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Freedom of Contract Prevails: Ontario Court of Appeal Confirms Developers Can Limit Liability in Pre-Construction Sales

On March 6, 2026, the Court of Appeal for Ontario released its decision in *Shiralian v Wyldewood Creek Inc*, dismissing the appellants' appeal and upholding the enforceability of a limitation of liability provision (also known as an exculpatory clause) contained in a pre-construction condominium purchase agreement. The decision is a welcome affirmation of the principles of freedom of contract and the enforceability of exculpatory clauses in the context of residential real estate development.

Background and Key Facts

The appellants were partners in a real estate investment business who purchased a pre-construction condominium unit in Collingwood from the respondent developer. Their agreement of purchase and sale included the mandatory Tarion Addendum, which contained an Early Termination Condition clause permitting the developer to cancel the project by a mutually agreed deadline if they were unable to obtain financing. The purchasers had the agreement reviewed by a lawyer and negotiated amendments to its terms, including a cap on the purchasers' liability for municipal development charges. Following unexpected issues with municipal approvals, the respondent developer terminated the project. However, they only did so after the Early Termination Condition deadline under the Tarion Addendum had already expired.

The Issue

The central issue on appeal was the enforceability of an exculpatory clause in the agreement of purchase and sale, which restricted the purchasers' remedies for the vendor's breach to the return of their deposits with interest, even though the Early Termination Condition deadline had already passed.

The Exculpatory Clause

The exculpatory provision in disputed provided as follows:

> Notwithstanding anything contained to the contrary in this Agreement, but subject always to the Tarion Addendum,

> all rights, remedies and recourses of the Purchaser in connection with this Agreement and the transaction resulting therefrom (and whether arising, based or founded in contract, tort, equity or otherwise) for any default of the Vendor hereunder are limited solely to the return of the deposits paid by the Purchaser pursuant to this Agreement and the Purchaser shall have no remedy or claim whatsoever against the Vendor or its agents, nominees, trustees, directors, officers, shareholders or any other person, firm, corporation, partnership, limited partnership or other entity related to or associated with the Vendor for economic loss, expectation damages or any other damages whatsoever whether arising, based or founded in contract, tort, equity or otherwise. This provision may be pleaded by the Vendor and by its agents, nominees, trustees, directors, officers, shareholders or any other person, firm, corporation, partnership, limited partnership or other entity related to or associated with the Vendor as a complete defence to any such claim.

The Application Judge's Decision: 2025 ONSC 2666

The application judge found that the developer had breached the APS by terminating the project after the expiry of the Early Termination Condition deadlines under the Tarion Addendum but enforced the exculpatory clause to limit the purchasers' damages to the return of their deposits plus interest under the *Condominium Act*.

The application judge applied the three-step framework established by the Supreme Court of Canada in *Tercon Contractors Ltd v British Columbia (Transportation and Highways)*, and followed the reasoning endorsed by the Court of Appeal in *Ritchie v Castlepoint Greybrook Sterling Inc*, and concluded that the exculpatory clause was applicable and not unconscionable, and that there was no public policy reason not to enforce the clause.

Accordingly, the purchasers were entitled to a return of their deposits with interest, but not to the expectation damages that they had claimed based on the alleged $280,000 increase in the value of the property after termination.

The Court of Appeal's Decision

On appeal, the purchasers focused on the broad policy argument that the effect of the enforcement of the exculpatory clause – by removing the difference between the remedy obtained by the purchasers for termination pursuant to or in breach of the contract – was to "destroy" the consumer

protections afforded by the Tarion Addendum and deprive the Early Termination Conditions of any meaning.

The Court of Appeal unanimously disagreed. It held that the motion judge's interpretation of the APS was entitled to deference under the standard of review established in *Sattva Capital Corp v Creston Moly Corp*, noting in particular that this was not a standard form contract in light of the amendments negotiated by the purchasers and their lawyer. Consequently, the court found that the purchasers should have been well aware of the limitation of liability clause, and the developer had no obligation to expressly bring it to their attention.

On the purchasers' core argument — that the exculpatory clause undermined the consumer protections of the Tarion Addendum by rendering the ETC deadlines meaningless — the Court emphasized that 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, and nor does it preclude the parties from agreeing on the consequences of default.

Importantly, the Court of Appeal endorsed the motion judge's reliance on *Ritchie v Castlepoint Greybrook Sterling Inc* where Justice Perell (in a decision upheld by the Court of Appeal) concluded that an exculpatory clause in a new home purchase agreement was enforceable under the *Tercon* framework and consistent with the policy underlying the Tarion Addendum and the freedom of parties to contracts to agree to the allocation of risk..

Consistent with the precedent in *Ritchie,* the Court in *Shiralian* concluded its decision with the following key passage:

> 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.

On the question of interest, the court agreed with the motion judge that a proper reading of the exculpatory clause — which was expressly made "subject always to the Tarion Addendum" — included the deposit interest provisions contained in section 1.03 of the APS and section 11 of the Tarion Addendum. The clause, the court held, took away none of the protections under the Tarion Addendum but merely fixed, by agreement, the consequences of any default by the respondent in accordance with the parties' freedom of contract.

Implications for Real Estate Developers and Purchasers

This decision sets a clear and significant precedent for real estate developers and purchasers in the Province of Ontario. It confirms that properly drafted exculpatory clauses in pre-construction agreements will be upheld, even where the developer has terminated the project in breach of the agreement, outside the timelines provided for by the Early Termination Conditions. This provides developers with a reliable contractual mechanism for managing their exposure to expectation damages in the often-volatile condominium market.

The decision further reinforces the fundamental principle that parties to a commercial transaction are free to allocate risk as they see fit, and that the courts will respect those bargains. For developers operating in a rising market, where the risk of purchasers seeking significant expectation damages following project cancellation is real, a well-drafted exculpatory clause therefore remains an essential tool in managing their risk exposure.

However, the court's observations regarding the relevance of the sophistication of the purchasers and the involvement of counsel should be considered carefully. Where purchasers are experienced investors who have had the benefit of legal advice and have negotiated amendments to the agreement, the courts will be reluctant to find that exculpatory clauses are unenforceable under the *Tercon* scheme or otherwise unconscionable or "surprisingly onerous." Conversely, in cases involving unsophisticated purchasers or where the clause is truly buried in a contract of adhesion, the same analysis may yield a different result.

Conclusion

This decision is a clear and welcome endorsement of contractual certainty in the pre-construction real estate market. Developers who include carefully drafted limitation of liability clauses — referencing the Tarion Addendum and consistent with statutory deposit and interest obligations — can take

comfort that the courts will uphold those provisions at least in circumstances with sophisticated investors. Purchasers and their advisers, for their part, should ensure that they carefully review and understand the effect of such clauses before signing, particularly given the court's emphasis on the role of legal counsel in the contracting process.

Lenczner Slaght’s Monique Jilesen, Andrew Parley, and Zachary Rosen represented the respondent, Wyldewood Creek Inc., in this matter.