

COURT OF APPEAL FOR ONTARIO

CITATION: Shiralian v. Wyldewood Creek Inc., 2026 ONCA 163

DATE: 20260306

DOCKET: COA-25-CV-0710

Fairburn A.C.J.O., Rouleau and Roberts JJ.A.

BETWEEN

Babak Shiralian, Samuel Anshilevich and Alex Ilchenko

Applicants (Appellants)

and

Wyldewood Creek Inc.

Respondent (Respondent)

Neil G. Wilson and Haya Sardar, for the appellants

Monique Jilesen and Zachary Rosen, for the respondent

Heard: February 19, 2026

On appeal from the judgment of Justice Michael K. McKelvey of the Superior Court of Justice, dated April 30, 2025, with reasons reported at 2025 ONSC 2666.

REASONS FOR DECISION

[1] This appeal concerns the enforceability of a clause in an agreement of purchase and sale that limits the appellant purchasers' damages for the respondent's breach of their agreement to the return of the appellants' deposits with interest ("the limitation of liability clause").

[2] The appellants purchased as a partnership investment a residential pre-construction condominium to be built by the respondent developer in Collingwood.

The respondent terminated the agreement of purchase and sale before the condominium was built and past the deadlines prescribed in the Tarion Addendum. The Tarion Addendum was included in the agreement of purchase and sale, in accordance with the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31.

[3] The application judge found that the respondent had breached the agreement of purchase and sale by its late termination notice and limited the appellants' damages to their deposits plus interest in accordance with the limitation of liability clause contained in s. 8.07 of Appendix A to the agreement of purchase and sale. Section 8.07 limited "all rights, remedies and recourses" of the appellants for "any default" of the respondent to "the return of the deposits paid ... pursuant to [the agreement of purchase and sale]" and subject to the Tarion Addendum. The application judge noted that s. 1.03 of the agreement of purchase and sale and s. 11 of the Tarion Addendum required that interest be paid on the appellants' deposits.

[4] The appellants argue that the application judge erred by enforcing the limitation of liability clause because they say it undermines the consumer protection afforded by the prescribed termination deadlines in the Tarion Addendum. According to the appellants, the limitation of liability clause effectively removes any consequence if the vendor terminates the agreement beyond the prescribed deadlines, rendering the deadlines functionally

meaningless. They submit that the terms of the limitation of liability clause are onerous and unconscionable because the limitation of liability clause does not provide for interest and is contrary to the remedial consumer protection of the Tarion Addendum. They insist that the respondent should have brought the limitation of liability clause to their attention.

[5] We are not persuaded that the application judge made any error.

[6] Absent a reversible error, which we do not see here, the application judge's interpretation of the parties' agreement of purchase and sale is subject to a deferential standard of review: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 52-53. The parties' agreement of purchase and sale was not a standard form contract: through their lawyers, the appellants, who were sophisticated and experienced in real estate transactions, negotiated significant changes to the agreement of purchase and sale. Consequently, the appellants should have been well aware of the limitation of liability clause. In these circumstances, the respondent had no obligation to expressly bring it to their attention.

[7] Further, the application judge's interpretation followed the governing principles of contractual interpretation as instructed by the Supreme Court in *Sattva*, at para. 47: he tracked the plain language of the limitation of liability clause and considered the clause in the context of the entire agreement of purchase and

sale. We disagree with the appellants that the limitation of liability clause did not provide for interest on the deposits: as the application judge rightly noted, a proper reading of the clause included the deposit interest provisions contained in section 1.03 of the agreement of purchase and sale and s. 11 of the Tarion Addendum.

[8] The appellants' arguments effectively seek to rewrite their agreement with the respondent. The Tarion Addendum does not stipulate what measure of damages or other consequences should flow from a vendor's default beyond the return of the purchaser's deposits with interest. Nor does it preclude the parties from agreeing, as they did here, on what damages or consequences should flow from any default by either party.

[9] Represented by counsel, the parties in the present case freely chose to allocate risk on termination and limit damages as provided for in their agreement of purchase and sale. They were entitled to do so. That the bargain did not turn out as the appellants would have wished is not, without more, a reason to set aside their agreement.

[10] In rejecting the appellants' argument, repeated on appeal, that it would be unconscionable to enforce the limitation of liability clause, the application judge properly referenced, in para. 46 of his reasons, the relevant three-step approach regarding the enforceability of exclusion clauses from *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69:

The first step is to determine whether as a matter of interpretation, the exclusion clause applies. I have no hesitation in concluding that the clause as drafted does apply to the circumstances of this case. Second, if the exclusion clause applies, the second step is to determine whether it was unconscionable at the time the agreement was made. Third, if the exclusion clause applies and it was not unconscionable, then the third step is to determine whether the court should refuse to enforce the clause because of the presence of an overriding public policy.

[11] The application judge then followed, correctly in our view, the conclusion endorsed by this court in *Ritchie v. Castlepoint Greybrook Sterling Inc.*, 2021 ONCA 214, 27 R.P.R. (6th) 256, at paras. 3-4, leave to appeal refused, [2021] S.C.C.A. No. 153, that the limitation on the respondent's liability is not unconscionable nor inconsistent with any of the provisions in the Tarion Addendum or the public policy underlying those provisions and that the parties were free to allocate risk and limit liability.

[12] We agree that the limitation of liability clause here takes away none of the protections under the Tarion Addendum but merely fixes, by agreement, the consequences of any default by the respondent in accordance with the parties' freedom of contract. We do not accept the appellants' argument that the enforcement of this clause will destroy the protection of the Tarion Addendum for every new condominium and house purchase in Ontario. The *Tercon* analysis serves as an effective safeguard against any abuse of such a clause or any other

conduct contrary to public policy, as its application to determine enforceability requires a fact-driven consideration of the particular circumstances of each case.

[13] Accordingly, the appeal is dismissed.

[14] The respondent is entitled to the costs of the appeal in the all-inclusive amount of \$25,000.

Fairbairn ACJO

Paul London JA

L.B. Roberts JA