ARBITRATION TRIBUNAL

Under the aegis of
CENTRE CANADIEN D'ARBITRAGE COMMERCIAL (CCAC)
CANADIAN COMMERCIAL ARBITRATION CENTRE (CCAC)

Arbitration body authorized by the *Régie du Bâtiment du Québec*

Constituted by virtue of *Regulation respecting the guarantee plan for new residential buildings*
(O.C. 841-98 of 17 June 1998)

CANADA
PROVINCE OF QUÉBEC

File #: S10-020201-NP

YAN LI LU ET PENG WANG
"Beneficiaries"
vs.
CONSTRUCTION ROGER VINCENT INC.
"Contractor"
and
LA GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC.
"Manager"

ARBITRATION AWARD

Arbitrator :	M^{e} Jean Philippe Ewart
For the Beneficiaries:	Ms. Yan Li Lu
For the Contractor:	No representative was present Construction Roger Vincent Inc.
For the Administrator:	M^{e} Élie Sawaya
Date of Hearing:	31 August 2010
Date of Award:	8 September 2010

IDENTIFICATION OF THE PARTIES

BENEFICIARIES: **YAN LI LU AND PENG WANG**
10 195 Gouin Blvd. West
Roxboro (Québec)
H8Y 1S1

(the "**Beneficiaries**")

CONTRACTOR: **CONSTRUCTION ROGER VINCENT INC.**
193, Route 132
Saint-Stanislas-de-Koska (Québec)
J0S 1W0

(the "**Contractor**")

MANAGER : **LA GARANTIE DES BÂTIMENTS RÉSIDENTIELS NEUFS DE L'APCHQ INC.**
5930, boul. Louis-H. Lafontaine
Anjou (Québec)
H1M 1S7

(the "**Manager**")

CHRONOLOGY

2006.10.17	Preliminary Contract and Guarantee Contract
2006.12.20	Notarial Deed of sale
2009.04.23	Letter from Beneficiaries to Contractor and Administrator
2009.05.31	Request for Claim
2009.09.14	15 day Notice to Administrator and Contractor
2010.01.06	Decision from Administrator
2010.02.02	Receipt of request for arbitration
2010.02.05	Nomination of Arbitrator
2010.07.06	Pre-trial conference
2010.07.06	Procedural Order
2010.08.31	Hearing

MANDATE AND JURISDICTION

[1] A request for arbitration was filed by the Beneficiaries dated 2 February 2010 and the undersigned was appointed arbitrator on 5 February 2010. No objection was filed as to competence and jurisdiction of the Tribunal was therefore confirmed.

EXHIBITS

[2] By consent at the Hearing, Exhibits have been initially labeled and numbered "A-" in accordance with the numbering of the Book of Exhibits filed by the Manager and the exhibit filed by the Beneficiaries was numbered and labeled "B-1".

FACTS AND PROCEEDINGS

[3] This is a request for arbitration from a decision of the Manager (#117975-1) dated 6 January 2010 (the **"Decision"**) (exhibit A-7) rendered in furtherance of a claim by the Beneficiaries under the guarantee contract entered into on 20 October 2006 (exhibit A-1) (the **"Guarantee Contract"**) providing for coverage in accordance with the terms and conditions under a guarantee plan for new residential buildings (the **"Guarantee Plan"**) administered by the Manager.

[4] The Beneficiaries expressed a preference to have the arbitration proceedings in English.

[5] The Contractor was not represented at the Hearing.

[6] A visit by an inspector of the Manager was effected on 3 December 2009 and resulted in the Decision.

[7] The Decision states:

> "The beneficiaries declared that they first discovered the problem described …in the summer of 2007.
>
> The administrator first received a written claim for this problem on May 5, 2010".

[8] The Decision further states that:

> "… hidden defects and major construction defects … must be declared in writing to both the Contractor and the Manager within a reasonable time limit, not exceeding six (6) months following their discovery or occurrence …

and that,

> "…In this case, it seems evident that the time between the discovery of the defect and the time when the written claim was presented is much longer than the legally established reasonable limit and, therefore, the administrator can not allow the Beneficiaries' claim."

[9] The Beneficiaries did not participate to the Pre-trial conference, notwithstanding having confirmed receipt of the notice thereof, and a Procedural Order was issued by the Tribunal dated 6 July 2010 which provided a summary of the subjects covered by such conference attended by the Manager and the Contractor and further provided for a peremptory order fixing a date of hearing, and same is hereby incorporated by reference as if fully recited. At the Hearing, the Beneficiaries confirmed prior receipt of such Procedural Order.

[10] The evidence indicates that the problem was denounced to the Contractor in the summer of 2007 and consequently at least then discovered by the Beneficiaries (admission under letter from Beneficiaries dated 31 January 2010, exhibit A-8-2, supported by evidence under exhibit A-3, such admission repeated under testimony of the Beneficiary Y.L. Lu at the hearing) and, as to the evidence before the Tribunal, only denounced in writing to the Contractor and the Manager by letter dated 23 April 2009 (stamped by the Manager as received 5 May 2009).

PRELIMINARY MOTION

[11] As indicated at the Pre-trial conference, Counsel to the Manager filed a declinatory motion in connection with the expiry of the delay of the giving of notice to the Manager by the Beneficiaries, which motion is akin to a motion for dismissal.

PLEADINGS - BENEFICIARIES

[12] As it pertains to the delay in denouncing the situations under review herein to the Manager within six months of the discovery or occurrence,

the Beneficiary produces a "Motion of Mis-en-cause for the revocation of judgement and for the suspension of the execution of a judgement" (exhibit B-1) dated 1 November 2007 and filed in Court of Quebec, and indicates to the Tribunal that this refers to the registration of a legal hypothec by an unpaid sub-contractor to the Contractor and a judgment thereafter in favor of the sub-contractor which the Beneficiaries settled, and then successively sued the Contractor for reimbursement.

[13] The Beneficiaries plead that this reflect the difficulties with the Contractor in the period of 2007 and following, and the fact that notwithstanding same, they believed the Contractor making promises to repair the problems under review herein (which he never did) which delayed their notice thereof.

PLEADINGS - MANAGER

[14] Counsel to the Manager reaffirmed the position indicated in the Decision

[15] Counsel to the Manager submitted that the Beneficiaries did not respect the delay for denunciation of the defects claimed as more specifically indicated under section 10 para. 4 of the *Regulation respecting the guarantee plan for new residential buildings*[1] (the **"Regulation"**).

ISSUES

[16] Taking into consideration the facts of this case, and the applicable provisions of the Regulation and corresponding clauses of the Guarantee Plan, when applicable, the following issues must be considered:

[16.1] Is the necessity of a notice to be given in writing to the Contractor and the Manager as provided under various paragraphs of section 10 of the Regulation of a procedural nature or otherwise?

[16.2] What is the nature of the delay "…within a reasonable time not to exceed 6 months…" provided under various paragraphs of section 10 of the Regulation?

16.2.1. Delay of procedure or of prescription?
16.2.2. Peremptory delay?
16.2.3 If so, is such delay one of forfeiture, foreclosure?

[1] O.C. 841-98 of 17 June 1998, (R.S.Q. Ch. B-1.1, r.0.2.), Building Act (R.S.Q., c. B-1.1) .

[16.3] What are the consequences of exceeding this 6 months?

APPLICABLE REGULATORY PROVISIONS

[17] It is appropriate to review the various possible applicable provisions for this case found under section 10 of the Regulation providing coverage for buildings not held in co-ownership (the type of building confirmed at the hearing notwithstanding notes inscribed in the Guarantee Contract):

> **10.** The guarantee of a plan, where the contractor fails to perform his legal or contractual obligations after acceptance of the building, shall cover:
>
> […]
>
> (3) repairs to non-apparent poor workmanship existing at the time of acceptance or discovered within 1 year after acceptance as provided for in articles 2113 and 2120 of the Civil Code of Québec, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the poor workmanship;
>
> (4) repairs to latent defects within the meaning of article 1726 or 2103 of the Civil Code of Québec which are discovered within 3 years following acceptance of the building, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months following the discovery of the latent defects within the meaning of article 1739 of the Civil Code of Québec; and
>
> (5) repairs to faulty design, construction or production of the work, or the unfavorable nature of the ground within the meaning of article 2118 of the Civil Code of Québec, which appears within 5 years following the end of the work, and notice of which is given to the contractor and to the manager in writing within a reasonable time not to exceed 6 months after the discovery or occurrence of the defect or, in the case of gradual defects or vices, after their first manifestation.
>
> *The underlines are ours.*

[18] It should be noted that the text applying a requirement of a written notice within a delay of six months is of identical effect for non-apparent poor workmanship, latent defects, faulty design, construction or production of the work or the unfavorable nature of the ground and consequently it is not necessary at this juncture to classify the problems or defects claimed to determine if denunciation has been made in accordance with the delay provided for by the Regulation.

ANALYSIS

General Rule of Interpretation

[19] Before addressing the crux of this matter, and taking into consideration that we shall use provisions of the Civil Code of Procedure[2] (sometimes **"C.C.P."**) to supplement our analysis of the provisions under study, it is appropriate to review briefly what are guiding principles in my view in cases where certain matters may be understood by some as procedural in nature and of a more substantive nature by others and where one must consider that the general rule of interpretation of the C.C.P. must be that of a liberal approach save specific exceptions.

[20] The Supreme Court of Canada has in several instances underlined the liberal approach that must be the general rule of interpretation, *inter alia* under the pen of Pigeon J., commenting on the 1965 reform of the Code of Civil Procedure:

> "In my opinion, it is important to intervene to ensure compliance with the intention of the Quebec legislator to repeal the old maxim that "form takes precedence over substance" ".[3]

and similarly as found in *Duquet vs. Town of Sainte-Agathe-des-Monts*[4].

[21] In this regard, note must also be taken, amongst others, of the same position taken in other matters by the Supreme Court including under the pen of L'Heureux Dubé J.,

> "Given this, it follows that the general rule must be given a broad and liberal interpretation and the exception, on the other hand, must be strictly interpreted.
> …, this Court cannot endorse the formalistic attitude of the Court of Appeal. This would be contrary to a fundamental principle that is at the root of s. 50 of the *Supreme Court Act* and of the reform of civil procedure effected by the 1965 *Code*, and which has been sanctioned in numerous decisions, the most recent being *Cité de Pont Viau v. Gauthier Mfg. Ltd*. This principle is that a party must not be deprived of his rights on account of an error of counsel where it is possible to rectify the consequences of such error without injustice to the opposing party. In the circumstances, it appears to me that appellant should be allowed to take the necessary steps to obtain a decision on his conclusions for the annulment of the expropriation, on which the courts below did not rule." [5]

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[2] R.S.Q. c. C-25
[3] Hamel v. Brunelle and Labonté, [1977] 1 S.C.R. 147, pp.153-154.
[4] [1977] 2 S.C.R. 1132
[5] Québec (Communauté urbaine) *v.* Services de santé du Québec, [1992] 1 S.C.R. 426

[22] This approach has also been noted by the Court of Appeal (Quebec), including by Gendreau J.C.A.[6] who made a review of several cases in the often referred case of *Têtu c. Bouchard*[7].

[23] In summary of this introductionary commentary, the Court should approach the interpretation of situations where a litigant is losing his rights with a view to reject unjust formalism and, unless otherwise compelled to do so, to safeguard the rights of the parties.

Nature of notice to Contractor and Manager

[24] What is the nature of the notice in writing? Is it of a procedural nature only or is it an element of a more substantive nature?

[25] The interpretation given to article 1739 [8] of the Civil Code of Québec (**"C.c.Q."**)[9] is a first element of response:

> "1739. A buyer who ascertains that the property is defective may give notice in writing of the defect to the seller only within a reasonable time after discovering it. The time begins to run, where the defect appears gradually, on the day that the buyer could have suspected the seriousness and extent of the defect."

[26] The authors have viewed this notice as a extra judicial demand subject to art. 1595 C.c.Q.:

> "The extrajudicial demand by which a creditor puts his debtor in default shall be made in writing.

and authors[10] and the Courts[11] have considered as to the circumstances under study herein that the notice under art. 1739 to be specifically required to be in writing, and to be imperative and essential in nature.

[27] The courts have in several occasions[12] identified that the notice under 1739 C.c.Q. has a specific character of a denunciation and even made

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6 (in a minority opinion ~ minority for reasons that do not affect this statement)
7 Têtu c. Bouchard, 1998 CanLII 12993 (QC C.A.) ; [1998] R.J.Q..
8 See also the reference to art. 1739 under section 10 paragraph 4 of the Regulation.
9 Civil Code of Québec (L.Q., 1991, c. 64)
10 Clueless and Moore, Droit des obligations, Éditions Thémis, no. 2800 (and note 38 *in fine*) - 2803
11 See *Voyer c Bouchard* (C.S. 1999-08.27) [1999] R.D.I. 611; and also *Fleurimont c. APCHQ inc.* (C.S. 2001.12.19) in this latter case, the facts precede the adoption of the Regulation and the then APCHQ certificate of guarantee required conciliation, but the principles on notice remain applicable *in extensio*.
12 Idem, *Voyer c Bouchard*; see also *L'Espérance c Bernstein*, (C.Q. 2000.12.12); *Dubé c Bourassa* (C.Q. 2004.06.28).

distinctions between the extra judicial demand and the denunciation on the basis of their respective objectives[13] and I am of the view that this applies to the notices to the Manager under section 10 of the Regulation

[28] The Supreme Court has addressed the issue of notice under a service mechanism in the case of an appeal procedure, which I believe is specifically relevant as the arbitration provided in the Regulation is of the nature of an appeal from the decision of the Manager.

[29] The undersigned notes that this is under the same case law that supports the general rule of liberal interpretation referred hereinabove, and more particularly by L'Heureux Dubé J. (and before her by Pratte J.) as reflected in the following extract from *Québec (Communauté urbaine) vs. Services de santé du Québec* [14] (which follows immediately after the citation extract from such case cited under our par. 18 herein):

> "This having been said, it is clear that, barring undue formalism, the peremptory provisions of the *Code of Civil Procedure* must be observed, as procedure judiciously applied provides an additional guarantee that the rights of litigants will be respected. This is especially true in the context of an appeal because, as the majority of the Court of Appeal pointed out, the right of appeal is a statutory creation, the very existence of which is subject to precise rules. This is what Pratte J. held in *Cité de Pont Viau v. Gauthier Mfg. Ltd.*, [1978] 2 S.C.R. 516, upholding the Court of Appeal on this point, when he wrote at p. 519:
>
> > An appeal is brought only if, within the time limit provided for in art. 494 C.C.P., the inscription is filed with the office of the court of first instance and served upon the opposing party or his counsel. In the case at bar, though the inscription was filed with the office of the Superior Court, it was never served upon respondent or its counsel. One of the two steps essential to the bringing of the appeal was therefore missing; this is not a mere formality that the Court of Appeal could allow to be corrected (art. 502 C.C.P.)."
>
> *The underlines are ours.*

[30] The notice in writing to be given to the Manager in accordance with section 10 of the Regulation is in effect a denunciation, it must be in writing, it is essential and imperative, and a substantive condition precedent to the right of the Beneficiary to arbitration.

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[13] *Dionne c. Guay* (C.Q. 2004.03.04) B.E. 2004 BE-414.

[14] Idem, note 5.

Nature of six month delay under various paragraphs of section 10

[31] The Beneficiary admitted that his denunciation to the Manager was in excess of six (6) months following the discovery or occurrence of the problem claimed by the Beneficiaries, as the case may be, representing delays between discovery or occurrence and denunciation, of more than two (2) years, from the summer of 2007 to January 2010.

[32] It is essential at this time, prior to any analysis of other matters which may be raised herein, to determine the appropriate application of this six (6) month rule submitted as the maximum delay for notice to be given in writing to the Contractor and the Manager for coverage under the Guarantee Plan (in as much as the other conditions of application are also met).

Delay of procedure or of prescription?

[33] In furtherance to my decision herein, I wish to emphasize the position taken by the Court of Appeal (Quebec) and the Supreme Court of Canada on similar or comparable provisions which may be found in the C.C.P. and the consequent conclusion that this Court has derived that the six (6) month delay provided under the applicable provisions of section 10 of the Regulation.

[34] It may be said that the wording and intent of section 10 of the Regulation ″…time not to exceed 6 months after the discovery …or occurrence … or first manifestation… ″ may at least be considered as stringent as the delay wording of articles 484 and 523 C.p.c.

[35] In several decisions[15], the Quebec Court of Appeal has rejected, on the basis that more than six months had elapsed from the appropriate date, motions for revocation of judgment under the principles found under article 484 C.C.P., which reads in part ″…the court may, on motion and provided that not more than six months have elapsed since judgment relieve from the consequences…″

Our underline.

[15] See *Laurendeau c. Université Laval,* Quebec Court of Appeal No. 200-09-003399-000 (200-05-000225-933), 28 February 2002; see also *Balafrej c. R.*, 2005 QCCA 18.

[36] More particularly, the Quebec Court of Appeal writes on the subject of the six month delay provided under the third paragraph of article 484 C.C.P. under the pen of Delisle, J.C.A.[16]:

> ″Malheureusement, ce n'est que […], en dehors donc de ce dernier délai [*note : délai de six mois prévu à l'article 484*] que l'avocat de l'appelant a demandé au tribunal que son client soit relevé des conséquences du retard à agir.
> Comme il s'était écoulé plus de six mois, le juge de première instance a accueilli le moyen d'irrecevabilité invoqué par l'intimée.
> Il a eu raison.
> Contrairement au délai de 15 jours de l'article 484 qui, a certaines conditions, n'est pas fatal, le délai de six mois du même article et celui de l'article 523 C.p.c. sont des délais de prescription.″
>
> ″Unfortunately, it is only […] outside this last delay [*note : six months delay set forth in article 484*] that counsel for the appellant requested from the tribunal that his client be absolved of the consequences of his delay in taking action.
> As more than six months have elapsed, the first instance judge granted the motion for dismissal submitted by the respondent.
> He was right.
> Contrary to the 15 day delay of article 484 which, under certain conditions, is not fatal, the six month delay of the same article as well as the one of article 523 C.C.P. are delays of prescription. ″
>
> *Translation and underline by the Tribunal.*

[37] The Quebec Court of Appeal classifies the six month delay as a delay in the nature of prescription. Delisle J.C.A. cites Justice Pratte of the Supreme Court of Canada in the case *Cité de Pont Viau c. Gauthier MFG Ltd.*[17] which addresses the application of article 523 C.p.c. which contains a similar provision as article 484 C.p.c. and similar to the concept under review in section 10 of the Regulation, and reads:

> ″523. The Court of Appeal may, notwithstanding the expiry of the time allowed by article 494, but provided that more than six month have not elapsed since the judgment, grant special leave to appeal to a party who shows that in fact, it was impossible for him to act sooner. […]″[18]
>
> *The underline is ours.*

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[16] *J.P. c. L.B.*, Quebec Court of Appeal No. 500-09-012743-027 (500-12-249425-996), 14 March 2003, pp.3 and 4.
[17] Supra, 1978 [2] S.C.R. 516; 1978 CanII 4 (Supreme Court of Canada).
[18] Article 494 C.p.c. provides that a motion for leave to appeal must be served and filed, save certain exceptions, within 30 days of the date of judgment.

[38] Justice Pratte writes[19] that the delay of six months under 523 C.C.P., which deals with the delay for leave to appeal, crystallize the *res judicata*, the fact that the judgment is final, i.e. no longer subject to appeal:

> "Article 523 *C.C.P.* specifically empowers the Court under special circumstances to grant special leave to appeal within six months of the judgment. It is therefore only after this six-month period has elapsed that a Superior Court judgment acquires the same force of *res judicata* that it had under the old *Code af*ter thirty days"

Delay of forfeiture – "déchéance ~ préfix"

[39] Is this a delay under which the Beneficiary may benefit from suspension or interruption of prescription?

[40] The Tribunal is of the view that the six month delays under section 10 of the Regulation are each in the nature of a delay of forfeiture. Furthermore, there are distinctions that have led the authors and the courts to identify certain elements that are specific to delays of forfeiture, with the remainder non-contradictory provisions of prescription to remain applicable to prescription. We must now review these elements.

[41] Article 2878 C.c.Q. under Book Eight, Prescription, under Rules governing Prescription, General Provisions states:

> "The court may not, of its own motion, supply the plea of prescription. However, it shall, of its own motion, declare the remedy forfeited where so provided by law. Such forfeiture is never presumed; it is effected only where it is expressly stated in the text."
>
> *The underline is ours.*

[42] The Court of Appeal has indicated[20] that the delay of forfeiture must be expressed in a clear, precise and unambiguous way. This jurisprudence confirms the position taken by authors, more specifically Jean Louis Baudouin, in *Les Obligations* [21] :

> "Le second alinéa de cette disposition [2878] précise que la déchéance ne se présume pas et doit résulter d'un texte exprès. Il n'y a donc désormais comme seuls délais préfix véritables que ceux à propos

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[19] Id. 527 and 528.

[20] *Entreprises Canabec inc. c. Laframboise*, J.E. 97-1087 (C.A.). where the Court determined that in the case of 524C.C.P. there was no forfeiture; see also: *General Motors of Canada Ltd c. Demers*, [1991] R.D.J. 551 (C.A.)

[21] Baudouin, Jean-Louis ; Jobin, Pierre-Gabriel. – Les obligations. – collaboration de Nathalie Vézina. – 6e éd. – Cowansville (Québec) : Éditions Y. Blais, ©2005, p. 1092, no. 1087.

desquels le législateur s'est exprimé de façon précise, claire et non ambiguë".

"The second paragraph of this provision [2878] provides that forfeiture may not presume and must result from a specific text. Consequently, there are now only real prefix delays those for which the legislator has expressed himself in a precise, clear and unambiguous fashion."

Translation by the Tribunal

[43] The Court of Appeal has also determined that it is not necessary to have the words forfeiture or foreclosure specifically mentioned in a text [22] but that:

"…, une mention formelle du terme "déchéance" ne me parait pas obligatoire. Il faut cependant que l'intention du législateur est d'en faire un tel délai. " [23]

"…, a formal indication of the word forfeiture does not seem mandatory. It is nevertheless necessary that the intent of the legislator was to create such a delay."

Translation by the Tribunal

[44] The Court of Appeal, more specifically Jean Louis Beaudoin, as J.C.A., interestingly in furtherance of his views as an author that the text must be clear, precise and unambiguous reflected under our par. 49 herein, also confirms same in the unanimous decision *Massouris et Honda Canada Finance Inc. (Re) (Syndic de)*, 2002 CanLII 39140 (QC C.A.), determining that the delay of publication under article 1852 C.c.Q:

1852. […].

[Second paragraph] Publication is required, however, in the case of rights under a lease with a term of more than one year in respect of a road vehicle or other movable property …; effect of such rights against third persons operates from the date of the lease provided they are published within 15 days. [24]

is a delay of forfeiture.

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[22] Such as articles 1103 C.c.Q. (co-ownership) or 1635 C.c.Q. (Paulian action) where the text is specific.

[23] Alexandre c Dufour, [2005] R.D.I. 1 (C.A.), par. 34, the Court evaluating the right of exclusion from indivision by an co-owner within 60 days of learning that a third party has acquired the share of an undivided co-owner as provided under art. 1022 C.c.Q..

[24] 1991, c. 64, a. 1852; 1998, c. 5, s. 8.

[45] Counsel to the Manager has submitted to the attention of the Tribunal jurisprudence from an arbitration award rendered by the undersigned on the subject in support of his position[25].

[46] The Tribunal has also noted the gist of decisions rendered by my learned colleagues MMrs. Fournier, Dupuis, Labelle [26] and our learned colleague Me Michel Jeanniot[27] is to the effect that, in each case based on the circumstances before them, the written notice of the denunciation had to be given to the contractor and the manager within the six (6) months from the discovery or occurrence of the defects.

[47] The Tribunal must underline to the reader recent decisions rendered by the undersigned[28] as well as recent further decisions rendered on this subject to the same effect[29], including a decision which provides a detailed review of this question rendered in 2010 by my learned colleague Me Pierre Boulanger in the matter of *Côté et Clermont c. Les Constructions E.D.Y. Inc.*, [30]

[48] The Tribunal is of the view that the six month delays under section 10 of the Regulation are each in the nature of a delay of forfeiture, delays of forfeiture are of public order and extinguish the right of the creditor of the obligation[31] and consequently extinguish the right of the Beneficiaries to require the coverage of the Guarantee Plan.

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[25] *Danesh c. Solico Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ inc.*, Me Jean Philippe Ewart, Arbitrator, 5 May 2008, Soreconi No. 070821001.

[26] *Syndicat de copropriété du 4570-4572 de Brébeuf Inc. c. Construction Précellence Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc.,* Soreconi No. 050512002, Alcide Fournier, Arbitre, 5 Septembre 2005.
Paul Blanchette Construction et Letiecq et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., Le Groupe d'arbitrage et de médiation sur mesure (GAMM), File APCHQ 025391, Claude Dupuis, ing., Arbitrator, 14 October 2005.
Chackal et Bardakji et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc., Henri P. Labelle, arch., Arbitrator, 5 May 2006.

[27] *Jobin et Plourde et Carrefour St-Lambert Lemoyne Inc. et La Garantie des bâtiments résidentiels neufs de l'APCHQ Inc* Soreconi No. 061215001, Me Michel Jeanniot, Arbitrator, 8 March 2007.

[28] *Danesh c. Solico Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ inc.*, Me Jean Philippe Ewart, Arbitrator, 5 May 2008, Soreconi No. 070821001; et *Moustaine & El-Houma c. Brunelle Entrepreneur inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ inc.*, Me Jean Philippe Ewart, Arbitre, Décision arbitrale en date du 9 mai 2008 au dossier Soreconi No. 070424001. Dossier n^{o} : 080730001, *Sylvain Pomone et Syndicat de la copropriété 7615 rue Lautrec, Brossard c. Habitation Signature Inc. et La garantie des bâtiments résidentiels neufs de l'APCHQ inc.*, Me Jean Philippe Ewart, Arbitrator, 14 January 2009, Soreconi n^{o} : 080730001.

[29] *Bertone et Scafuro c. 9116-7056 Québec Inc.*, SORECONI 090206002, 29 October 2009, Guy Pelletier, Arbitrator, referring to a decision of the undersigned in connection with this matter.

[30] CCAC S09-030301-NP, 12 January 2010, , Me Pierre Boulanger Arbitrator, with reference to other decisions under note 2 thereof to same effect.

[31] Supra, Baudouin, Jobin – Les obligations – p. 1092, no. 1086.

[49] One of the consequence of forfeiture, the foreclosure of the right to exercise a particular right, in our case as the Manager is concerned the right of the Beneficiaries to require the coverage of the Guarantee Plan, is not subject to the provisions of suspension or interruption applicable in certain circumstances to delays of prescription:

> ″… alors qu'un délai de prescription peut être suspendu et interrompu (articles 2289 et s.), …, la solution contraire prévaut pour le délai de déchéance, qui éteint le droit de créance dès que la période est expirée sans que le créancier ait exercé son recours et quoi qu'il arrive. Le titulaire du droit, de ce fait, ne peut même plus invoquer celui-ci par voie d'exception. ″[32]
>
> ″… while a prescription delay may be suspended or interrupted (art. 2289 and following), …., a contrary solution applies to the delay of forfeiture, which extinguishes the creditor's right as soon as the period for the creditor to exercise his right is lapsed, and whatever happens afterwards. The holder of this right may then not even invoke the latter by any means of exception. ″
>
> *Underline and Translation by the Tribunal*

May the six month delay be extended by the Tribunal?

[50] Can this six month delay be extended by the Tribunal in certain circumstances? We must answer in the negative.

[51] The Tribunal sympathizes with the Beneficiaries' situation, even more so when taking into consideration that the Beneficiaries may have been misled by the Contractor as to promises of having the repairs effected in a timely manner, promises which were not fulfilled at such time nor thereafter prior to the filing of this request for arbitration.

Our underlines.

[52] Nevertheless, a reasonable delay in excess of the six month period is not an applicable concept in the circumstances of the delays respectively provided under the applicable(s) paragraph(s) provided under section 10 of the Regulation, purely and simply by the definition of a delay of forfeiture.

CONCLUSIONS

[53] In conclusion, this Tribunal is of the view that:

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[32] Idem, pp. 1092 -3, no. 1086.

- The notice in writing to be given to the Contractor and the Manager in accordance with section 10 of the Regulation is in effect a denunciation, it must be in writing, it is essential and imperative, and, as the Manager is concerned, is a substantive condition precedent to the respective rights of the Beneficiaries to require the coverage of the Guarantee Plan and to require arbitration in connection thereto.

- The six month delays under section 10 of the Regulation are each in the nature of a delay of forfeiture, delays of forfeiture are of public order and the failure by the Beneficiaries to give notice to the Manager in writing within such delay of six months extinguish the respective rights of the Beneficiaries to require the coverage of the Guarantee Plan and to require arbitration in connection thereto.

- The foreclosure of the rights of the Beneficiaries by the expiry of the six month delays under section 10, as the Manager is concerned, to have the Beneficiaries require the coverage of the Guarantee Plan and to require arbitration respectively, are not subject to the provisions of suspension or interruption applicable in certain circumstances to delays of prescription.

- The Tribunal does not have discretion to extend the six month delays under section 10, including neither under 'an impossibility to act' concept nor any 'reasonable delay thereafter' element, both of which do not find application under section 10 of the Regulation.

[54] Consequently, the denunciation to the Manager by the Beneficiaries of the problem which is the subject of their application for arbitration was made outside the six (6) month delay provided under the applicable provisions of section 10 of the Regulation and this delay is a delay of forfeiture, which this Tribunal does not have the discretion of extending and which causes foreclosure of the Beneficiaries' rights.

[55] I wish to underline that the decision of this Tribunal is solely in application of the Regulation and does not purport in any manner to provide a decision under any other applicable legislation which may find application to the facts of this case. This decision is therefore without prejudice to the rights of the Beneficiaries to bring any action before the civil courts having jurisdiction, subject to the applicable rules of law.

[56] In accordance with section 123 of the Regulation, and as the Beneficiaries have failed to obtain a favorable decision on any of the elements of his claim, the Tribunal must determine the division of the fees to be charged between the Manager and the Beneficiaries.

[57] Consequently, the cost and fees of this arbitration, as well under law as under equity, in accordance with sections 116 and 123 of the Regulation, shall be apportioned as to $50 to the Beneficiaries and the remainder to the Manager.

FOR THESE REASONS, THE ARBITRATION TRIBUNAL:

[58] GRANTS the declinatory motion of the Manager as it pertains to the non respect of the delay of six (6) months provided under and in accordance with section 10 of the Regulation.

[59] DISMISSES the arbitration demand of the Beneficiaries;

[60] ORDERS, in accordance with section 123 of the *Regulation,* that the costs of the present arbitration be borne as for $50 by the Beneficiaries and for the remainder by the Manager.

DATE: 8 September 2010

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M^{e} Jean Philippe Ewart
Arbitrator