give effect to commercial contracts and contracts of adhesion entered into freely), the question remains whether the parties' agreement to arbitrate was invalidated by the actions of the Defendants or the Alberta New Home Warranty Program. The latter was also a party to the arbitration agreement in the sense that it could initiate arbitration.

[74] For ease of reference, the relevant parts of the arbitration clause is reproduced with emphasis:

> If <u>any dispute</u> arises between the builder and the purchaser(s) with respect to any matter in relation to this Agreement, the dispute <u>shall be settled</u> through binding arbitration ... provided that, where the dispute is in relation to the Builder Warranty, the dispute shall not be referred to arbitration until it has first been referred to and reported on, under the conciliation procedure.... A copy of the Arbitration rules ... shall be furnished to both parties for the commencement of an arbitration, the selection of an agreed single arbitrator and the arbitration hearing. It is expressly agreed that the arbitration by the single arbitrator shall be final and binding on both parties.

[75] The arbitration clause's use of the phrase "shall be settled" is passive. Its subject, "any dispute" receives the action of the verb. To quote from *Guide to Modern English* by Richard K.

Corbin, Portier G. Perrin and Earl W. Buxton (W.J. Gage-Toronto Limited), passive verbs are used "when the doer of the action is unknown, unimportant or obvious, or when special emphasis is wanted for the receiver of the actions."

[76] Here, the doer of the action (i.e., the person doing the settling) is obvious. It is the single arbitrator referred to later in the clause. But, conspicuously absent is any direction as to whose responsibility it is to refer disputes to arbitration. What the clause states is that if the dispute relates to the builder's warranty, the dispute must be first referred to and reported on under the conciliation procedure. The dispute receives the action of the verb.

[77] The conciliation procedure provides that if there is a warranty dispute between the builder and the homeowner, "either the Builder or the Homeowner must provide the Program with ... written notice requesting Conciliation of the dispute." In other words, responsibility for initiating conciliation lies with either the homeowner or the builder. But if issues arise with a conciliation report, they "shall be settled by arbitration" and either the homeowner, the builder, or the Alberta New Home Warranty program may initiate that arbitration.

[78] If the dispute does not relate to the builder's warranty, but concerns the purchase agreement, conciliation is not required and the clause is silent as regards how or by whom arbitration is initiated. All the general arbitration clause states is that such disputes "shall be settled through binding arbitration" in accordance with specified arbitration rules. Those rules were not provided to the Plaintiffs when they were alleged to have agreed to arbitration and there was some suggestion that they were not even retrievable from the Alberta New Home Warranty Program website. They were not in the "Disclosure Package". The more important point is that disputes in relation to the Sale Agreement (like disputes with respect to conciliation reports) are to be settled by arbitration and the agreement is silent on who has responsibility for initiating that arbitration.

[79] The disputes in this case were of both types: disputes about what was promised versus what was delivered (i.e., recessed lighting and cabinetry) and warranty disputes (i.e., the Deficiencies).

[80] The Defendants were aware of the dispute about the recessed lighting and cabinetry from around the time the Plaintiffs took possession. This was not a situation where one of the parties did not know that the other was taking the position that the agreement was breached. The Defendants knew of the dispute and did not referred it to, let alone settle it, by arbitration.

[81] The disputes with respect to the warranty items, which were never settled, evolved into a dispute over the conciliation procedure and its fairness. Neither was referred to arbitration, let alone settled by it.

[82] Who was responsible for those failures? The answer is that the Defendants and the Alberta New Home Warranty Program must share some of the responsibility because they did nothing about the Sale Agreement dispute and as soon as the conciliation dispute arose, they unilaterally declared that the "remaining items in the Conciliation Report have been voided and the program no longer requires Knightsbridge Homes to complete the work" and that the Plaintiffs' "inability to respond

to [the Alberta New Home Warranty Program] within the set deadlines had voided [their] warranty with Knightsbridge." In effect the Defendants and the Alberta New Home Warranty Program unilaterally declared that the Plaintiffs' concerns would not be settled by arbitration. This was contrary to what the Sale Agreement and its arbitration clauses required.

[83] It might be argued that the responsibility for initiating arbitration is with the aggrieved party; but in light of the arbitration clause which made the settlement of disputes by arbitration mandatory and in the absence of express words requiring the so-called aggrieved party to initiate the arbitration, I believe the responsibility to have the dispute settled by arbitration lay with all parties. The consequence of not referring a dispute to arbitration was that the parties might properly end up in court.

[84] The Defendants were fully aware that there was a dispute with the Plaintiffs over what was agreed to be constructed. The Defendants and the Alberta New Home Warranty Program were also fully aware of disputes over the warranty items and over the conciliation procedure which the Plaintiffs invoked to resolve the warranty issues. All the disputes were governed by mandatory arbitration clauses. They gave the Defendants and the Alberta New Home Warranty Program the right to initiate the arbitration. Yet neither did anything to initiate arbitration. They simply waited until what they believed was the deadline for initiating arbitration to pass.

[85] The Defendants may not even have been correct in thinking that the arbitration deadlines had passed because, strictly speaking, the conciliation report is incomplete. Regardless, if disputes are to be settled by arbitration, then the risk the parties run of not invoking arbitration is that they may end up in court. I have concluded that a valid arbitration agreement may be rendered invalid by the actions of the parties.

[86] Counsel for the Defendants argues that there was "no evidence that ... Knightsbridge had any intention to relieve the Plaintiffs of their written contractual obligation to arbitrate". As I have explained, the obligation to initiate arbitration was not solely the Plaintiffs'. The obligation was shared by the Defendants and the Alberta New Home Warranty Program. In the face of a clause which states that disputes shall be settled by arbitration, it is not open to a party fully aware of disputes to simply state, we have met our warranty obligations and we are "no longer responsible for any outstanding issues". And then to go on to suggest, in effect, that the existence of the disputes had somehow voided the Plaintiffs' warranty with the Defendants is wrong. Firstly, it was not the Plaintiffs' warranty with the Defendants; it was the Defendants' warranty obligation to the Plaintiffs. And secondly, a dispute could not possibly void the warranty. The warranty remained. The dispute was over whether the warranty was being properly honoured and that was clearly a dispute which had to be settled by arbitration. It was not settled by arbitration. And it was not so settled because the Defendants and the Alberta New Home Warranty Program took the position that the Plaintiffs' warranty and therefore the arbitration provisions contained therein were no longer valid.

[87] By taking that position, and by not initiating arbitration to settle the disputes, the Defendants justify the exercise this court's discretion under section 7(2)(b) of the *Arbitration Act* to refuse to

stay the Claim because there is no longer a valid arbitration agreement in place. One of the parties has repudiated it.

[88] In the alternative, the Defendants' conduct might also have justified court intervention, pursuant to section 6(b), to ensure that the arbitration is carried out in accordance with the arbitration agreement or, pursuant to section 6(c), to prevent unfair treatment of a party to an arbitration agreement. However, given the Defendants' conduct and my reservations about the validity of the arbitration agreement, the appropriate remedy is to refuse to stay the Claim.

Disposition

[89] The Defendants' application for a summary dismissal of the Claim, pursuant to section 3(1) of the *Limitations Act*, their application for a stay of the Claim, pursuant to section 7(1) of the *Arbitration Act,* are dismissed.

[90] The costs of these applications will be in the cause of this action and will be determined by the trial judge.

Heard on the 11th day of February, 2011 with further submissions February 25, 2011 and March 4, 2011.

Dated at the City of Calgary, Alberta this 3rd day of June, 2011.

B.K. O'Ferrall
A Judge of the Provincial Court of Alberta

Appearances:

Ryan Kary
Plaintiff

Beamer Comfort
Counsel for the Defendant (Student-at-Law)