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Ruling may have major impact on TARION

An appeal decision by the Ontario Divisional Court released in April could result in a significant change in the way homeowner claims are treated under the Ontario New Home Warranties Plan Act (ONHWPA).

Joao Luis DaSilva Cecilio purchased a new home from a builder back in June 2000. After closing, he was unhappy with the quality of the house and made numerous deficiency claims to the Tarion warranty program.

Tarion responded to the complaints in July and October 2005. Cecilio was dissatisfied with their position and appealed to the Licence Appeal Tribunal (LAT) in November that year.

One main complaint was that he heard too much noise from his neighbour's house through the shared wall between their homes. The Tribunal had to decide whether the wall complied with the Ontario Building Code requirements for limiting sound transference.

In January 2006, the Tribunal ordered Tarion to conduct testing to check for any Code infractions and to repair the party wall, if necessary.

Tarion's position was that it had no obligation or authority to do testing after the house was completed and it appealed the LAT decision to a three-judge panel of the Ontario Divisional Court.

At the appeal hearing, Cecilio's lawyer, David J. McGhee, argued that Tarion's position was contrary to the underlying purpose of the legislation, which is intended to protect the homeowner against breaches of the warranty.

Tarion's interpretation, he told the court, "gutted" the protections meant to be in the Act and freed Tarion from its duties under the Act to inspect and test and, if necessary, do work to mitigate the breaches of warranty.

The three-judge panel, in a decision written by Justice Dennis Lane, ruled Cecilio's "submissions make sense out of the Act, whereas the Tarion interpretation does not."

Justice Lane wrote, "(Tarion's) warranties only begin when the construction has been completed. It makes no sense that the power of inspection would exist only during construction ... I conclude that (the legislation) authorizes inspections and tests for all purposes of the Act and is not confined to the construction period."

The purpose of the Tarion legislation, the court wrote, "is clearly remedial consumer protection legislation and should be liberally construed ... Tarion has taken the side of the builder in opposing the homeowner."

The court ordered the case to be sent back to the Tribunal to consider whether the builder or the homeowner ought to have the test performed by an independent tester and the report distributed to the parties.

Janice Mandel, Tarion's vice-president of corporate affairs, says Tarion won't appeal the Divisional Court decision.

As I see it, the Cecilio case is a watershed decision, which should affect the way many Tarion claims are dealt with in the future. It could also open the floodgates of claims for similar noise complaints.

The decision clearly implies that future Tarion decisions, which do not "make sense" in light of the consumer protection mandate of the program, will be reversed by the courts.

The case also establishes that Tarion's inspection obligations extend beyond the completion of the house, and that post-completion inspection and testing could result in a finding of responsibility by the program. I also read the Cecilio decision as a criticism by the appeal court of Tarion's interpretation of the legislation.

The case could well point the way to a sea change in the way consumers are treated under the ONHWPA legislation if not by Tarion, then definitely by the courts.

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Case Name:

Cecilio v. Tarion Warranty Corp.

Between
Joao Luis Dasilva Cecilio, Applicant (Respondent and Cross-Appellant), and
Tarion Warranty Corporation, Respondent (Appellant),
and Lexington Green Enterprises Inc., Added Party
(Respondent and Cross-Appellant)

[2007] O.J. No. 1692
Court File No. 130/06

Ontario Superior Court of Justice
Divisional Court
G.D. Lane, K.E. Swinton and M.G.J. Quigley JJ.

Heard: January 9, 2007.
Judgment: April 12, 2007.

(56 paras.)

Counsel:

Peter Balasubramanian and Joel Oliphant, for the Appellant.

David J. McGhee, for the Respondent and Cross-Appellant.

Darren Gluckman, for the Added Party, Respondent and Cross-Appellant.

REASONS FOR JUDGMENT

The judgment of the Court was delivered by

1 **G.D. LANE J.**: Tarion Warranty Corporation ("Tarion"), appeals to this court from the Order of the Licence Appeal Tribunal (the "Tribunal"), dated January 17, 2006, whereby the Tribunal ordered Tarion to conduct testing to determine the existence of an alleged Ontario Building Code ("Code") infraction and to repair a party wall, if necessary. The appellant, Tarion, is the nonprofit corporation designated by the Lieutenant Governor in Council to administer the Ontario New Home Warranties Plan ("Plan") under the Ontario New Home Warranties Plan Act (the "ONHWP Act"). Tarion's statutory duties include conciliating disputes between vendors and purchasers of homes regarding warranty breaches, including alleged construction deficiencies and Code infractions [See Note 1 below]. It is also the payor of last resort where there has been a breach of warranty by the builder of a home.

Note 1: Ontario New Home Warranties Plan Act, subsections 13(1) and 17(1).

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2 The applicant purchased a new home from the Added Party ("Lexington") and took possession in June 2000. Since then, he has made numerous claims on Tarion relating to alleged deficiencies in the new home. Tarion responded to some of these complaints in a Decision Letter dated July 16, 2005, and a Supplementary Decision Letter dated October 31, 2005 (together, the "Decision Letters"). Dissatisfied with Tarion's response, the applicant appealed to the Tribunal. A hearing was held on November 21 and 22, 2005, and the Tribunal released its decision and reasons as noted above.

3 One of the five matters complained of by the applicant to the Tribunal was that he heard too much noise from his neighbour through the party wall between their homes. The Tribunal set out the complaint as follows:

> 3. Does the party wall between the Applicant's home and its semi-attached neighbour comply with the Ontario Building Code with respect to sound transference? The Applicant claims it does not and as a result he is disturbed by the noise coming from his neighbour.

4 In its decision, the Tribunal ordered Tarion to conduct sound transference testing of the wall. The appellant appeals asking that the claim as to the wall be disallowed. There are also cross-appeals as to other matters by the homeowner and the added party.

The Legal Framework

5 The ONHWP Act directs the establishment of a non-profit corporation without share capital to administer the Plan, to establish a guarantee fund providing for the payment of compensation under section 14, to assist in conciliating disputes between vendors and owners and to engage in undertakings to improve communication between vendors and owners. Tarion is that corporation. There is a registration scheme as a pre-requisite to a person acting as a vendor or builder. Section 13 provides that every vendor of a home warrants to the owner that the home is constructed in a workmanlike manner and free from defects in material, is fit for habitation, is constructed in accordance with the Code and is free from major structural defects. These warranties apply despite any agreement to the contrary and are enforceable even though there is no privity of contract between the owner and the vendor/builder.

6 By section 14, the ONHWP Act provides for payments out of the guarantee fund in a variety of situations. Of importance in the present case is section 14(3):

> (3) Subject to the regulations, an owner of a home is entitled to receive payment out of the guarantee fund for damages resulting from a breach of warranty if,
>
> (a) the person became the owner of the home through receiving a transfer of title to it or through the substantial performance by a builder of a contract to construct the home on land owned by the person; and
>
> (b) the person has a cause of action against the vendor or the builder, as the case may be, for damages resulting from the breach of warranty.

7 The ONHWP Act also provides by section 14(7) that Tarion may:

> perform or arrange for the performance of any work in lieu of or in mitigation of damages claimed under this section.

8 Where Tarion has made a decision on an application for compensation under section 14, it must notify the owner affected of the decision and of the owner's right to a hearing by the Licence Appeal Tribunal. Where the owner requires a hearing, the Tribunal holds a hearing and, by section 16(3) the Tribunal:

> ... may by order direct the Corporation to take such action as the Tribunal considers the Corporation ought to take in accordance with this Act and the regulations, and for such purposes the Tribunal may substitute its opinion for that of the Corporation.

9 Tarion is empowered by section 18 to appoint inspectors for the purposes of the Act. While a home is under construction, an inspector may enter in or upon the premises at any time without a warrant: section 18(2). There is no similar right of warrantless entry after the construction period. Section 18(3) provides that, for the purposes of an inspection the inspector may require the production of drawings and specifications and may require information from any person about the home; may be accompanied by an expert to assist and may make such examinations, tests or inquiries as are necessary for the purposes of the inspection.

10 Tarion is empowered to make by-laws having the force of Regulations including:

> (m.1)

allowing prescribed persons to inspect homes during or after their construction and requiring builders or vendors to pay the costs of the inspections;

11 Regulation 892, made under the ONHWP Act, provides that where Tarion determines that remedial work will require time to complete, it shall continue to conduct such inspections as it considers necessary until the work has been completed.

Section 18: Powers of Inspection

12 There was debate at the bar about the extent of Tarion's right of inspection. It was submitted that Tarion could not be directed to conduct an inspection and tests of the party wall because it had no power under the Act to do so. Counsel for Tarion submitted that section 18 only authorized an inspection during construction and pointed to section 18(2) which confines warrantless entry to the period of construction. He submitted that the restriction to the period of construction applied to the whole of section 18 and hence there was no authority to direct Tarion to conduct an inspection of the completed home nor did the power to conduct tests apply after the construction period. Counsel for the respondent homeowner submitted that on its face the restriction was confined to the warrantless entry permitted by section 18(2); that any other reading ignored the significance of the fact that there was as yet no homeowner during construction and failed to effect the underlying purpose of the ONHWP Act, the protection of the homeowner against breaches of the warranty provided by the statute. The Tarion interpretation 11 gutted" the protections meant to be in the Act and freed Tarion from its duties under the Act to inspect and test and, if necessary, do work to mitigate the breaches of warranty.

13 In my view, the respondent's submissions make sense out of the Act, whereas the Tarion interpretation does not. The appointment of inspectors is expressly "for the purposes of this Act," purposes which go well beyond the construction of the home and include administering a compensation scheme for breaches of warranties created by the Act. These warranties only begin when the construction has been completed. It makes no sense that the power of inspection would exist only during construction, although it makes good sense that the power of warrantless entry should cease once there is a homeowner in residence. I conclude that section 18 authorizes inspections and tests for all purposes of the Act and is not confined to the construction period.

The Hearing

14 Turning to the hearing, the applicant called as an expert witness Mr. David Hellyer, a professional engineer with 25 years experience in the construction business, who has appeared as an expert on numerous occasions. The Tribunal found him to be duly qualified as an expert in the areas of the Code and new home construction. Mr. Hellyer had inspected the home on January 19, 2004, and prepared a report in which he identified the absence of acoustic sealant as a defect in compliance with the Code. He identified the relevant provisions in the Code as sections 9.11.2.1(1) and 9.11.1. He testified that to comply with the Code, the wall must have a sound transmission class rating of at least 50, which can be achieved in one of two ways. The first is to build the wall in accordance with one of the prescribed construction methods set out in Tables 8.1 and 8.2 in the Supplementary Guidelines to the Code, in which case the wall complies. The other was to have the wall tested, using a prescribed technique, to determine the actual sound transference rating.

15 Mr. Hellyer further testified that by destructive examination of a representative part of the wall he determined that it had not been built in one of the prescribed construction methods. Therefore it did not automatically qualify as having the necessary sound rating. However, he had not conducted the sound transference test, as he was not qualified to do so.

16 Lexington called Mr. Joel Pereira, with over 20 years experience in the construction business, but no formal professional qualifications, and apparently employed by a related company, as a witness. He was not qualified by counsel as having any expertise so as to give opinion evidence in acoustical analysis. He testified that the technique used to build the wall, consisting of three layers of gypsum, was preferable to the requirements of the Code. He had no basis in proven expertise to enable him to testify to that effect. The Tribunal was entitled to ignore that part of his evidence. He agreed that it was not built to either of the prescribed techniques.

17 Thus, the Tribunal did not have any evidence before it of the actual sound transmission class rating of the party wall as built. Tarion submitted to the Tribunal that the applicant must fail as he had not met the burden of proof of showing that the wall, as built, did not conform to the Code. In this submission, Tarion relied on the Tribunal's decision in Reid v. ONHWP LAT 2000, released October 18, 2000, in which the Tribunal had only evidence that the owner complained of too much noise and that the wall was not built to the standard of the Code. There was no evidence of actual sound transference testing and the Tribunal found that the burden of proof had not been met by the homeowner.

18 In its analysis, the Tribunal in the present case came to a different conclusion by analogy to the Supreme Court decision in Snell v. Farrell, [1990] 2 S.C.R. 311 ("Snell"). In that case, a physician continued with an eye surgery to remove a cataract with the knowledge that there was retrobulbar bleeding in the eye. The presence of the blood prevented an examination of the condition of the optic nerve. Later, when the nerve became visible, it was found to have atrophied. The trial judge stated:

> No one can say what happened or with certainty when it happened, because the bleeding from the cataract removal prohibited the doctors from seeing the optic nerve. I am of the opinion that the defendant was "asking for trouble" by operating when he knew his patient had a retrobulbar bleed and that the increased risk was followed by injury in the same area of risk.
>
> I am of the opinion that the plaintiff has prima facie proved that the defendant's actions caused the plaintiffs injury and that the defendant has not satisfied the onus that shifted to him.

19 The Supreme Court agreed with the trial judge in the result through a different analysis. The doctor was present and could see what occurred and interpret it from a medical standpoint. He was in charge of the operation and decided to continue, thus making the detection of the damage caused by the retrobulbar bleed impossible until much later, when it could no longer be remedied. It was open to the trial judge to draw the inference that the injury was caused by the retrobulbar bleeding. The defendant brought no evidence to rebut this inference. The Supreme Court drew the inference and made the necessary finding of causation despite the absence of a positive medical opinion. It was not speculation, but the application of common sense to draw such an inference where the circumstances permit.

20 The two broad principles employed in the allocation of the burden of proof in a civil case are set out by the Supreme Court at paragraph 16:

1. that the onus is on the party who asserts a proposition, usually the plaintiff;

2. that where the subject matter of the allegation lies particularly within the knowledge of one party, that party may be required to prove it.

21 In discussing these principles, the Supreme Court reviewed many authorities in Canada and elsewhere on proof of causation and concluded, at paragraph 33, that "the legal or ultimate burden remains with the plaintiff, but in the absence of evidence to the contrary adduced by the defendant, an inference of causation may be drawn although positive or scientific proof of causation has not been adduced."

22 Analogizing to Snell, the Tribunal found that Lexington was an experienced builder of homes, had access to the appropriate professionals, and had a statutory obligation to build in accordance with the Code. It elected to use a different method to build the wall than those described in the Code and thereby lost the benefit of the provision in the Code that walls built as the Code described would be deemed to be acoustically satisfactory. The applicant having proved the foregoing, it became incumbent on Lexington to show that the method it adopted actually provided appropriate protection from sound transference. Lexington was in the best position to produce this evidence, but did not call anyone qualified to give it. Having heard the applicant's evidence of the excessive sound transmitted through the wall, and in the absence of such evidence from Lexington, the Tribunal might have been entitled to draw the inference that the wall does not conform to the required acoustical standard. In fact, however, the actual order did not go that far.

23 The Tribunal went on to find that not only Lexington, but also Tarion, were far better positioned to bring forward the evidence as to the acoustical rating of the wall as constructed. Tarion had inspection powers, which it failed to exercise to obtain acoustical tests of the wall. The Tribunal ordered Tarion to do so and to arrange for repairs if required to bring the wall into compliance.

24 The Tribunal did not find either Tarion or Lexington liable to the homeowner. Its order is directed to further testing to reveal the true facts as to the acoustical properties of the wall. It is only if the tests show that the wall is defective that repairs are to be made by Tarion.

25 Tarion appeals to this court alleging that the Tribunal was in error in applying the Snell principles to the case and in ordering it to conduct tests.

Standard of Review

26 The appellant submitted that the issues before the Tribunal were issues of law: the burden of proof and the true interpretation of section 18 of the ONHWP Act. Therefore the standard of review must be correctness. The respondent submits that the standard on questions of law is correctness, but on questions of fact and of mixed law and fact, the standard is that of a palpable and overriding error [See Note 2 below].

Note 2: Housen v. Nikolaisen [2002] 2 S.C.R. 235.

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27 In order to determine the appropriate standard of review, the court applies the "pragmatic and functional analysis" of the Tribunal and its functioning mandated by a series of Supreme Court decisions of which Pushpanathan [See Note 3 below] is perhaps the most prominent example. Dealing with the factors to be considered, there is no privative clause protecting the decisions of the Tribunal; on the contrary there is a statutory right of appeal under section 11 of the Licence Appeal Tribunal Act, 1999 [See Note 4 below] to this court. The appeal is not confined to questions of law, but the section does not expressly give the court the right to substitute its opinion for that of the Tribunal. This factor tends toward a relatively low level of deference requiring correctness as to general questions of law and reasonableness as to other matters. The second factor is the level of expertise relative to the court. Here again, the Tribunal has little, if any advantage over the court in interpreting the legislation, but must be given deference as to the facts as the primary fact finder. This expertise extends to the weighing of the evidence as well as the finding of the facts.

Note 3: Pushpanathan v. Canada [1998] 1 S.C.R. 982.

Note 4: S.O. 1999 c. 12, Schedule G, s. 11.

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28 The third factor is the purpose of the ONHWP Act. It is clearly remedial consumer protection legislation and should be liberally construed and this court has so held [See Note 5 below]. To set aside this present decision because a court might have dismissed the case, rather than order the tests, would be to fail to recognize the remedial and protective features of the legislation.

Note 5: Grudzinski v. O.N.H.W.P. (1007) 32 O.R. (3d) 376 (Div. Ct).

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29 The final factor is the nature of the question to be decided. There are two points made in the appeal: whether the applicant met the burden of proof and the correct reading of the inspection powers of Tarion under section 18 of the ONHWP Act. The latter is a question of law as to which the Tribunal has no expertise not shared by the court. Therefore correctness is the standard of review. The former is a mixed question of law and fact depending in part on the weighing of the evidence. Accordingly, the court must concede deference to the findings of fact and should apply the standard of reasonableness.

Burden of Proof

30 Tarion submits that the Tribunal erred in failing to appreciate that the burden of proof rests on the homeowner, as was held by this court in Ontario New Home Warranty Program v. Ontario (Commercial Registration Appeal Tribunal) [1998] O.J. No. 1948 (Div. Ct.). Certainly that is so as a general rule, but nothing in the cited case prevents the application of evidentiary principles that modify that burden in the proper circumstances. In that 1998 case, the Divisional Court observed that this Act [See Note 6 below] is intended to be a consumer protection scheme for the benefit of people who buy new homes. It should be read in the light of that purpose.

Note 6: Strictly the predecessor Act, but in this respect the amended Act is no different.

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31 In Snell at paragraph 29, Sopinka J., for the court, pointed out that both the burden of proof and the standard of proof are flexible concepts, and at paragraph 32, after reviewing cases on the shifting of the burden of proof during the trial, stated:

> It is not strictly accurate to speak of the burden shifting to the defendant when what is meant is that evidence adduced by the plaintiff may result in an inference being drawn adverse to the defendant. Whether an inference is or is not drawn is a matter of weighing evidence. The defendant runs the risk of an adverse inference in the absence of evidence to the contrary.

32 The Tribunal did not use the Snell principle as it was used in Snell itself: to determine the causation of the injury. Instead it reasoned that there was sufficient evidence before it so that it was entitled "if need be" to draw the inference that the wall did not conform to the acoustical standard. It was submitted that this was unreasonable because the homeowner had not established his case in full: he lacked definitive evidence that the wall was acoustically defective. The Tribunal, having weighed the evidence, concluded that the homeowner had satisfied the burden of proof to the extent necessary to call for evidence from the builder. This is a question of mixed fact and law on which the Tribunal is entitled to some degree of deference [See Note 7 below].

Note 7: See Canada (Director of Investigation and Research) v. Southam Inc., [1997] 1 S.C.R. 748 paras. 43 to 45.

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33 The Tribunal analogized from Snell that, like the doctor in that case, the builder, and even Tarion, were in a far better position than the homeowner to obtain the facts on which that decision could be made and it ordered Tarion to do so. While the analogy may be flawed, the result is entirely reasonable, at least so far as the builder is concerned. The builder chose not to build the wall in the fashion described in the Code as acoustically sufficient and it is not unfair to require it to prove that the method adopted has in fact accomplished the necessary result.

34 Tarion has taken the side of the builder in opposing the homeowner and has inspection powers if the homeowner consents to entry, factors tending to make it reasonable that it be ordered to perform the testing. On the other hand, it did not build the wall and it is in no better position than the builder or the homeowner to do the testing and provide the facts. The Tribunal erred in placing an evidentiary burden on Tarion to establish the claim against itself. Who should do the testing is really a question of cost, which can be re-distributed after the facts are in. I would vary the order to return the matter to the Tribunal to consider which of the builder or the homeowner ought to have the test performed by an independent tester and the report distributed to the parties. Such an order is appropriate as part of the Tribunal's control of its own process.

35 It was submitted that the Tribunal erred in making any order other than to dismiss the case because the homeowner had failed to prove his case. I do not agree. Even if a court hearing a breach of warranty case might have dismissed the action for failure of proof, the Tribunal is not such a court and it is not bound by the Court's practices. It is an administrative tribunal administering a consumer protection Act and its decision to have the wall tested is entirely in line with that responsibility.

36 For these reasons, I would vary the order appealed from as noted above, but dismiss the appeal of Tarion on this issue in all other respects.

The Garage

37 The owner, Mr. Cecilio, cross-appeals against that part of the Tribunal's order that denied his claim that the garage wall had not been built in accordance with the Code. He submits that the Code requires that untreated lumber not be used in below grade construction. Such lumber (2' x 4' studs) was used below grade in the garage wall. Mr. Hellyer testified that the appropriate section of the Code was section 9.3.2.9.2 requiring pressure-treated wood elements where they were in contact with, or less than 150 millimetres clear of the ground. He said that the structure did not comply with that section. In cross-examination, section 9.23.2.3 was put to him, which required damp proofing any wooden members supported by concrete that is in contact with the ground. He testified that, while this structure had the damp-proofing, that did not save it because it had also to comply with the previous section.

38 In its reasons, the Tribunal said at page 8 that the builder's witness, Ms. Skyba, "testified that in her view section 9.3.2.9.2 was not the applicable section of the OBC and that instead section 9.15.4.3 was the appropriate section and that the wall did conform to this section." Unfortunately, the Tribunal was in error as to this evidence. The transcript of her evidence at page 198 reveals that the witness concluded that section 9.15.4.3 did not apply because there was no foundation wall; the garage was built upon a floating monolithic

slab.

39 The Tribunal's error as to this important evidence directly impacted the decision on the garage issue. The Tribunal found at pages 9 and 10, that there was conflicting evidence as to the wall's compliance with the Code and the applicant had failed to meet his burden of proof. There are two aspects of this that are troubling. First, as noted, there was no such conflict in the evidence. Second, the existence of conflicting evidence does not, alone, establish a failure to meet the burden of proof unless the Tribunal makes a finding that it cannot choose one expert's view over the other. The Tribunal should have weighed the evidence to make that determination before concluding that the burden had not been met.

40 This part of the decision must therefore be set aside and remitted to the Tribunal for further consideration in the light of these reasons.

The Kitchen Floor

41 The Tribunal found that the kitchen floor was not in compliance with the Code and ordered that it be repaired so that it complied. Lexington appeals from this order.

42 Mr. Hellyer's report at page 14 states:

> The floor structure under the ceramic tile has not been sufficiently reinforced as required by the OBC 9.3 0.6.1.

43 In his evidence, Mr. Hellyer pointed out that the subfloor acts as a beam but where it is on 16 inch centres it is not stiff enough on its own between the joists to resist the cracking of the tile. Accordingly the Code provides three options to stiffen the floor under ceramic tile. However, as built, this floor did not comply with any of the three options. There had been no measurement of any actual deflection as that can only be done by breaking the tile. It was, he said, "... not a question of whether or not they'll come loose, its just a question of how long it takes them to come loose, the 16-inch centres."

44 The Tribunal found that the floor did not comply with the Code. It observed that there was currently no chipping or cracking of the kitchen floor, but accepted Mr. Hellyer's evidence that the failure to construct the kitchen floor in accordance with the requirements of the Code will result in premature cracking of the tiles and grout. It pointed out that there was no serious challenge to his evidence on the point.

45 Tarion submitted to the Tribunal that the claim must be rejected because the breach of warranty had not manifested itself in any observable physical deterioration within the one year limitation period set out in the Act. Tarion cited two decisions [See Note 8 below] of the Tribunal to the effect that if there have been no damages suffered from the breach there can be no claim against the ONHWP. It argued that there must be a physical manifestation of the sub-standard work within the year.

Note 8: Dan Vera (1998) 17 CRAT 185; John Collins (1993) CRAT 170.

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46 The Tribunal distinguished the two precedents on their facts and on the law. As to the facts, it observed that in neither precedent had there been evidence that the breach would be manifested in premature deterioration, whereas in the present case there was the uncontroverted evidence of Mr. Hellyer to that effect. As to the law, the Tribunal stated at page 15 of its reasons:

> It is one of the oldest legal maxims that one cannot have a wrong without a remedy. Section 13(1)(a)(iii) of the Act warrants that home builders shall "construct in accordance with the Ontario Building Code." Failure to do so is a breach of warranty. From a breach there must be a remedy at law.
>
> It may be that the damages arising from a given breach are so minor (de minimus) as to not justify the granting of an award of substantial damages. However, refusing to grant an award of damages because they are de minimus is very different than stating there are no damages resulting from a given breach of the statutory warranty set out in the Act. While tort law has policy reasons to compensate only physical damage and only allows recovery for pure economic loss in limited cases, there is no basis to import such concepts into a statutory warranty scheme. The Applicant did not get what he bargained for and what the Act warrants, namely a house built in accordance with the Ontario Building Code.

47 The Tribunal also noted that, while some other warranty claims were limited in scope by the regulations, claims under section 13(1)(a)(iii) were not limited in any way.

48 The Tribunal continued its analysis by observing that the Act is "public protection legislation" to be given "such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Act according to its true intent, meaning and spirit." [See Note 9 below] It then concluded that the true intent, meaning and spirit of the Act was to protect members of the public who are new home buyers in Ontario and give them assurance in part that the houses they are buying comply with the OBC. It should not, said the Tribunal, be a defence for a builder that a house not built to Code did not deteriorate in one year. "A house is either built in conformity with the OBC or it is not. If it is not, there is a breach of warranty which entitles the purchaser to a remedy."

Note 9: The Tribunal cited the Interpretation Act, section 10.

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49 Accordingly, the Tribunal ordered that the floor be brought into compliance.

50 The appellant Lexington submits that the Tribunal erred in the order that it made. First, Lexington submitted that there must be more than mere non-compliance with the Code to constitute "damages resulting from the breach of warranty" under section 14(3) of the Act and the homeowner had failed to demonstrate any such damages. Therefore the claim should be dismissed.

51 In my view, the fallacy in Lexington's analysis is that the applicant has demonstrated damages: the likelihood of early failure of the faulty installation. While the amount has not been quantified, the damage to the owner exists now.

52 There is more substance to Lexington's second point: that even if the latent defect constitutes damage within the Act, the remedy is overbroad. The life of the floor should have been estimated and compared to the life expectancy of a properly built floor and the difference quantified in monetary terms and given as monetary damages.

53 The remedy awarded by the Tribunal amounts to ordering specific performance by the builder. If that order stands, the floor must be replaced now, when it has much useful life ahead, because it is likely to fail earlier than it should. This remedy entirely discounts that useful life, a result unfair to the builder and unduly beneficial to the owner. As well, consideration ought to be given to methods short of rebuilding that may be available to stiffen the floor and increase its useful life, thus mitigating the loss to the owner.

54 In Anglo-Canadian contract law, the primary remedy for breach of contract is the award of monetary compensation, specific performance being available only when monetary compensation is inadequate [See Note 10 below]. Such compensation may be called for here, but we are without the record necessary to calculate it.

Note 10: Waddams: The Law of Contracts 4th ed., 1999; Canada Law Book, paragraphs 667 ff.

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55 For these reasons, I am of the opinion that the award as to the kitchen floor must be set aside and the matter returned to the Tribunal to rehear that matter in the light of the law as I have set it out and such additional evidence as may be brought by the parties.

Disposition

56 Order to go accordingly. Costs, if sought, to be addressed in written submissions to be sent to the Registrar within thirty days.

G.D. LANE J.
K.E. SWINTON J.

M.G.J. QUIGLEY J.