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Toronto Standard Condominium Corporation No. 2095 v. West Harbour City (I) Residences Corp. 2013 ONSC 5987

In this case, the Condominium applied to the court seeking confirmation that one of its by-laws and an agreement between the Condominium and the Developer were invalid, and the Developer opposed. The agreement limited the liability of the Developer with respect to potential common element construction deficiency claims. The Developer also passed a by-law that required the Condominium to enter into the agreement. It also stipulated that the agreement could not be terminated or breached by the Condominium. The major questions asked of the court were: 1) whether the by-law and agreement were consistent with the *Condominium Act, 1998*; and 2) whether the by-law and agreement were unreasonable?

In determining whether the by-law and agreement were consistent with the *Condominium Act, 1998* (the “Act”), the court reviewed the by-law provisions of the Act. The Condominium argued that the Condominium did not have the authority to pass such a by-law pursuant to section 56(1) of the Act. Upon considering such argument, the court reasoned that since a board is authorized to bring forth or settle claims against a developer, a board must then be permitted to choose not to engage in such actions, which may be outlined in an agreement. Given such, it appears that it was within a condominium’s authority to pass the by-law in question. However, the court did express some doubt with regards to whether an original board of directors could prevent future directors from amending or repealing a corporation’s by-laws.

The court also looked at whether the by-law and agreement were reasonable. In determining whether the by-law and agreement were reasonable, it appears that a major consideration for the court was the advance notice provided to potential purchasers. The agreement of purchase and sale disclosed the limitation of liability of the developer. The agreement and the by-law were also provided to potential purchasers in the disclosure package, and registered on title. Given such considerations, potential purchasers were made aware of the Developer’s limitation of liability on numerous occasions. The court also noted that the agreement did not diminish and appeared to be consistent with the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c.O31 (“ONHWP”).

Overall, the court appears to have determined that a developer is permitted to limit its liability to a condominium with respect to potential claims that may arise as a result of common element deficiencies. This removal of liability however would not apply to Tarion warranties. A limitation on liability appears to be permitted so long as any agreements are disclosed to potential purchasers, in advance.

Bottom Line: It appears that developers of residential condominiums may be permitted to limit their exposure to potential claims arising from common element construction deficiencies via an agreement or by-law, so long as potential purchasers are made aware of it in advance. Given such, especially after turn-over, new condominiums should carefully review and identify any documents that may be in favour of a developer, and that may restrict the rights of the condominium.

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