

BEFORE THE TRIBUNALS OF DISPUTE PREVENTION & RESOLUTION, INC.

STATE OF HAWAII

Tadashi Mitsuoka and Victoria Mitsuoka; Individually, and on Behalf of Themselves and All Others Similarly Situated,)	D.P.R. No. 17-0447-A
)	
Claimants,)	PARTIAL FINAL ARBITRATION
)	DECISION AND AWARD
vs.)	
)	
HASEKO HOMES, INC., a Hawaii corporation, HASEKO CONSTRUCTION, INC. a Hawaii corporation; KE NOHO KAI DEVELOPMENT, LLC, a Hawaii corporation; SPINNAKER PLACE DEVELOPMENT, LLC, a Hawaii corporation; FAIRWAY'S EDGE, LLC, a Hawaii corporation; COASTAL CONSTRUCTION CO., INC., a Hawaii corporation; and DOES 1-10,)	
)	
Respondents.)	
)	
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PARTIAL FINAL ARBITRATION DECISION AND AWARD

I. INTRODUCTION.

This arbitration matter involves a class of Claimants ("Claimant Class") who are homeowners in a housing development project known as Ocean Pointe, Phases II E and III B, C, D and E ("Project"). The Claimant Class was initially represented by TADASHI MITSUOKA and VICTORIA MITSUOKA individually and in a representative capacity on behalf of all others similarly situated. Prior to the commencement of the evidentiary hearings in this matter, JOHN STEWART was added individually and as an additional representative of the Claimant Class. Respondents in this matter are HASEKO HOMES, INC. ("Haseko Homes"), HASEKO CONSTRUCTION, INC. ("Haseko Construction"), KE NOHO KAI DEVELOPMENT, LLC ("KNK Development") and FAIRWAY'S EDGE DEVELOPMENT, LLC ("FE Development") (collectively, the "Haseko

Respondents”) The Haseko Respondents consist of a group of related entities involved in the development, construction and marketing of the homes in the Project.

Sidney K. Ayabe, Esq., Jerry M. Hiatt, Esq. and Lou Chang, Esq. (collectively referenced herein as the “Arbitration Panel”) were duly appointed by the parties to serve as the panel of arbitrators for this matter.

Arbitration hearings were held in this matter by video conference on October 12-16, 19-21, 23 and 26-30, 2020. during which the parties were afforded a full and fair opportunity for examination and cross-examination of witnesses, introduction of relevant exhibits and submission of arguments and legal authorities in support of their respective claims defenses and all related positions.

II. APPEARANCES.

In this matter, the parties were professionally and competently represented by:

On behalf of the Claimants:

Melvin Y. Agena, Esq., Law Office of Melvin Y. Agena, 55 Merchant St. Suite 1850, Honolulu HI 96813 and Kenneth S. Kasdan, Esq. and Sharla Manley, Esq., Kasdan Lippsmith LLP, 1003 Bishop Street, Suite 1180, Honolulu, Hawai’i 96813 and Graham B. Lippsmith, Esq. and Celene Chan Andrews, Esq., LippSmith LLP, 55 Merchant Street, Suite 1850, Honolulu, Hawai’i 96813

On behalf of the Respondents:

Melvyn M. Miyagi, Esq., and Ross Shinyama, Esq., Watanabe Ing LLP, First Hawaiian Center, 999 Bishop Street, Suite 1250, Honolulu, Hawaii 96813.

III. BACKGROUND FACTS.

The Ocean Pointe Project is part of a residential and marina/lagoon development project located in Ewa Beach on the southern shore of Oahu, Hawaii. Respondent Haseko Homes, Inc. is the general developer of the Ocean Pointe Project. Respondent Haseko Construction, Inc., is a related general contractor entity associated with Haseko Homes. Respondent Fairway’s Edge, LLC is the Haseko Homes related entity that is the developer of the Fairway’s Edge development project known as “Fairway’s Edge” or area “2E” which is comprised of 216 townhome units with detached garages. Respondent Ke Noho Kai Development, LLC is the Haseko Homes related entity that is the developer of the Ke’alohi Kai development project referred to and known as “Ke’alohi Kai” or areas

"3B, 3C, 3D and 3E", which consists of 405 single-family residences (327 single-family homes and 78 paired homes with detached garages). Collectively, the homes in the Fairway's Edge and Ke'alohe Kai development projects will be referred to herein as either "Project Homes" or "Subject Homes". For the sale of the Project Homes, Respondent Haseko Homes procured and entered into an insurance/warranty administration program administered through a warranty administration company known as Professional Warranty Service Corporation. The program offered a 10 year limited warranty that purportedly provided remedies and protection from defined "Construction Defects".

The individual Claimants, Tadashi Mitsuoka, Victoria Mitsuoka and John Stewart, are purchasers and owners of homes and are representatives of a class of purchasers and homeowners in the Fairway's Edge and Ke'alohe Kai projects. The Project Homes were built between 2005 and 2008. In connection with the purchase of the Subject Homes all Claimants signed and agreed to a Deposit Receipt and Sales Contract ("Sales Contract"). The Sales Contract provided that each home is covered by a Home Builder's Limited Warranty ("HBLW"), a transferrable ten (10) year limited warranty. Paragraph 13.1 of the Sales Contract stated that:

Seller's Limited Warranty. The House will be covered and Purchaser shall be bound to the terms of a transferable ten (10) year HOME BUILDER'S LIMITED WARRANTY, a sample of which is attached hereto as Exhibit E and incorporated herein by reference (the "Limited Warranty"). The Limited Warranty provides coverage for construction defects that occur during the Warranty Period (as that term is defined in the Limited Warranty) and includes provisions limiting the responsibility and conditions under which it is valid or applicable. The Limited Warranty gives the Purchaser specific legal rights, *and Purchaser may also have other legal rights under applicable laws of Hawaii.* Seller's obligations under the Limited Warranty are expressly conditioned on prompt notification by Purchaser to Seller of any construction defects as set forth in the Limited Warranty. In addition, the Limited Warranty does not cover certain construction defects that result, either directly or indirectly from certain excluded causes or occurrences as set forth in the Limited Warranty. None of Seller's employees, salesmen or other agents is authorized to make any warranty other than the Limited Warranty, nor can they extend or in any way alter the Limited Warranty. (italics supplied)

Claimants, as purchasers, were required to initial the bottom right-hand corner of the Sales Contract page containing the above description of the HBLW. A form of the HBLW was attached to the Sales Contract and was marked "SAMPLE" and identified as "PWC FORM No. 117 Sample Rev. 05/02."

The Sales Contract also included a form to be signed by the purchaser acknowledging receipt of the HBLW; agreeing that the purchaser would review the HBLW and acknowledging that the purchaser had the right to have the HBLW reviewed by an attorney of the purchaser's choosing. The Acknowledgment and Receipt form stated:

Purchaser hereby acknowledges that on, or prior to, the date of this Agreement, Purchaser has received a sample of the Limited Warranty (PWC Form No. 117). Purchaser further agrees that Purchaser will read the sample Limited Warranty in its entirety prior to the Closing Date. Purchaser understands that Purchaser has the right to have the Limited Warranty and all other documents related to the purchase of the Property reviewed by an attorney of Purchaser's choosing at Purchaser's sole expense. *This review does not, however, allow Purchaser to alter the terms of the Limited Warranty nor delay or cancel this Agreement.* Moreover, Purchaser's failure to read the sample Limited Warranty and to obtain any needed assistance in understanding the Limited Warranty shall not in any way change either Purchaser's or Seller's rights, duties and obligations under the Limited Warranty. Prior to Closing, Purchaser shall deliver to Escrow a fully executed document entitled "Warranty Acknowledgment of Receipt and Agreement to Read," a copy of which is attached hereto as Exhibit F, and incorporated herein by reference. Escrow shall thereafter deliver notice to the warranty administrator, Professional Warranty Service Corporation ("PWC"), at P.O. Box, Annandale, Virginia 22003-0800 that the Closing of the sale of the Property has occurred and that the Property is registered in the Home Builders Limited Warranty. (italics supplied)

Claimants, as purchasers, were required to sign the Acknowledgment and Receipt form as part of the Sales Contract documents. By signing the Acknowledgment and Receipt form, the purchasers in the Ocean Point Project certified and agreed to the following:

I/we hereby certify that on, or prior to, the date of this Agreement, I/we have received a sample of the Home Builder's Limited Warranty (PWC Form No. 117) which commences on the date the title for the home is transferred to the first homeowner and expires ten (10) years from the date the title for the home is transferred to the first homeowner. I/we agree that, prior to closing/settlement on

the home to which this Agreement relates, I/we will read the sample Home Builder's Limited Warranty in its entirety and will contact the builder with any questions I/we have about my/our or the builder's duties, rights and obligations under the Home Builder's Limited Warranty or the coverage, limits or exclusions contained therein.

* * *

I/we agree that my/our failure to read the sample Home Builder's Limited Warranty and to obtain any needed assistance in understanding the Home Builder's Limited Warranty document shall not in any way change my/our or the builder's rights, duties or obligations under this Home Builder's Limited Warranty.

The Project Homes are one and two story residential structures which are built on concrete slabs on grade with thickened edge footings and are framed with cold formed steel. The housing slabs are built on engineered coralline fill material which was largely obtained on site from dredging. The Project Homes are built with a wind resistance (a.k.a. hurricane) protection system consisting of steel ties, connectors, braces, fasteners and anchor bolts connecting the roof and framing of the structures to the concrete slab foundation of the homes.

Claimants claim in this case that there are deficiencies in the wind resistance protection systems of the Project Homes. In 2009, Claimants Tadashi and Victoria Mitsuoka filed a complaint in the First Circuit Court of the State of Hawai'i. The complaint was amended by a First Amended Complaint dated March 8, 2013. The First Amended Complaint asserts that the Haseko Respondents "designed, developed, and constructed [the Subject Homes] with foundation anchor bolts and an inadequate high-wind protection system. Claimants allege in the First Amended Complaint that the purportedly inadequate high-wind protection system violated the applicable building code and that the high-wind protection systems built in the Project Homes do not meet the minimum standards required under applicable law and breached the Sales Contract.

IV. PROCEDURAL BACKGROUND AND STIPULATIONS.

Both the Sales Contract and the HBLW signed and incorporated into the Sales Contract contain arbitration agreement provisions. The parties have participated in extensive proceedings before the Circuit Court regarding the enforceability of the arbitration agreement provisions of the Sales Contract and HBLW and the processing of the claims asserted in this matter as a class action. By her Order Granting in Part and

Denying in Part Defendants Haseko Homes, Inc., Haseko Construction, Inc., Ke Noho Kai Development, LLC, Spinnaker Place Development, LLC, and the Fairway's Edge Development, LLC's Motion to Compel Arbitration and Stay Judicial Proceedings, Filed May 14, 2013, dated July 11, 2013, the Hon. Virginia Lea Crandall, Judge of the First Circuit Court of the State of Hawaii ordered that the Claimants were "compelled to binding arbitration under the Home Builders' Limited Warranty, PWC Form No. 117, Rev. 05/02 (the "HBLW")."

On April 25, 2017, the Claimant Class filed a motion entitled "Plaintiffs' Motion for Clarification that the Claims of Both the Class Representatives and the Class Are in Arbitration or, in the Alternative, to Compel Class Arbitration". After hearing and consideration of such motion, Judge Virginia Lea Crandall of the First Circuit Court of the State of Hawaii granted the motion and ruled as follows:

The Court finds that the arbitration clause is enforceable and that it contemplates class action arbitration. There has been no waiver by Plaintiffs and judicial estoppel does not apply because Plaintiffs did not prevail with respect to their previous position that the arbitration clause was not enforceable. The case will proceed in arbitration as a certified class action.

On December 29, 2017, the Haseko parties filed a Motion for Order Requiring the Arbitration to Be Governed by the Terms of the Home Builder's Limited Warranty. Following a hearing on that motion, the Circuit Court issued an Order Denying Defendants Haseko Homes, Inc., Et Al.'s Motion for Order Requiring the Arbitration to Be Governed by the Terms of the Home Builder's Limited Warranty Filed December 29, 2017. The court's order stated that:

The Court has compelled arbitration in this case pursuant to the Home Builders Limited Warranty (HBLW). *All disputes are to be submitted to the Arbitrators to determine the specific claims and law that apply.* (italics supplied)

Following determination that this matter was to proceed in arbitration, the parties appointed the Arbitration Panel to serve as arbitrators in the matter. In preliminary proceedings conducted during the course of the arbitration of this matter, the Claimants filed a Motion for Determination of Applicable Law and the respondents filed a Motion for an Order Enforcing the Terms of the Homebuilder's Limited Warranty. Following a

hearing held with regard to said motions, the parties entered into the following stipulations:

1. This arbitration is governed by the Home Builder's Limited Warranty, PWC Form No. 117, Rev. 05/02 ("HBLW") and the Federal Arbitration Act, 9 U.S.C. sections 1 – 16 ("FAA");
2. Where HBLW and/or the FAA are silent, the arbitration rules of the Dispute Prevention and Resolution, Inc. ("DPR rules") shall apply if they are not inconsistent with the HBLW and/or the FAA.

The Arbitration Panel approved such stipulations by the Panel's order dated September 5, 2018.

The Arbitration Panel thus notes and accepts as the law of this case that the orders of the court have determined that the agreement of the parties to arbitrate is enforceable and that this matter shall proceed as a class action and that "All disputes are to be submitted to the Arbitrators to determine the specific claims and law that apply." The findings and Award rendered herein by the Panel are provided pursuant to this law of the case and independently pursuant to the authority provided under the Sales Contract and HBLW and also independently by the stipulations and agreements of the parties.

In the arbitration proceedings conducted in connection with this matter, all exhibits offered by both Claimants and Respondents were stipulated into evidence and received by the Arbitration Panel, subject only to consideration as to their weight. All witnesses offered by both Claimants and Respondents were heard by the Arbitration Panel.

The findings and awards made by the Arbitration Panel in this case are based upon both the extensive testimony heard and the many exhibits introduced during the 14 days of hearings and arguments in this matter. The testimony revealed very direct disagreements between the parties' respective experts and other witnesses about the disputed issues. The Arbitration Panel was thus required to weigh the witnesses' respective credibility on those issues. The Arbitration Panel did so and this was one basis for the findings made herein. All finding herein were reached after weighing the evidence and reaching determinations that the prevailing party either met, or failed to meet, its burden of proof as to that issue.

The burden of proof applied was the normal civil standard of a “preponderance of the evidence”.

In the course of the proceedings before the Arbitration Panel, the parties entered into multiple other stipulated agreements which established agreements covering various items, as shown by the record. These included, but were not limited to, each of the following matters:

1. The parties were given options as to the form of the award and the parties stipulated and agreed that the Arbitration Panel should issue a summary decision as to the merits in its Partial Final Award, rather than a more detailed reasoned award containing findings of fact and conclusions of law, in order to save both sides the costs of a more detailed decision.
2. The parties agreed to the submission of post-hearing briefs which were submitted on or about December 14, 2020, whereupon the substantive issues in this matter were submitted for decision.
3. The parties agreed that the Arbitration Panel was provided 60 days from receipt of these closing briefs to issue its initial award, with the understanding that there would possibly be further briefing required on the issue of attorneys’ fees and costs following issuance of an award on the merits.
4. The parties agreed, based on all disclosures made by members of the Arbitration Panel prior to and during the hearing, that no party claimed any conflict of interest on the part of any member of the Arbitration Panel up to the closing of the evidence taken in the hearing.
5. The parties agreed that DPR rules applied and that the proceeding was governed by the HBLW and the Federal Arbitration Act.
6. The parties agreed that both sides had made some claims and raised some defenses under contract theories and that both sides were seeking their respective attorneys’ fees based on those claims and defenses.

This Award is made in reliance upon the entire record herein, including each of the above stipulations.

Based on the totality of the prior court orders; the stipulations and agreements of the parties and applicable law, the Arbitration Panel finds that this matter is properly before

the Arbitration Panel for a final and binding resolution between all of the parties hereto as to all of the claims and all of the defenses thereto. This matter having proceeded in arbitration through pre-hearing proceedings, discovery and evidentiary hearings, the Panel hereby addresses the claims and issues raised in this matter as follows:

V. DISCUSSION REGARDING CLAIMS OF PROCEDURAL AND SUBSTANTIVE UNCONSCIONABILITY.

A. The Claims.

The claims of the Claimant Class were initially and generally set forth in a First Amended Class Action Complaint filed in the Circuit Court of the First Circuit on March 8, 2013. Following proceedings conducted before the Circuit Court of the First Circuit which determined that the claims were arbitrable and that the claims were to proceed as a class action, this matter was referred to Dispute Prevention and Resolution, Inc., to process and administer the arbitration of this matter. The Claimant Class filed a Statement of Claims in this arbitration on June 29, 2018 which, in pertinent part, set forth the claims of the Claimant Class as follows:

The Developer Defendants failed to install adequate and complete wind-resisting systems, particularly when they failed to adequately anchor the framing to the foundations of the homes. ...

Because the inadequate high-wind protection systems do not provide sufficient load paths, Plaintiffs—the current owners of the Ocean Pointe Homes—face a substantial risk that their homes will be unable to withstand the next hurricane that strikes Oahu and will suffer significant structural damage and even be completely destroyed. The damaged homes will, in turn, become a source for flying debris and cause additional harm to neighboring homes, and this will increase the risk that Plaintiffs, their families, and their neighbors could be seriously injured or even killed by flying debris. Because the high-wind protection systems installed in Plaintiffs' homes have insufficient wind protection systems, Plaintiffs' homes have diminished in value in an amount needed to replace the inadequate wind protection systems and fix related cosmetic damage to the homes.

Based on the allegations in the operative First Amended Complaint, Plaintiffs alleged the following counts:

- I. Strict Products Liability
- II. Breach of Implied Warranty
- III. Breach of Express Warranty
- IV. Breach of Contract Against Haseko Homes, Ke Noho Kai, and Fairway's Edge

V. Breach of Contract Against Haseko Construction and Coastal

VI. Negligence

VII. Unfair Business Practices Violation of HRS §§ 480 *et seq.*

Plaintiffs seek the following relief:

1. Damages according to proof, including the amounts needed to repair or replace the defects in each class home and/or to compensate the class home owners for the diminution in value of each class home;
2. Declaratory and injunctive relief;
3. Treble damages;
4. Prejudgment interest;
5. Attorney fees and costs; and
6. Such other and further relief the Court may deem just and proper.

B. Discussion Regarding Enforceability of Contractual Waiver and Remedial Limitation Provisions.

An initial fundamental contention raised by the parties in this matter concerns the applicability and enforceability of the terms of the Sales Contract and, more specifically, the terms of the HBLW. As previously noted, it has been determined that the arbitration provisions of the sales contract and HBLW are enforceable. However, the parties in this action disagree as to the applicability and enforceability of the waiver and remedial provisions contained in the HBLW. The Haseko Respondents assert that the terms of the HBLW are applicable and should be binding. The Haseko Respondents submit that in accordance with the terms and provisions of the HBLW, the claims of the Claimant Class--whether founded upon liability theories including but not limited to strict products liability, breach of implied and express warranties, breach of contract, negligence and/or unfair business practices under the provisions of HRS Chapter 480 have all been waived and have been replaced by a limited warranty pertaining to construction defects.

The Claimant Class contends that the terms and restrictions contained in the HBLW are unconscionable and unenforceable and, accordingly, the Claimant Class is entitled to assert and pursue their common law contract and statutory claims against the Haseko Respondents.

Unconscionability has been recognized by the Hawaii Supreme Court as a general contract defense. Specific provisions of a contract, or even the entirety of a contract, may

be unenforceable if determined to be unconscionable. In Narayan v. The Ritz-Carlton Development Company, Inc., SCWC-12-819; 2017 WL 3013022 (Haw. July 14, 2017)), the Hawaii Supreme Court ruled that:

Under Hawai'i law, unconscionability is recognized as a general contract defense:

Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party. Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. *City & Cty. of Honolulu v. Midkiff*, 62 Haw. 411, 418, 616 P.2d 213, 218 (1980) (quoting *Williams v. Walker-Thomas Furniture Co.*, 350 F.2d 445, 449 (D.C. Cir. 1965)); see also *Lewis v. Lewis*, 69 Haw. 497, 501, 748 P.2d 1362, 1366 (1988) ("The basic test is whether . . . the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . .").

The Court explained that unconscionability encompasses two principles; one-sidedness and unfair surprise, which the court also characterized as procedural and substantive unconscionability. In assessing whether contractual provisions are procedurally and/or substantively unconscionable, many factors can be pertinent, including, but not limited to, considering the fairness of the contractual process, the one-sidedness of the agreement, a disparity in bargaining power, a lack of meaningful choice for the weaker party, the presentation of a contract on a "take it or leave it basis", the presence of exculpatory provisions disfavored by the law, or which are contrary to public policy, the presence of provisions limiting recoverable damages when coupled with inequality of bargaining power, the presence of provisions which unreasonably limit discovery and the presence of unreasonable confidentiality provisions. When a contract or a contractual provision is determined to be unconscionable, the unconscionable provision may be severed and the lawful remainder of the agreement can be enforceable where the unenforceable provision is not central to the parties' agreement. However, if unconscionability "pervades the agreement" a court may choose to refuse enforceability of the entire agreement. (Id.)

Consistent with such statements of contract law principles, the Arbitration Panel notes that the terms of the HBLW also expressly provide for severability of any provisions found to be unenforceable. The HBLW states:

If any provision of this LIMITED WARRANTY is determined to be unenforceable, such a determination will not affect the remaining provisions...*The issue of enforceability, as well as all other issues, will be determined by Binding Arbitration as provided for in this LIMITED WARRANTY.* (italics supplied)

As noted previously, the agreement to arbitrate as contained in the Sales Contract and HBLW has been determined to be enforceable. With regard to the contentions of the Class Claimant's that the waiver and remedial provisions HBLW are unconscionable and thus unenforceable, the Arbitration Panel notes the following and finds and awards as follows:

- a. the sales contract and HBLW are part of a detailed and integrated set of contractual documents presented to buyers at, or shortly before, signing;
- b. the nature of the contractual relationship can be fairly described as adhesive because the developer and builder entities presented to the prospective buyers a prepared set of contractual documents in a setting where the issues related to the technical terms in the Sales Contract (as opposed to price and time of closing terms) were not expected to be open for negotiation and where the contractual documents were presented to buyers essentially on a "take it or leave it" basis;
- c. in the presentation of the Sales Contract documents, the HBLW was presented as an attached exhibit E to the signed sales contract and the purchaser was asked to sign an Acknowledgment of Receipt and Agreement to Read attached as Exhibit F to the Sales Contract. The Acknowledgment of Receipt and Agreement to Read contains a representation or commitment on the part of the purchaser which states "I/we agree that, prior to closing/settlement on the home to which this Agreement relates, I/We will read the sample Home Builder's Limited Warranty in its entirety and will contact the builder with any questions...." Such provisions encourage the purchaser to subsequently read the HBLW some time prior to closing/settlement which occurs many months after the initial signing of the Sales Contract and to obtain advice of counsel if desired to explain its terms;

- d. the Sales Contract in Article XIII discloses the existence of the HBLW and explains that it limits the responsibility and conditions under which the warranty would be valid or applicable. A copy of the HBLW is provided. The disclosure states that "Purchaser further agrees that Purchaser will read the sample Limited Warranty in its entirety prior to the Closing Date." The provision further states that such review will not allow the Purchaser to alter the terms of the Limited Warranty nor delay or cancel the Sales Contract. It then requires the Purchaser to deliver a fully executed "Warranty of Receipt and Agreement to Read" prior to closing. The Sales Contract also contains an exhibit "F" which is an acknowledgment of receipt and agreement to read the Limited Warranty. These provisions appear to encourage the Purchaser to read the terms of HBLW and to consider having it reviewed by an attorney after the Sales Contract is signed and before the Closing Date which generally occurs several months later. Such encouragement to the Purchaser to read and have reviewed the HBLW the Sales contract is potentially misleading and confusing;
- e. substantively, the HBLW provides for:
1. a waiver of all express or implied warranties provided by Hawaii law in terms broad enough to include warranties of habitability, merchantability and fitness for intended or a particular use;
 2. a waiver of the right to seek the damages otherwise recoverable under Hawaii law as well as all other legal or equitable remedies available to a purchaser under Hawaii law;
 3. a waiver of the purchaser's right to pursue any other parties or entities who might share liability under Hawaii law, including subcontractors, vendors, suppliers or design professionals under any common law or statutory theory of liability;
 4. a waiver of all claims founded upon negligence or strict liability;
 5. a waiver of all statutory claims, including claims for unfair and deceptive acts and or practices under HRS Chapter 480; and
 6. a waiver of all claims for consequential or incidental damages.

- f. In place of the above waived claims, the HBLW provides a replacement warranty for "Construction Defects" which are defined as:
1. "any performance standards or guidelines or other documents or manuals that contain OUR building standards, that were provided to YOU at or prior to closing on the HOME,... Absent such standards, the Residential Construction Performance Guidelines published by the National Association of Home Builders, in effect at the time of closing on the HOME.... Absent a specific standard in the documents identified above, building practices and standards in use in the region of the country in which the HOME or the COMMON elements are located shall apply;
 2. Consideration as to whether the magnitude of the flaw or imperfection:
 - materially affects the structural integrity of the HOME or COMMON ELEMENTS; or
 - jeopardizes the life or safety of the occupants; or
 - results in the inability of the HOME or the applicable COMMON ELEMENTS to provide functions that can reasonably be expected in such a HOME or COMMON element;
 3. Consideration as to whether a condition is the result of normal wear and tear (conditions that are normal wear and tear or are caused by normal wear and tear are not CONSTRUCTION defects);...
 4. ...
 5. ...
 6. Recognition that any conditions resulting directly or indirectly from or worsened by changes, additions, alterations or other actions or omissions by the HOMEOWNER ... will not be considered a CONSTRUCTION DEFECT (this includes changes to the topography, drainage or grade of the property)...
- g. With regard to remedial provisions, the HBLW limits any remedy to the arbitrators' determination as to whether a "Construction Defect" exists and as to whether it is the Builder's responsibility. The arbitrators are then to determine the scope of any repair or replacement and the Builder's cost for performing any such repair or replacement as well as the diminution in fair market value. The HBLW then provides that it is *the Builder's sole option to*:
1. repair or replace the construction defect;

2. pay the homeowner the actual amount it would cost the Builder to repair or replace the defect; or
3. pay the homeowner an amount equal to the determined diminution in fair market value.
- h. The HBLW further provides that each party is to bear their own attorneys' fees and costs, including expert costs and it also provides that arbitration filing fees and other arbitration fees are to be divided and equally paid by the Builder and Homeowner with the additional proviso that the arbitrators may award such filing fees and arbitration fees to the prevailing party.
- i. ...
- j. ...

The Parties stipulated in the arbitration that the HBLW, irrespective of whether it is marked sample or not, is the warranty at issue in this arbitration. See Oct. 20 p.m. Tr. at 1288:8-1291:9.

Contractual agreements to waive rights and claims can be enforceable and are not necessarily by themselves unconscionable. The Arbitration Panel notes that in the course of the sales contract signing process, the buyer receives a sample copy of the HBLW and signs an agreement that the buyer will read it and acknowledges an understanding that the buyer has the right to obtain advice of counsel to explain the terms of the documents. However, the Sales Contract and the HBLW provide that the buyer is not allowed to alter the terms of the HBLW, or to cancel the transaction. Thus, by the time the buyer signs the sales agreement, including the acknowledgment of receipt and awareness of the HBLW attachment, the buyer is already purportedly bound to the terms of the HBLW.

In addition, substantively, where a construction deficiency is determined to exist, the remedial provisions which limit a remedy to be at the sole option of the Builder to either pay for the cost of the repair of the defective condition, or to pay the homeowner the actual amount that it would cost the Builder to repair the construction defect, or to pay the homeowner an amount equal to a determined diminution in fair market value coupled with the provision requiring each party to pay their respective attorneys' fees and costs, including expert costs effectively ensures that any remedy will constitute a net loss to the homeowner.

Under such provisions, a homeowner who has to hire an attorney and construction experts to establish that one or more construction defects exists will thus never be able to be made whole under the terms of the HBLW and the Sales Contract.

Based on a careful consideration of the totality of the Sales Contract, the HBLW and the related documentation, including the terms and conditions related to the waivers of rights and the limitations of remedies provisions set forth in the HBLW which are noted above, the Arbitration Panel finds, determines and awards that the waivers of rights provisions and the remedial limitation provisions in the HBLW are both procedurally and substantively unconscionable under applicable Hawaii law.

The Arbitration Panel further finds, determines and awards that the waivers of rights provisions and remedial limitation provisions in the HBLW are unenforceable under applicable Hawaii law and accordingly that all of these terms must be severed from the Sales Contract, the HBLW and all related documentation thus leaving the parties to their contractual, statutory and tort claims, rights and defenses.

VI. DISCUSSION REGARDING WIND SAFETY DESIGN CLAIMS.

In this action, the Class Claimant's assert that the wind safety design system as built in the Project Homes constitutes a construction defect. The principal objective of a wind safety design for a house structure is to protect the homes from racking and separation of roofs and walls and floors from foundations due to lateral and uplift forces created by either seismic and/or wind (hurricane) forces. For the Project Homes a system of connectors, clips, metal straps, anchor bolts and fasteners was designed and constructed. An issue raised in this case is whether the homes as constructed meet or satisfy the minimum wind safety requirements set forth in the 1997 Uniform Building Code (97 UBC) which was acknowledged by all parties to be the applicable minimum building code applicable to the construction of the Project Homes.

The Haseko Parties assert that the homes as constructed do comply with the 97 UBC and together with the designed and constructed safety factors inherent in the design are functional and safe and do not constitute a construction defect. The Claimant Class, however, asserts that the structural engineers for the Project Homes specified and that the Honolulu building authorities then approved a wind safety design of the Project Homes that called for the homes to be built to meet the higher standards of the 2003 International

Building Code (03 IBC). The Claimant Class submits that, as designed and constructed, the wind resistance protection system for the Project Homes is deficient with respect to the following:

1. the fasteners or shot pins that were utilized to secure the steel framing of the Project Homes to the foundation slabs are corroding and either have failed, or will fail; and
2. elements of the wind resistance system at the roof and framing anchors at the second floor of certain of the Project Homes (garages of homes in Roll 15 (Area III), Town Homes 1, 2, 11, 12 and 21 and garages of homes in Roll 17 (area IIE) , SF homes (301, 302, 303, 304, 401, 402, 403, 404, 501, 502, 503 and garages) in Roll 18 (Area III) and SF homes (305, 405 and garages) in Roll 19 (Area III).

A. Discussion Regarding Shot Pins.

For the Project Homes, at the floor level where the walls of the structures are connected to the concrete slab and foundations, the design of the Project Homes called for the use of zinc coated steel fasteners or “shot pins” to be ramset by powder actuated charges to fasten the bottom’s steel framing sill plates to the concrete slab at the thickened edge footings. The functionality and degree of corrosion that has been found to exist with regard to shot pins that have been extracted for study was a highly disputed issue between the parties during their presentations in this case.

In two sets of destructive testing, a total of approximately 287 shot pins were extracted from 21 Project Homes. Examination of the extracted shot pins showed that a significant proportion (almost one third or 92 out of 287) of the installed shot pins fractured and thus could not be extracted intact. Most of the fractured shot pins exhibited more significant degrees of corrosion along the shaft of the shot pin and degrees of corrosion into the core of the shaft. Virtually all extracted shot pins showed corrosion which ranged from mild to extensive along the portion of the shaft of the one and one half (1 and ½) inch shot pins that was embedded into the concrete foundation. The severely corroded shot pins exhibited a significant loss of cross-section and thus a loss of functionality.

The corrosion was alleged by the Claimants to be caused by the presence of corrosive chlorides in the fill used throughout the Project. One of the construction experts

presented by the Haseko Parties opined that 10% of the shot pins exhibited greater than 10% loss of cross-section. That expert acknowledged that a 10% loss of cross-section was sufficient corrosion to be considered a functional failure of the shot pin. In addition, as noted above, approximately 30% of the extracted shot pins were fractured. Based on this and the weight of the other evidence presented the Arbitration Panel finds and concludes that up to 40% of the extracted shot pins were demonstrated to be problematic as of the time of the hearing in this matter.

In addition the Arbitration Panel finds that it is more likely than not that a greater proportion of the shot pins will eventually corrode, as that process has clearly started for virtually all of the shot pins and there was no testimony from any expert that anything could be done to stop that corrosion from continuing to progress.

B. Discussion Regarding Slab and Foundation Construction

The Ocean Point Project is a Large Community Development Project on the Ewa Plain, an area which in geologic time had been submerged under the ocean. The coralline shelf in modern times is covered with a relatively shallow mantle of soil. Development of parcels in the Ocean Point Development generally called for the removal of the soil overlay and regrading with compacted coralline fill material. The development of the Ocean Point area contemplated the dredging and construction of a marina or lagoon which produced large quantities of coralline rock material which the developers contemplated would be used as a stable fill material under the homes planned for construction in the area. The record in this case reflects that such coralline fill material was in fact utilized for the fill material under the Project Homes.

During the course of development of the Haseko related subdivision projects, professional geotechnical engineering investigations were conducted of the soils conditions for the areas under the Project Homes and for the soil conditions of the contemplated coralline fill material. The soils engineering reports confirmed and reported that the coralline fill material was to be considered very corrosive or extremely corrosive due to the presence of chlorides and sulfates in that material. The soils engineering reports generally called out that foundation excavations should be in excavations that are free of "deleterious materials". Fill materials containing chlorides and sulfates are regarded as "deleterious materials". The soils engineering reports contain no specific

guidance for the protection of steel that may be embedded in foundations. The soils engineering reports did contain more specific discussion of recommended actions with reference to corrosion protection of water lines buried in materials containing very corrosive or extremely corrosive elements but the reports did provide a general statement that "other structures" exposed to the ground should be appropriately designed to withstand such corrosive levels.

The Project Homes are constructed on a layer of engineered coralline fill material. While some corrosion protection design elements (such as epoxy coated anchor bolts; a moisture barrier layer underlying the interior concrete slabs; and a protective membrane underlayment for the steel foundation sill plates) were incorporated into the design and construction of the Project Homes, no moisture barrier material was installed under the thickened edge footings and only zinc coated shot pins, which are not sufficiently resistant to corrosion from chlorides, were used to secure the sill plates to the concrete foundations.

Over the span of the 10 to 15 years of the construction of the Project Homes, the evidence presented in this case shows that virtually all of the extracted shot pins exhibited some degree of corrosion, ranging from mild to significant along the shot pins shafts, with over 32% of the shot pins being fractured upon removal and with most of those showing that the degree of corrosion extended into the core or shank of the shot pins.

Based on a preponderance of the evidence, the Arbitration Panel finds, concludes and awards that a significant proportion of the extracted shot pins exhibited sufficient degrees of corrosion along the shanks and in the cores of the shot pins and that the chlorides present in the fill were the most likely factor contributing to the corrosion of the shot pins.

The shot pins are an integral component of the structural design of the house structures intended to protect the homes from uplift and lateral wind forces. The Arbitration Panel finds, determines and awards that the shot pins are not expected to fracture upon manual extraction and that the great majority of the fractured shot pins exhibited corrosion into the core of the shot pins shanks such that it is reasonable to conclude that the fractured shot pins are failed and unreliable. Some of the shot pins have corroded to the point that one can reasonably conclude that the corroded shot pin has lost

a significant extent of its functional capacity to provide the designed wind resistance protection. Together with the substantial proportion of the remaining shot pins exhibiting different degrees of corrosion ranging from minor to substantial with loss of section, pitting and scaling, the Arbitration Panel finds determines and awards based on a preponderance of the evidence that the demonstrated corrosion is a progressive condition such that it is reasonable to expect that the corrosion of the shot pins will continue to further deteriorate as time passes. Such demonstrated functional failure of the shot pins due to corrosion and the likely progressive worsening of the condition supports the Arbitration Panels' finding and conclusion that the wind safety design system of the Project homes will not perform as designed over the reasonable anticipated usable life of the constructed homes and that such condition constitutes a "Construction Defect" as defined by the HBLW and under commonly accepted principals of construction law.

The Arbitration Panel is concerned that, unless the wind resistance system of the Project Homes are appropriately remediated, upon full disclosure of these issues to prospective future buyers of the Project Homes they may well be unmerchantable as a practical matter.

The Arbitration Panel thus finds, determines and awards that the Claimants have established liability and are entitled to recover damages from Respondents HASEKO HOMES, INC., KE NOHO KAI DEVELOPMENT, LLC and FAIRWAY'S EDGE DEVELOPMENT, LLC (together the "Liable Respondents") for this defect (hereafter the "Defect") under each of the following alternative theories pled by Claimants:

1. Breach of contract and breach of express warranty that there would be no "Construction Defects" under the HBLW.
2. Breach of the implied warranty of habitability under Hawaii law.
3. Negligence in the construction of this aspect of the Project under Hawaii law.

The Arbitration Panel thus finds, determines and awards, based upon a preponderance of the evidence, that the portion of the wind resistance system at the foundation slabs of the Project Homes that relies upon the strength and function of the corroding shot pins requires remediation under each of the above theories of liability.

C. Discussion Regarding Unfair and Deceptive Acts and Practices, Treble Damages and Claims of Strict Liability,

The Arbitration Panel further finds, determines and awards that Claimants have not met their burden to establish liability for the Defect under any of the above theories of liability in this arbitration as to any of the Respondents.

The Arbitration Panel further finds, determines and awards that Claimant Class has not met their burden to establish liability for the Defect as an Unfair or Deceptive Trade Practice, under HRS Chapter 480, or upon or upon any theory of strict liability or upon any other theory of liability which may have been plead by the Claimants (together hereafter the "Other Theories"). Thus, the Arbitration Panel further finds, determines and awards that liability against all Respondents under all of the Other Theories except for those stated above is hereby denied.

D. Discussion Regarding Damages Related to Failed Shot Pins

Upon review and consideration of the extensive evidence submitted regarding the anticipated cost to remediate the corroding shot pins, the Arbitration Panel finds, determines and awards based on a preponderance of the evidence that the reasonable cost to remediate this Defect is Fifteen Million Eight Hundred and Ten Thousand Dollars, (\$15,810,000.00) which sum is due from the Liable Respondents to the Claimants.

E. Discussion Regarding Wind Resistance at 2nd Floor and or Roofs of Structures.

The project design by the Haseko Parties' design professionals called for the Project to meet the wind resistance standards set forth in the 03 IBC. In this case it is not disputed that the Honolulu building code applicable to the construction of the project homes was the 97 UBC. Under the 97 UBC, the wind resistance requirements were based upon the constructed homes being designed to resist the force of 80 mph windspeeds equivalent to 3 second gusts of 105 mph winds. However, the design professional engineer engaged by the Haseko builders sought to design the homes to withstand the higher wind resistance requirements standards set forth in the 03 IBC. The approved building plans for the project homes provided that the project homes were to be constructed to the following design criteria:

DESIGN CRITERIA:

1. THE STRUCTURAL DESIGN IS BASED ON THE PROVISIONS OF THE INTERNATIONAL BUILDING CODE, 2003 EDITION, AS AMENDED BY THE CITY & COUNTY OF HONOLULU, INCLUDING THE FOLLOWING:

A. DESIGN UNIFORMLY DISTRIBUTED LIVE LOADS

1. ROOF (SLOPE \geq 4:12) = 16 PSF
(SLOPE $<$ 4:12) = 20 PSF
2. FLOOR (RESIDENTIAL) = 40 PSF

(DESIGN LIVE LOADS HAVE BEEN REDUCED IN ACCORDANCE WITH IBC SECTION 1607)

B. DESIGN UNIFORMLY DISTRIBUTED SUPERIMPOSED DEAD LOADS

1. MISCELLANEOUS = 5 PSF

C. WIND - EXPOSURE "C" = 110 MPH

2. ALL MATERIALS AND WORKMANSHIP SHALL CONFORM WITH THE REQUIREMENTS OF THE ABOVE REFERENCED CODE

Such design criteria reflect the project engineer's conservative design intent to provide above code wind resistance protection. The design criteria even reflect the engineer's aim to design the homes to meet wind exposure "C" winds of 110 mph, even though the homes are more appropriately classified as being in the lower wind exposure "B" category. The project engineer thus designed the homes to an "above code" standard. As designed and constructed the Project Homes met and exceeded the requirements of 97 UBC, the applicable building code but they did not meet the "above code" standard discussed above.

The Arbitration Panel finds, determines and awards, based upon a preponderance of the evidence, as follows:

1. That, as designed and constructed, those certain portions of the second floor and roof areas of the wind resistance system above the slab foundation of certain of the Project Homes (garages of homes in Roll 15 (Area III), Town Homes 1, 2, 11, 12 and 21 and garages of homes in Roll 17 (area IIE), SF homes (301, 302, 303, 304, 401, 402, 403, 404, 501, 502, 503 and garages) in Roll 18 (Area III) and SF homes (305, 405 and garages) in Roll 19 (Area III)

together hereafter the "Affected Areas" were built to the 1997 code requirements and are thus code compliant with that code.

2. That compliance with the 1997 code is sufficient to support the Arbitration Panel's determination that the Affected Areas do not constitute a construction defect under the HBLW, or applicable law and;
3. That liability is therefore denied as to all of the claims of Claimants against all of the Respondents as to the Affected Areas; no remediation of the Affected Areas is required and thus no damages are therefore due to the Claimants on this portion of their claims.

The Arbitration Panel finds, concludes and awards, based on a preponderance of the evidence presented in this case that the Haseko Parties have not engaged in unfair or deceptive acts or practices nor in otherwise unlawful practices. Thus, the Arbitration Panel concludes that the claims of the Claimant Class founded upon HRS Chapter 480, or other wrongful conduct are hereby denied.

F. Discussion Regarding Claim For Prejudgment Interest.

It is the intention of the Arbitration Panel that this Partial Final Arbitration Decision and Award together with a Supplemental Final Arbitration Decision and Award which addresses reserved claims relating to the award of attorneys' fees and costs shall together constitute the Final Arbitration Award to be issued in connection with this matter.

Prejudgment interest at the statutory rate shall accrue on the amounts awarded hereunder from 90 days after the date that the Arbitration Panel's Supplemental Award is issued with regard to the award of attorneys' fees and costs which is reserved by the Arbitration Panel hereunder, or until the earlier entry of a court judgment on the Award issued hereunder, or until the date of payment and satisfaction of the amounts awarded hereunder, whichever event occurs first.

G. Discussion Regarding Retention Of Jurisdiction.

The Arbitration Panel finds, determines and awards that Claimants are determined to be the prevailing party in this matter and are therefore entitled to an award of their reasonable attorneys' fees and recoverable costs together with the costs of the arbitration proceeding in this matter.

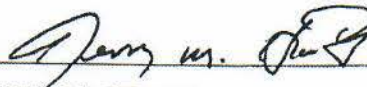
Pursuant to the stipulation and agreement of the Parties, the Arbitration Panel retains jurisdiction in this matter to address Claimants' claims for costs and reasonable attorneys' fees. Claimants shall submit their declaration with an accounting of such costs; reasonable attorneys' fees and arbitration expenses together with any supporting documents related thereto to the Arbitration Panel by email within 20 business days of the date of this Partial Final Award. Respondents shall submit any responsive statement and supporting documents within 20 business days thereafter. Upon and after such submissions the matter of costs of suit and reasonable attorneys' fees shall be deemed submitted to the Arbitration Panel for determination in a supplemental award which shall be provided within 30 days of the Respondent's submission unless otherwise agreed.

This Partial Final Award is intended to and shall resolve any and all claims and defenses thereto by all of the parties hereto which were submitted to the Arbitration Panel by the parties in this matter except for the issues specifically reserved as to the attorneys' fees and costs claims noted above which will be addressed in a subsequent supplemental arbitration award. Any claim, counterclaim or defense not specifically addressed above is hereby denied with prejudice.

This Partial Final Award may be executed in counterparts, electronic signature or by facsimiles, and any set of counterparts, electronic signatures or facsimiles which are collectively executed by all members of the Arbitration Panel shall be sufficient proof of the execution of this Partial Final Award.

DATED: Honolulu, Hawaii, February 8, 2021.

SIDNEY K. AYABE



JERRY M. HIATT

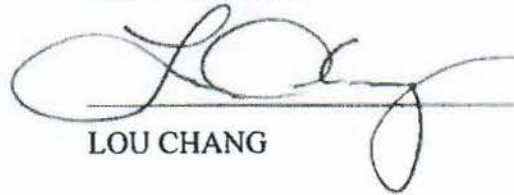
LOU CHANG

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SIDNEY K. AYABE

JERRY M. HIATT



LOU CHANG

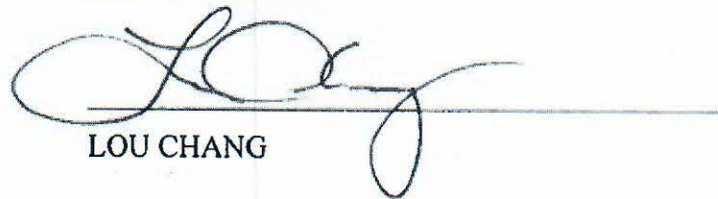
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DATED: Honolulu, Hawaii, February 8, 2021.



SIDNEY K. AYABE

JERRY M. HIATT



LOU CHANG