**Licence Appeal Tribunal**

**Tribunal d'appel en matière de permis**

Ontario

DATE: 2013-11-07
FILE: 7782/ONHWPA
CASE NAME: 7782 v. Tarion Warranty Corporation



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An Appeal of a Decision of Tarion Warranty Corporation under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O. 31 – to Disallow a Claim

Applicant

Applicant

-and-

Tarion Warranty Corporation

Respondent

-and-

695059 Ontario Inc.

Added Party

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## REASONS FOR DECISION AND ORDER

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**ADJUDICATOR:** Harinder S. Gahir, Vice Chair

**APPEARANCES:**

**For the Applicant:** Self-represented

**For the Respondent:** Ellie Choi, Counsel

**For the Added Party:** No one appeared

**Heard in Toronto**: September 23 & 27, 2013

## Reasons for Decision and Order

This is an appeal by the Applicant to the Licence Appeal Tribunal (the "Tribunal") from Decision Letter of Tarion Warranty Corporation ("Tarion"), with respect to a new home purchased from 695059 Ontario Inc., (the "Added Party" or "Builder"), for which Tarion denied the Applicant's claim.



### Preliminary matters

At the onset of the hearing, the Tribunal noted that the Added Party was not in attendance. The Tribunal set the matter down for 30 minutes to wait for the Added Party or its representative. At the resumption of the hearing at 10.00 a.m., the Added Party did not show up. Upon hearing submissions from the Applicant and Tarion's Counsel that the Agent for Added Party was in attendance at the time of pre-hearing on April 15, 2013, when the hearing dates were fixed in consultation with all parties, the Tribunal proceeded with the hearing without the Added Party's presence.

### Applicant's Claim

The items under appeal as set out in the Tarion Decision Letter dated November 12, 2012 (the "Decision Letter") as follows[1]:

1. Smaller windows and doors on main floor installed contrary to the Agreement of Purchase and Sale (the "APS").

2. Kitchen window is too high off the ground and smaller in height.

3. Granite floor tiles on the main floor were not sealed that is causing liquid to seep into the tiles.

4. Bedroom number three closet dimensions are smaller contrary to the APS and as a result the closet door rubs against clothes on the rod.

5. Subfloor boards not screwed-in as per APS and feature sheet provided by builder.

Tarion took the position that there is no defect in the workmanship that amounts to a breach of the One Year Workmanship Warranty. However, the Applicant took the position that items 1, 2, 4 and 5 are unauthorized substitutions.

[1] **Exhibit 3, tab 9**

## Law

### Section 13 of the Act states in part:

> **13.** (1) Every vendor of a home warrants to the owner,
>
> (a) that the home,
>
> (i) is constructed in a workmanlike manner and is free from defects in material,
>
> (ii) is fit for habitation, and
>
> (iii) is constructed in accordance with the Ontario Building Code;

Sections 18 and 19 of Regulation 892, provide for warranties relating to substitutions in the construction of a new home. The sections state:

> 18. (1) Every vendor of a new home warrants to the owner that the vendor shall make no substitutions in those items of construction or finishing for which the purchaser is entitled to make selection pursuant to the purchase agreement without the written consent of the purchaser
>
> 19. (1) Every vendor of a new home warrants to the purchaser that, where the vendor makes a substitution with respect to an item that is referred to in the purchase agreement
>
> that is not an item that is to be selected by the purchaser, the item will be of equal or better quality than the item referred to in the purchase agreement.

## Issue

The issue before the Tribunal is whether the noted claims listed in the Decision Letter are warranted under Section 13 of the Act or Section 19 of the Regulations[2] and, if so, what are the appropriate remedies.

## Evidence and Analysis

It is settled that the onus of proof is on the Applicant. If the Applicant proves on a balance of probabilities that the Builder breached the warranty, the Applicant is entitled to damages arising from the breach.

The evidence of the parties consisted of testimony of the Applicant, her one witness, the Registrar's witness, Donald Butwell, and documentary evidence.

The Tribunal will deal separately with each item under dispute.

[2] **R.R.O. 1990, Regulation 892**

**Larger windows on main floor of the home**

The Applicant stated she is entitled to have all of the windows on the main floor of her home increased in height to 12 inches as some of the installed windows are short by 12 inches in height. However, she only made a claim for two of the windows on the main floor she believes should have been taller: $17,724.00 for replacement of the window at the front of her home plus $5,000.00 for the window in her kitchen. In support of her position, the Applicant relies on the APS[3] and an amendment to the APS[4] (together, the "APS"). The relevant portion of the Amendment reads as:

> Raise the main floor ceiling at approximately 12 inches – to be included in the purchase price

She also relied on a computer generated price list that the Applicant claimed the Builder has supplied her at the time of entering into the APS[5]. It provides:

> 10 ft. ceilings on first floor $12,000.00
> (Includes taller windows & interior doors)

The above price list is not signed by any party and the Applicant confirmed that this price list is not part of the APS. Furthermore, she agreed that there is nothing on the price sheet that would denote the author of this document.

The Applicant relied upon the permit drawings that the Added Party had submitted to the City of Toronto[6] that showed the front window to be 11 feet high, whereas the installed window is 10 feet high. However, the Applicant agreed that permit drawings did not form part of the APS. She testified that she paid $12,000.00 cash for this upgrade but did not provide any evidence of the payment.

The Respondent took the position that the Applicant received exactly what was set out in the Amendment and her home was constructed with the first floor height increased by approximately one foot. The Tribunal agrees with the Respondent that even if the Applicant did pay an extra amount for an increased main floor height, the amendment is limited to raising the height of the ceiling and does not provide for taller windows. In the absence of evidence that the Applicant and the Builder agreed to taller windows on the main floor, the Applicant is not entitled to any relief.

**Higher kitchen window**

The Applicant insisted that the window installed in the kitchen is too high off the ground for her to reach the locking mechanism[7]. She testified that she requires a ladder to open

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[3] **Exhibit 4, tab F**
[4] **Exhibit 4, tab G**
[5] **Exhibit 4, tab J**
[6] **Exhibit 4, tab V**
[7] **Exhibit 4, tab O**

the window. In addition, she insisted that the bottom of the window is 41/2 feet off the ground and therefore she cannot see out of the window.

Mr. Butwell testified that the kitchen window is meant for lighting and ventilation and that the parties did not specify the location or the size of the window in the APS.

The Applicant stated that the kitchen window was not part of the selection she had made. She did not adduce any evidence to establish that the Builder had contracted with her to install the window at the lower height or a taller window. In the absence of such evidence, the Tribunal denies Applicant's claim.

**Smaller closet in bedroom number three**

The Applicant claimed that the closet in bedroom number three is not a walk-in-closet as indicated in the APS[8]. Also, the closet is not properly functional as the door of the closet has an inside swing. It causes there to be inadequate space between the door and the rod for hanging the clothes[9]. The Applicant suggested that she would need to change the swing of the closet door to the outside in order to make the closet functional. She presented a quote of $1,700.00 plus HST to complete this work[10].

The Respondent's Counsel submitted that the *ONHWP Act* does not cover all situations where homeowners may be disappointed and where their home was not built exactly as the homeowners expected. She further submitted that the closet has been used continuously as a closet since the Applicant took possession of the home more than two years ago. She submitted that the there is no breach of warranty set out in the ONHWP Act or regulations that covers this item.

The Tribunal disagrees with the Respondent. The Added Party contracted with the Applicant to provide a walk-in-closet in this bedroom. The swing of the closet not only made the closet improperly functional, it also cannot be called a walk-in. The inside swing of the closet door is a defect in the workmanship and must be corrected to make the closet functional.

The only evidence the Tribunal had before it to rectify this defect was a quote submitted by the Applicant. Mr. Butwell has agreed that the scope of work mentioned in the quote is reasonable. The Tribunal allows this claim.

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[8] **Exhibit 4, tab F, Schedule "E"**
[9] **Exhibit 4, tab S**
[10] **Exhibit 8**

**Unsealed granite tiles**

The Applicant made a claim that the granite floor tiles on the main floor of her home had not been sealed by the Added Party. She submitted that the granite is a very porous material and liquids can easily seep through. Tarion's Warranty Claim Representative testified that at the time of the conciliation in September 10, 2012 he did not see any staining from a normal viewing position. The Applicant's evidence as well as the testimony of Mr. Butwell confirmed that sealants have a limited lifespan and should be reapplied every one to two years. The Applicant testified that she has not applied any sealant since moving into her home in March 2011. Mr. Butwell testified that at the time of his inspection of the home in September 2012 the Applicant did not establish that the granite was not sealed, which claim the Applicant did not dispute. The Tribunal agrees with the Respondent's Counsel that the Applicant has not proven on a balance of probabilities that there is a warrantable defect. Therefore, the Tribunal denies this claim.

**Subfloor board not screwed in**

The Applicant testified that a screwed and nailed subfloor was part of the Builder's standard offering of features as per the APS. The Applicant did agree that the subfloor was glued and nailed. She testified that she did not know if glue is better than screws as she did not do any research on this. She further testified that as a result of the Builder's failure to put screws in the subfloor, the hardwood floor is squeaking. However, she agreed that she was not able to demonstrate the squeaking floor to Mr. Butwell on September 10, 2012 when he went to her home for inspection.

Mr. Butwell testified that gluing and nailing subfloors is equal in quality as nailing and screwing the subfloors. He further testified that in accordance with Section 19, Regulation 892, substitutions are permitted so long as what is provided by the builder is of equal or better quality than the item set out in the APS.

The Applicant did not provide any evidence that gluing and nailing of subfloors is inferior to screwing and nailing. The Tribunal does not have any evidence before it to conclude that the Builder did not provide substitution of equal or better quality than the item set out in the APS. Therefore, the Tribunal denies this claim.

**ORDER**

Pursuant to the authority vested in it under the provisions of the Act, the appeal is allowed with respect to the closet in bedroom number three, as set above, and directs that this claim is warranted and that Tarion pay to the Applicant the sum of $1700.00 plus applicable HST ($1921.00).

All other claim items before the Tribunal on this appeal are dismissed

LICENCE APPEAL TRIBUNAL

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Harinder Gahir, Vice Chair

*Released: November 7, 2013*