

**Ontario New Home Warranty Program v. Carlyle
Residences (II)
Inc.**

Between
Ontario New Home Warranty Program ("Warranty Program"), and
Carlyle Residences (II) Inc.

[1995] O.J. No. 1596

DRS 95-15773

Court File No. Re 2220/93

Ontario Court of Justice (General Division)

Whitby, Ontario

LaForme J.

Heard: May 11, 1995.

May 30, 1995.

(2 pp.)

Practice — Discovery — Examination, range of — Examination in aid of motion — Questions related to issues between the parties.

Motion by the Warranty Program for an order requiring B to provide answers to undertakings and refusals on her examination in aid of a motion brought by her brother G. G sought to have an order set aside requiring him to post a \$500,000 letter of credit. G claimed that he did not have the financial ability to comply with this order.

HELD: Motion granted. The information sought by the Warranty Program was relevant. The information sought was not an unwarranted intrusion on B and G himself made his financial status an issue.

Statutes, Regulations and Rules Cited:

Ontario Rules of Civil Procedure, Rule 39.03.

Counsel:

Joanne Fox, for the Moving Party.

Gardner Hodder, for the respondent (Non-Party).

¶ 1 LaFORME. (endorsement):-- Motion was made by Warranty Program for an order compelling Maria Battaglia ("Mrs. Battaglia") to provide answers to undertakings and refusals on her examination in aid of motion on September 30, 1994, within 7 days, failing which Peter

Gionetti's ("Mr. Gionetti") motion to set aside the order of the Honourable Mr. Justice Borins dated May 27, 1994 which was adjourned sine die on August 29, 1994 shall be dismissed.

¶ 2 Mrs. Battaglia was examined, pursuant to Rule 39.03, by Warranty Program as a witness on a pending motion brought by Mr. Gionetti. Mrs. Battaglia is Mr. Gionetti's sister. She was summoned to witness and attended the examination voluntarily.

¶ 3 The test as to what may be elicited in examinations under Rule 39.03 is that the evidence must be relevant to the issue in the motion (*Re Canada Metal Co. Ltd. et al. v. Heap et al.* (1975) 7 O.R. (2d) 185 (C.A.)). The issue in Mr. Gionetti's motion is his ability to comply with Mr. Justice Borins' Order requiring him to post a \$500,000 letter of credit or surety bond. Mr. Gionetti has sought to set aside Justice Borins' Order, partly on the grounds that he does not have the financial ability or the funds to comply, and that he is "unable to borrow funds for this purpose from any source" (ref. Notice of Motion of Mr. Gionetti dated June 20, 1994, Ground No. 4. p. 30 of this Motion Record and para. 12 of his affidavit in support at p. 36).

¶ 4 Given the recent history of financial dealings between Mrs. Battaglia and Mr. Gionetti and the nature of their business relationship, I am of the opinion that the information sought by Warranty Program is relevant to the motion. I do not find the request of Warranty Program to be an abuse of process (ref. *Fort Norman Explorations Inc. v. McLaughlin et al.* (1982) 36 O.R. 787). Moreover, what is being requested is not for an improper purpose, it is relevant and is not an unwarranted intrusion of Mrs. Battaglia. Mr. Gionetti himself made his financial position, and more particularly his inability to borrow the funds necessary to comply with the Order of Justice Borins, an issue.

¶ 5 Accordingly, the motion is granted. Mrs. Battaglia is hereby, ordered to provide answers to her remaining undertakings and refusals within ten days of the date of this order failing which, Mr. Gionetti's motion to set aside the Order of Justice Borins dated May 27, 1994 which was adjourned sine die on August 29, 1994 shall be dismissed.

¶ 6 Warranty Program shall receive their costs of this motion fixed in the amount of \$500 payable by Mrs. Battaglia forthwith.

LaFORME J.