

# COURT OF APPEAL FOR ONTARIO

CITATION: Wu v. Suevilia Development Corporation, 2024 ONCA 124

DATE: 20240221

DOCKET: COA-23-CV-0309

Simmons, Paciocco and Thorburn JJ.A.

BETWEEN

Zhenhong Wu

Defendant/Plaintiff in Counterclaim/Moving  
Party/Responding Party in Cross- Motion (Appellant)

and

Victor Xie, Suevilia Development Corporation\* and  
Re/max Imperial Realty Inc.

Plaintiff/Defendant in Counterclaim/Responding  
Party/Moving Party in Cross- Motion\* (Respondent\*)

Paul H. Starkman, for the appellant

Patrick K. Martin, for the respondent

Heard: November 24, 2023

On appeal from the order of Justice Vanessa V. Christie of the Superior Court of Justice, dated February 13, 2023, with reasons reported at 2023 ONSC 1056.

**Simmons J.A.:**

## **Introduction**

[1] The issues on this appeal concern whether a vendor of a pre-construction home fulfilled its obligations concerning setting closing dates and obtaining an occupancy permit for the home.

[2] The appellant, Zhenhong Wu, agreed to purchase a pre-construction home from Suevilia Development Corporation under an agreement of purchase and sale dated March 28, 2017 (the “APS”). The purchase price for the home was \$3,380,000. Between March 28, 2017, and September 24, 2017, Mr. Wu made six payments of \$50,000 each on account of the \$300,000 deposit.

[3] Because the APS related to the sale of a pre-construction home, Suevilia was required, by O. Reg. 165/08, to attach the Tarion Addendum<sup>1</sup> to the APS. The Tarion Addendum includes provisions that are part of the Vendor’s delayed closing warranty under the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31. Among other things, the Tarion Addendum establishes procedures for setting and changing closing dates under the APS and, subject to certain conditions, a requirement for delayed closing compensation.

[4] Under the terms of the Tarion Addendum, at the time APS is signed, the Vendor must specify a First Tentative Closing Date in a Statement of Critical Dates attached to the Tarion Addendum. Thereafter, the Vendor has the option of unilaterally delaying Closing on up to two occasions for periods of up to 120 days each by setting a Second Tentative Closing Date and/or a Firm Closing Date. To do so, the Vendor must give written notice to the Purchaser at least 90 days prior

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<sup>1</sup> Under O. Reg. 273/04, Tarion Warranty Corporation is designated as the Corporation for the purposes of the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31. In this case, the Tarion Addendum is The Freehold Home Addendum (Tentative Closing Date) as prescribed under s. 7 of O. Reg. 165/08.

to the immediately preceding properly set closing date, *i.e.*, prior to the First Tentative Closing Date and/or the Second Tentative Closing Date.

[5] The Vendor is also entitled to set a Delayed Closing Date(s) that is no later than 365 days after the earlier of the Second Tentative Closing Date or the Firm Closing Date (the “Outside Closing Date”) on proper written notice to the Purchaser. However, subject to certain conditions, delayed closing compensation becomes payable where a Delayed Closing Date is set.

[6] The First Tentative Closing Date, Second Tentative Closing Date, Delayed Closing Date and Outside Closing Date are all defined terms under s. 12 of the Tarion Addendum and, together with the “Purchaser’s Termination Period”, are collectively defined in s. 12 as “Critical Dates”.

[7] As required under s. 1(b) of the Tarion Addendum, Suevilia identified July 31, 2018, as the First Tentative Closing Date in the Statement of Critical Dates attached to the Tarion Addendum forming part of the APS. As also required, it identified the outer limits for the Second Tentative Closing Date, the Firm Closing Date and the Outside Closing Date based on the timing for each such Critical Dates in relation to the other Critical Dates.

[8] About two months after the APS was signed, on May 30, 2017, Mr. Wu asked that the “Closing Date” be amended to May 31, 2018. Suevilia agreed. In accordance with s. 4 of the Tarion Addendum, which addresses “Changing Critical

Dates – By Mutual Agreement”, the parties signed a new Statement of Critical Dates advancing the First Tentative Closing Date from July 31, 2018, to May 31, 2018, and also advancing the outer limits for the Second Tentative Closing Date, Firm Closing Date and Outside Closing Date established in the original Statement of Critical Dates.

[9] Suevilia takes the position that it subsequently sent notices to Mr. Wu setting a Second Tentative Closing Date, a Firm Closing Date, and two Delayed Closing Dates, in accordance with the processes established in the Tarion Addendum. Suevilia further asserts that Mr. Wu failed to close the transaction on December 18, 2018, the second Delayed Closing Date it had set. Suevilia therefore issued a Certificate of Default on January 7, 2019, and later resold the home in April 2019.

[10] Mr. Wu, who does not speak, read, or write English, takes the position that the notices sent by Suevilia were defective, either because they did not specify which Critical Date they were setting, did not provide proper notice, did not include a revised Statement of Critical Dates and/or because they did not refer to entitlement to delayed closing compensation.

[11] In the result, Mr. Wu maintains that because of the deficiencies in the notices, in accordance with the terms of the Tarion Addendum, the First Tentative Closing Date was deemed to be the Firm Closing Date, and that the other closing dates Suevilia purported to set, including the December 18, 2018 closing date,

were not properly set. He submits that Suevilia therefore repudiated the APS by serving its notice of default, and that Suevilia also breached the terms of the APS by failing to pay delayed closing compensation. In the alternative, if the December 18, 2018 Delayed Closing Date was properly set, Mr. Wu asserts that Suevilia was not ready, willing, and able to close on that date because the occupancy permit for the home was not issued until December 19, 2018.

[12] In January 2019, Suevilia commenced an action against Mr. Wu claiming forfeiture of the deposit and damages for its losses in reselling the property. In April 2019, Mr. Wu sued Suevilia for, among other things, return of his \$300,000 deposit.

[13] Mr. Wu moved for summary judgment in both actions, seeking dismissal of Suevilia's action and the return of his deposit.

[14] Mr. Wu acknowledged on his cross-examination on his affidavit that he was not in funds to close the transaction on December 18, 2018.

[15] The motion judge dismissed both of Mr. Wu's motions and ordered that the deposit be forfeited to Suevilia. She found that although Suevilia did not always use the precise nomenclature for Critical Dates set out in the Tarion Addendum when it sent notices to Mr. Wu, Suevilia complied with the necessary timelines for giving notice and it was obvious in each instance which Critical Date was being set. Further, she concluded that it was unnecessary under the Tarion Addendum

that Suevilia provide a new Statement of Critical Dates when it sent its notices to Mr. Wu. Finally, she found that Suevilia was ready, willing and able to close the transaction on December 18, 2018, because it was Mr. Wu's obligation under the Tarion Addendum and the APS to obtain the occupancy permit. Accordingly, the fact that Suevilia obtained the occupancy permit on December 19, 2018, did not mean Suevilia was not ready, willing and able to close the transaction on December 18, 2018.

[16] Further, it was apparent from the record that Mr. Wu had not taken any steps toward closing the transaction. He had not responded to any of Suevilia's notices, and he did not have a solicitor acting for him between December 5, 2018, and December 31, 2018. In addition, he did not respond to requests from Suevilia that he participate in a completion inspection for the property ("PDI Inspection").

[17] Mr. Wu's arguments can be consolidated into the following four grounds of appeal:

- 1) The motion judge erred in concluding that Suevilia's notices to set Critical Dates complied with the Tarion Addendum;
- 2) The motion judge erred in finding that Suevilia was ready, willing and able to close the transaction on December 18, 2018;
- 3) The motion judge erred in finding that Delayed Closing Compensation is not payable to Mr. Wu;

- 4) The motion judge erred in finding that Mr. Wu forfeited his deposit.

## Discussion

### A. DID THE MOTION JUDGE ERR IN CONCLUDING THAT SUEVILIA'S NOTICES TO SET CRITICAL DATES COMPLIED WITH THE TARIION ADDENDUM?

#### (1) Background

##### (a) Key provisions of the Tarion Addendum

[18] As indicated above, s. 1(b) of the Tarion Addendum requires that the Vendor identify the First Tentative Closing Date in a Statement of Critical Dates attached to the Tarion Addendum. Sections 1(c), (d) and (e) of the Tarion Addendum specify the requirements the Vendor must meet to unilaterally set a Second Tentative Closing Date and the Firm Closing Date:

#### **1. Setting Tentative Closing Dates and the Firm Closing Date**

...

(b) First Tentative Closing Date: The Vendor shall identify the First Tentative Closing Date in the Statement of Critical Dates attached to the Addendum at the time the Purchase Agreement is signed.

(c) Second Tentative Closing Date: The Vendor may choose to set a Second Tentative Closing Date that is no later than 120 days after the First Tentative Closing Date. The Vendor shall give written notice of the Second Tentative Closing Date to the Purchaser at least 90 days

before the First Tentative Closing Date, or else the First Tentative Closing Date shall for all purposes be the Firm Closing Date.

(d) Firm Closing Date: The Vendor shall set a Firm Closing Date, which can be no later than 120 days after the Second Tentative Closing Date ... If the Vendor elects to set a Second Tentative Closing Date, the Vendor shall give written notice of the Firm Closing Date to the Purchaser at least 90 days before the Second Tentative Closing Date, or else the Second Tentative Closing Date shall for all purposes be the Firm Closing Date.

(e) Notice: Any notice given by the Vendor under paragraphs (c) and (d) above, must set out the stipulated Critical Date, as applicable.

[19] Section 2(a) of the Tarion Addendum sets out three ways the Firm Closing Date can be changed, one of which permits the Vendor to unilaterally change the Firm Closing Date by setting a Delayed Closing Date in accordance with s. 3:

## 2. Changing the Firm Closing Date-Three Ways

(a) The Firm Closing date, once set or deemed to be set in accordance with section 1, can be changed only:

i) by the Vendor setting a Delayed Closing Date in accordance with section 3.

[20] If the Vendor cannot close on the Firm Closing Date, s. 3 permits the Vendor to set a Delayed Closing Date(s) by giving the Purchaser written notice of the Delayed Closing Date in accordance with s. 3 and provides that delayed closing compensation will be payable. Sections 3 (c) and (d) specify the requirements the Vendor must meet to set a Delayed Closing Date(s):



## 2.Changing the Firm Closing Date - By Setting a Delayed Closing Date

...

(c) The Vendor shall give written notice to the Purchaser of the Delayed Closing Date as soon as the Vendor knows that it will be unable to Close on the Firm Closing Date, and in any event at least 10 days before the Firm Closing Date ... If notice of a new Delayed Closing Date is not given by the Vendor before the Firm Closing Date, then the new Delayed Closing Date shall be deemed to be the date which is 90 days after the Firm Closing Date.

(d) After the Delayed Closing Date is set, if the Vendor cannot Close on the Delayed Closing Date, the Vendor shall select and give written notice to the Purchaser of a new Delayed Closing Date.

[21] Section 4 permits changes to Critical Dates by mutual agreement in writing. Among other things, s. 4 specifies that the written amending agreement must include a revised Statement of Critical Dates.

[22] Section 7 of the Tarion Addendum is entitled Delayed Closing Compensation. Among other things it sets requirements for when delayed closing compensation will be payable including that: Closing occurs or that the transaction is terminated for certain reasons other than breach of contract by the Purchaser.

[23] Section 12 of the Tarion Addendum is a definition section, which includes definitions of the following terms:

"Critical Dates" means the First Tentative Closing Date, the Second Tentative Closing Date, the Firm Closing Date, the Delayed Closing Date, the Outside Closing

Date and the last day of the Purchasers Termination Period.

"Delayed Closing Date" means the date, set in accordance with section 3, on which the Vendor agrees to Close, in the event the Vendor cannot Close on the Firm Closing Date.

"Firm Closing Date" means the firm date on which the Vendor agrees to Close as set in accordance with this Addendum.

"First Tentative Closing Date" means the date on which the Vendor, at the time of signing the Purchase Agreement, anticipates that it will be able to close, as set out in the Statement of Critical Dates.

"Second Tentative Closing Date" has the meaning given to it in paragraph 1(c).

**(b) Relevant provisions of the APS**

[24] Sections 9(a) and (b) of the APS address requirements for completion, and a completion inspection, of the home to be constructed on the property. They provide in relevant part as follows:

9. (a) COMPLETION

For the purposes of Closing, the Dwelling shall be deemed to be completed when all interior work has been substantially completed so that the Dwelling may be occupied, notwithstanding that there remains interior or exterior work to be completed. ... If required, the Purchaser shall be responsible to obtain confirmation of allowable occupancy and a copy of any occupancy certificate from the Municipality, and, unless otherwise required by the Municipality, the Vendor need not provide same to the Purchaser.

(b) COMPLETION INSPECTION (PDI)

The Vendor agrees to make available and the Purchaser agrees to meet a representative of the Vendor prior to Closing ... to inspect the Dwelling and verify that the Dwelling has been completed in accordance with the provisions of this Agreement. ... If there is any deficient or uncompleted work remaining at the time of inspection, such items shall be listed on the Certificate of Completion and Possession (PDI) required to be completed pursuant to the provisions of the Ontario New Home Warranty Program (TARION). ... This Certificate ... together with the warranty itself under the Ontario New Home Warranty Program (TARION), shall constitute the Vendor's only undertaking to remedy or complete the Dwelling and the Vendors only warranty with respect to the Real Property.

...

**(c) Mr. Wu's request to amend the "Closing Date to May 31, 2018" and the Revised Statement of Critical Dates**

[25] On May 30, 2017, Mr. Wu sent a letter to Suevilia requesting Suevilia "to amend the Closing Date to May 31, 2018". Suevilia agreed and in accordance with s. 4 of the Tarion Addendum (Changing Critical Dates by Mutual Agreement), the parties executed an undated revised Statement of Critical Dates, which, among other things, advanced the First Tentative Closing Date to May 31, 2018, and reduced the outer limits for the other Critical Dates. As did the original Statement of Critical Dates, the revised Statement of Critical Dates included a Note concerning changes to Critical Dates:

**3. Critical Dates**

The **First Tentative Closing Date**, which is the date that the Vendor anticipates the home will be completed and ready to move in, is the 31st day of May 2018.

A **Second Tentative Closing Date** can subsequently be set by the Vendor by giving proper written notice at least 90 days before the First Tentative Closing Date. The Second Tentative Closing Date can be up to 120 days after the First Tentative Closing date, and so could be as late as: the 28th of September 2018.

The Vendor must set a **Firm Closing Date** by giving proper written notice at least 90 days before the Second Tentative Closing Date. The Firm Closing Date can be up to 120 days after the Second Tentative Closing date, and so could be as late as: the 28th of January 2019.

*If the Vendor cannot close by the Firm Closing Date, then the Purchaser is entitled to delayed closing compensation (see section 7 of the Addendum) and the Vendor must set a Delayed Closing Date.*

The Vendor can set a Delayed Closing Date that is up to 365 days after the earlier of the Second Tentative Closing Date and the Firm Closing Date: This Outside Closing Date could be as late as: the 30th of September, 2019.

...

**Note:** Any time a Critical Date is set or changed as permitted in the Addendum, other Critical Dates may change as well. At any given time the parties must refer to: the most recent revised Statement of Critical Dates; or agreement or written notice that sets a Critical Date, and calculate revised Critical Dates using the formula contained in the Addendum. Critical Dates can also change if there are unavoidable delays (see section 5 of the Addendum).

**(d) Notices sent by Suevilia to Mr. Wu**

[26] The respondent subsequently sent written notices to Mr. Wu delaying various closing dates and, ultimately, setting the December 18, 2018 closing date.

Those notices read in part, as follows:

- February 26, 2018 - “It was pleasure meeting you on December 12, 2017 to complete your Colour Selections. ... We are anticipating harsh winter conditions this year and have decided to postpone the closing date for your home ... As such, the Vendor hereby sets August 30, 2018, as the new Tentative Closing Date ... The setting of this new Tentative Closing Date may change other future Critical Dates as set out in the Statement of Critical Dates (Page 1 of the Addendum) provided by the Vendor at the time of the Purchase Agreement for the home was signed ... Our Décor Representatives will be contacting you in the New Year to schedule your PDI Inspection. If you have not already done so, we ask that you please forward your solicitor’s information to our solicitor at the address below...”;
- May 31, 2018 - “Further to our letter dated February 26, 2018, we would like to advise that the closing date has been postponed due to the unpredictable weather conditions. As such, the Vendor hereby sets October 31, 2018 as the Firm Closing Date. ... Our Décor Representatives will be contacting you in the upcoming months to schedule your PDI Inspection. If you have not already done so, we ask that you please forward your solicitor’s information to our solicitor at the address below...”;
- September 5, 2018 – “Further to our letter dated May 31, 2018, we would like to advise that the closing date has been postponed. As such, the Vendor hereby sets November 30, 2018 as the Closing Date. ... Our Décor

Representatives will be contacting you in the upcoming months to schedule your PDI Inspection. If you have not already done so, we ask that you please forward your solicitor's information to our solicitor at the address below...";

- November 6, 2018 - "Further to our letter dated September 5, 2018, we would like to advise that the closing date has been postponed. As such, the Vendor hereby sets December 18, 2018 as the Closing Date. ... Our Décor Representatives will be contacting you in the upcoming months to schedule your PDI Inspection. If you have not already done so, we ask that you please forward your solicitor's information to our solicitor at the address below...".

[27] Suevilia received no response to any of the foregoing notices it sent to Mr. Wu.

**(e) Discovery that Mr. Wu no longer has a solicitor**

[28] On December 5, 2018, counsel for Suevilia sent a letter to a law firm believed to be acting for Mr. Wu, Dai Law Professional Corporation, with a link to the closing documents for the completion of the transaction. Later the same day, a representative of that law firm faxed a document to counsel for Suevilia advising "we are no longer acting for the purchaser for this property".

**(f) December 17, 2018 Reminder of the Closing Date**

[29] On December 17, 2018, Suevilia sent an email reminder to Mr. Wu of the impending December 18, 2018 closing date, requesting contact information for his

lawyer and warning of the consequences of failing to close the transaction. Suevilia also confirmed that it had completed the PDI inspection required to be completed prior to closing as he had not responded to its requests to do so. The email stated, in part, as follows:

Further to our letter dated November 6th, 2018, we have advised your agent to remind you of your Closing Date. This letter shall be an additional reminder to you that your Closing date is set at December 18th, 2018.

As of the date of this letter, our Décor Representatives has tried contacting you on multiple occasions to schedule your PDI Inspection, but have not received your response. As such, we have completed the PDI Inspection and made a relevant record.

...

... [W]e request that you provide your solicitor's information no later than 4:30 PM on Thursday, December 20th, 2018. Failing receiving your solicitor's information to complete the transaction, we will notify our solicitor to proceed according to the terms of the Agreement of Purchase and Sale.

Your failure to close the transaction as scheduled constitutes a default under the Agreement of Purchase and Sale. We will avail ourselves of all remedies ... including, but not limited to, termination of the Agreement of Purchase and Sale, forfeiture of your deposits due to your failure to comply, and an action for damages against you.

[30] Suevilia did not receive a response to its December 17, 2018 email within the specified timeframe. There is no dispute that Mr. Wu did not have a lawyer acting for him between December 5, 2018 and December 31, 2018.

**(g) Events after December 18, 2018**

[31] On December 31, 2018 the law firm of Henry K. Hui & Associates faxed a letter to counsel for Suevilia advising that a member of that firm acted for Mr. Wu on the purchase but was currently on vacation until January 3, 2019.

[32] As noted above, Suevilia served a Certificate of Default on Mr. Wu on January 7, 2019 and subsequently resold the home in April 2019.

[33] On January 11, 2019, Mr. Hui wrote to counsel for Suevilia requesting confirmation of the closing date for the transaction.

**(2) Mr. Wu's Position**

[34] As noted above, Mr. Wu takes the position that the notices sent by Suevilia were defective either because they did not specify the Critical Date being changed, did not provide sufficient notice, did not include a revised Statement of Critical Dates, and/or because they did not refer to entitlement to delayed closing compensation.

[35] In particular, Mr. Wu points out that Suevilia's February 26, 2018 notice referred to setting a "new Tentative Closing Date", a term not referred to or defined in the Tarion Addendum or Statement of Critical Dates. As the February 26, 2018 notice does not refer to setting a Second Tentative Closing Date, he maintains that under s. 1(c) of the Tarion Addendum, the First Tentative Closing Date of May 31,



2018 is deemed to be the Firm Closing Date. In any event, he notes that the February 26, 2018 notice did not include a revised Statement of Critical Dates.

[36] Although Suevilia's May 31, 2018 notice purported to set a "Firm Closing Date" of October 31, 2018, Mr. Wu maintains it was not compliant with the Tarion Addendum. Because of the deficiencies in the February 26 notice, pursuant to s. 1(c) of the Tarion Addendum, May 31, 2018 was deemed to be the Firm Closing Date. If Suevilia wished to extend that closing date, it was required to set a Delayed Closing Date by sending a notice 10 days in advance of May 31, 2018. Given that Suevilia failed to do so, under s. 3(c) of the Tarion Addendum, the Delayed Closing Date was deemed to be 90 days from May 31, 2018 *i.e.*, August 29, 2018, and delayed closing compensation became payable. In any event, the May 31, 2018 notice did not include a revised Statement of Critical Dates or refer to delayed closing compensation.

[37] Finally, Suevilia's September 5, 2018 and November 6, 2018 notices both purported to set a "Closing Date", a term not referred to or defined in the Tarion Addendum or Statement of Critical Dates. Like the May 31, 2018 notice, Suevilia had failed to serve these notices 10 days prior to the deemed Firm Closing Date of May 31, 2018. They were also deficient because they did not include a revised Statement of Critical Dates and did not refer to delayed closing compensation.

[38] Mr. Wu relies on the fact that paragraph 1(e) of the Tarion Addendum specifically requires that notices given under paragraphs 1(c) and (d) to set the Second Tentative Closing Date and the Firm Closing Date “must set out the stipulated Critical Date, as applicable.” Further, he says that s. 12 requires a vendor to properly refer to defined Critical Dates in a notice and that because the terms “new Tentative Closing Date” and “Closing Date” are not defined in s. 12, the notices are defective. Since the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31 and its regulations, are consumer protection and remedial legislation, the motion judge erred in failing to interpret the Tarion Addendum in a manner that would protect the consumer/purchaser: *Reddy v. 1945086 Ontario Inc.*, 2019 ONSC 2554, 6 R.P.R. (6th) 326, at paras. 20-21.

### **Discussion**

[39] In *Canadian Imperial Bank of Commerce v. Urbancorp (Leslieville) Developments Inc.*, 2020 ONCA 449, 18 R.P.R. (6th) 194, at para. 27, this court identified the standard of review for interpretation of the Tarion Addendum as correctness.

[40] Questions of fact and questions of mixed fact and law are reviewable on a standard of palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 10, 26-28; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 50, 52.

[41] In my view, the motion judge made no error in holding that Suevilia's February 26, 2018 notice, setting a "new Tentative Closing Date", operated to set August 30, 2018 as the "Second Tentative Closing Date". Section 1 therefore did not operate to deem May 31, 2018 as the Firm Closing Date. Consequently, I would reject the argument that the notice periods for Suevilia's subsequent notices should have been calculated with reference to May 31, 2018, a point I discuss in greater detail below.

[42] Under both paragraph 1 of the Tarion Addendum and the terms of the revised Statement of Critical Dates signed by the parties after Mr. Wu's May 30, 2017 request to change the "Closing Date" to May 31, 2018, the only Tentative Closing Date the Vendor is entitled to set unilaterally by written notice following execution of the APS, is the Second Tentative Closing Date. As the motion judge held, it would have been patently obvious that, in stating it was setting a "new Tentative Closing Date", Suevilia could only have been referring to setting the "Second Tentative Closing Date" as permitted under the Tarion Addendum.

[43] In that regard, I also agree with the motion judge that Suevilia was not required to send a revised Statement of Critical Dates to Mr. Wu when sending its notices postponing Critical Dates. The Tarion Addendum explicitly requires that a revised Statement of Critical Dates be prepared where the parties make changes to Critical Dates by mutual agreement under s. 4. There is no similar requirement in ss. 1 or 3, which address setting Tentative Closing Dates and the Firm Closing

Date (s. 1) and changing the Firm Closing Date by setting a Delayed Closing Date (s. 3).

[44] Further, in my view, the “Note” set out at the bottom of the Statement of Critical Dates, and, in this case, at the bottom of the revised Statement of Critical Dates signed by the parties following Mr. Wu’s request to change the “Closing Date”, makes it clear that, when a Critical Date is set or changed as permitted in the Addendum, it is the responsibility of both the Vendor and the Purchaser to calculate resulting changes in other Critical Dates. I reproduce the Note here for ease of reference:

**Note:** Any time a Critical Date is set or changed as permitted in the Addendum, other Critical Dates may change as well. At any given time the parties must refer to: the most recent revised Statement of Critical Dates; or agreement or written notice that sets a Critical Date, and calculate revised Critical Dates using the formula contained in the Addendum. Critical Dates can also change if there are unavoidable delays (see section 5 of the Addendum).

[45] Thus, I would reject Mr. Wu’s argument that all of Suevilia’s notices were invalid because they did not include a revised Statement of Critical Dates.

[46] I agree with Mr. Wu that the *Ontario New Home Warranties Plan Act* and its regulations are remedial, consumer protection legislation requiring a broad and liberal interpretation in light of their object and purpose: *Ontario New Home Warranty Program v. Lukenda* (1991), 2 O.R. (3d) 675 (C.A.), at para. 7. Such objects and purposes have been recognized to include protecting purchasers from

vendors who do not proceed expeditiously with completion of a house, or who seek to use the fact of noncompletion to extricate themselves from an agreement in a rising market; and also, to better clarify and prescribe the conditions under which agreements of purchase and sale can be terminated: *Wong v. Greyrock (Saddlebrook) Building Corp.* (1993), 34 R.P.R. (2d) 215 (Ont. Gen. Div.), at para. 18; *Reddy*, at para. 23.

[47] Nonetheless, as noted in *Reddy*, the Special Committee that conducted the review that led to the reforms that brought about O. Reg. 165/08 acknowledged that the imposition of regulatory warranties should not unduly favour purchasers in a manner that is onerous for builders or that fails to recognize the inevitability of certain delays in new home construction: *Final Report of the Special Committee on Delayed Closing*, released February 2007, at p. 19.

[48] In my view, where a Vendor gives written notice of setting or changing a Critical Date, as it is entitled to under s. 1, 2 or 3 of the Tarion Addendum, it is not in the interests of either the Purchaser or the Vendor that such notice be invalidated merely because the Vendor fails to use the precise nomenclature used in the Tarion Addendum to identify the particular Critical Date. So long as the written notice complies with the deadlines for giving written notice specified in the Tarion Addendum and the circumstances make it obvious which Critical Date is being set or changed by a notice, a failure to use the precise nomenclature identified in the Tarion Addendum should not in itself invalidate the notice.

[49] The deadlines for giving notice to change a Critical Date are key to protecting Purchasers' interests because they ensure that Purchasers have adequate time to ready themselves for closing. On the other hand, where timely notice is provided and it is obvious from the circumstances which Critical Date a Vendor is purporting to set, invalidating a notice because of an obvious nomenclature flaw undermines the goals of providing fairness to both builders and purchasers and of recognizing the inevitability of certain delays in new home construction.

[50] The fact that Vendors are not required to include a revised Statement of Critical Dates when giving notice of a change in a Critical Date reinforces this conclusion. Purchasers have an obligation to acquaint themselves with the scheme of, and formula for, setting Critical Dates.

[51] While Vendors have an obligation under para. 1(e) of the Tarion Addendum, to "set out the stipulated Critical Date, as applicable", when giving a notice setting a Second Tentative Closing Date or Firm Closing Date, under para. 1(c) or (d), minor failures in nomenclature that do not create uncertainty about the Critical Date being set should not invalidate a timely notice. That said, builders would be wise to follow the Tarion Addendum nomenclature to the letter to avoid disputes over whether a flawed notice leaves room for any uncertainty about the Critical Date being set.

[52] Here, Suevilia's February 26, 2018 notice set August 30, 2018 "as the new Tentative Closing Date". Under the scheme of closing dates established by both the Tarion Addendum and the revised Statement of Critical Dates, the only Tentative Closing Date Suevilia was entitled to set without the purchaser's consent was the Second Tentative Closing Date.

[53] Mr. Wu's submissions concerning Suevilia's May 31, 2018 notice setting October 31, 2018 as the Firm Closing Date, and Suevilia's September 5 and November 6, 2018 notices setting November 30 and December 18, 2018 as Closing Dates turn on his submissions concerning the alleged deficiencies in Suevilia's February 26, 2018 notice. As I have rejected those submissions, I conclude that none of the subsequent notices should have been calculated with reference to a deemed Firm Closing Date of May 31, 2018.

[54] Mr. Wu also relies on the fact that Suevilia's September 5 and November 6, 2018 notices both referred to setting a Closing Date, as opposed to a Delayed Closing Date.

[55] I observe however that unless Suevilia was relying on Unavoidable Delay to postpone the Closing Date, which it would have to specifically quantify in its notice, the only closing date Suevilia was entitled to set unilaterally after setting a Firm Closing Date was a Delayed Closing Date. This would have been obvious to any Purchaser who familiarized themselves with the Statement of Critical Dates as they

were obligated to do. As I stated above, minor failures in nomenclature that do not create uncertainty about the Critical Date being set should not invalidate a timely notice. Contrary to Mr. Wu's submissions, there is no requirement in the Tarion Addendum or Statement of Critical Dates that a Vendor refer to delayed closing compensation when setting a Delayed Closing Date.

[56] In the result, I would reject Mr. Wu's arguments that the motion judge erred in holding that Suevilia's notices setting Critical Dates did not comply with the Tarion Addendum.

**B. DID THE MOTION JUDGE ERR IN FINDING THAT SUEVILIA WAS READY, WILLING AND ABLE TO CLOSE THE TRANSACTION ON DECEMBER 18, 2018?**

[57] Given that I have rejected his argument that the December 18, 2018 closing date was not properly set, Mr. Wu's argument that the motion judge erred in finding that Suevilia was ready, willing and able to close on December 18, 2018 turns on whether the motion judge erred in finding that it was Mr. Wu's obligation under the APS to obtain the occupancy permit.

[58] The motion judge relied on s. 9(a) of the APS, set out above, to hold that it was Mr. Wu's obligation to obtain the occupancy permit. Section 9(a) of the APS stipulates that unless otherwise required by the Municipality, it is the Purchaser's



obligation to obtain any occupancy permit from the Municipality. I repeat that portion of s. 9(a) for ease of reference:

9. (a) COMPLETION

...If required, the Purchaser shall be responsible to obtain confirmation of allowable occupancy and a copy of any occupancy certificate from the Municipality, and, unless otherwise required by the Municipality, the Vendor need not provide same to the Purchaser. [Emphasis added.]

[59] There was no evidence that the Municipality required the Vendor to obtain the occupancy permit.

[60] Section 9 of the Tarion Addendum also addresses who has the obligation to provide an occupancy permit. Although it stipulates that the Vendor shall deliver an occupancy permit to the Purchaser prior to closing, it also allows for “Purchaser Occupancy Obligations” to be created by mutual agreement:

9. Ontario Building Code - Conditions of Closing

(a) On or before Closing, the Vendor shall deliver to the Purchaser:

(i) an Occupancy Permit ... for the home;

...

(b) Notwithstanding the requirements of paragraph (a), to the extent that the Purchaser and the Vendor agree that the Purchaser shall be responsible for one or more prerequisites to obtaining permission for occupancy under the Building Code, (the “Purchaser Occupancy Obligations”):

...

(ii) the Vendor shall deliver to the Purchaser, upon fulfilling all prerequisites to obtaining permission for occupancy under the Building Code (other than the Purchaser Occupancy Obligations), a signed written confirmation that the Vendor has fulfilled such prerequisites; and

(iii) if the Purchaser and Vendor have agreed that such prerequisites (other than the Purchaser Occupancy Obligations) are to be fulfilled prior to Closing, then the Vendor or shall provide the signed written confirmation required by subparagraph (ii) on or before the date of Closing.

[61] The motion judge concluded that s. 9(b) of the Tarion Addendum permitted the parties to agree that Mr. Wu was “responsible for one or more prerequisites to obtaining permission for occupancy under the Building Code” and that, by s. 9(a) of the APS, they had placed the obligation on him to obtain the occupancy permit. She concluded that because s. 9(b) of the Tarion Addendum permitted the parties to make the purchaser responsible for such prerequisites to occupancy, s. 9(a) of the APS requiring the purchaser to obtain the occupancy permit, is not inconsistent with the Tarion Addendum. She further found that Suevilia did what it could to comply with s. 9(b) of the Tarion Addendum “by completing the PDI and documenting same despite Mr. Wu’s lack of interest in attending.”

[62] Mr. Wu relies on s. 13 of the Tarion Addendum, which provides that the Tarion Addendum prevails over any provision of the Purchase Agreement that conflicts with, or is inconsistent with, the Tarion Addendum. He submits that

actually obtaining a building permit, as required under s. 9(a) of the APS, is not the same as “a prerequisite to obtaining permission for occupancy” as described in s. 9(b) of the Tarion Addendum. In any event, he asserts that Suevilia failed to comply with its obligations under s. 9(b)(ii) and (iii) of the Tarion Addendum.

[63] Section 13 of the Tarion Addendum provides as follows:

The Addendum forms part of the Purchase Agreement. The Vendor and Purchaser agree that they shall not include any provision in the Purchase Agreement or any amendment to the Purchase Agreement or any other document (or indirectly do so through replacement of the Purchase Agreement) that derogates from, conflicts with or is inconsistent with the provisions of this Addendum, except where this Addendum expressly permits the parties to agree or consent to an alternative arrangement. The provisions of this Addendum prevail over any such provision.

[64] In my view, the motion judge was correct in holding that s. 9(a) of the APS is not inconsistent with s. 9 of the Tarion Addendum. While s. 9(a) of the Tarion Addendum requires the Vendor to deliver the occupancy permit, s. 9(b) contemplates the parties agreeing that the Purchaser would be responsible for one or more prerequisites to obtaining permission for occupancy under the Building Code. Based on my review of the APS and the Tarion Addendum it is difficult to understand what that could entail, other than obtaining the occupancy permit.

[65] I see no basis for concluding that Suevilia failed to comply with its obligations under s. 9(b)(ii) and (iii) of the Tarion Addendum. Mr. Wu did not take any steps toward preparing for closing and acknowledged that he was not in funds to close

on December 18, 2018. Suevilia informed him that it had completed the necessary PDI Inspection on his behalf and prepared the necessary record. It is unclear what else Suevilia should have done in the circumstances.

### **Disposition**

[66] In light of the foregoing conclusions, there is no need to address Mr. Wu's remaining grounds of appeal. Under the Tarion Addendum, delayed closing compensation is payable only if the transaction closes or if it fails to close for any reason other than breach of contract by the Purchaser. Here, the transaction did not close due to Mr. Wu's default. Further, in light of these circumstances, I see no error in the motion judge's conclusion that Mr. Wu forfeited his deposit.

[67] Based on the foregoing reasons, I would dismiss the appeal. I would award Suevilia its costs of the appeal on a partial indemnity scale fixed in the amount of \$15,500 inclusive of disbursements and HST.

Released: February 21, 2024 "J.S."

"Janet Simmons J.A."  
"I agree. David M. Paciocco J.A."  
"I agree. Thorburn J.A."