Circuit Court for Montgomery County
Case No. 457564

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

No. 581

September Term, 2019

MB MAPLE LAWN LLC, et al.

v.

CONSUMER PROTECTION DIVISION

Kehoe,
Graeff,
Wells,

JJ.

Opinion by Kehoe, J.

Filed: May 21, 2020

This is an appeal from a judgment of the Circuit Court for Montgomery County, the Honorable Deborah L. Dwyer, presiding, that affirmed an order of the Consumer Protection Division[1] of the Office of the Attorney General dated October 19, 2018. Consistent with that order, the court directed appellants to submit their dispute with Chhaya Patel Shah and Tushar Kanaiyal Shah to arbitration. The appellants are MP Maple Lawn LLC, MB Oak Creek LLC, and MB Holly House Meadows LLC. They are affiliates of Mitchell & Best Homebuilders, LLC. The appellee is the Division. Appellants present two issues, which we have reworded:

1. Was there substantial evidence in the record to support the Division's determination that the Shahs submitted a written claim to the Division, and that the Division produced the Shah's written claim to appellants in discovery?

2. Is it within the arbitrator's jurisdiction to decide whether the Shahs submitted their

[1] The Consumer Protection Division exercises both executive and quasi-judicial powers. The Division refers to itself as the "Agency" when it acts in a quasi-judicial capacity and as the "Division" when it exercises its investigative and enforcement capacities. In the present case, the Division exercised its quasi-judicial powers through William Gruhn, its chief. We will refer to him by name when he was acting in a quasi-judicial role.

claim on a timely basis?[2]

We agree with the circuit court and will affirm its decision.

Background

We can sometimes fulfill our obligations as an intermediate appellate court without necessarily "indulging the conceit that we could somehow say it better" than did the circuit court. *See Sturdivant v. Maryland Dep't of Health & Mental Hygiene*, 436 Md. 584, 587–88 (2014). This is such a case. We would be hard-pressed to improve upon Judge Dwyer's thorough and lucid summary of the factual and legal background to this appeal contained in her memorandum opinion and order. We have attached that document as an appendix for those readers who wish to delve further into the history of this matter. What follows should suffice for our purposes.

In April 21, 2016 and after a prolonged investigation, the Consumer Protection Division of the Office of the Attorney General filed a statement of administrative charges

[2] Appellants articulate the issues as follows:

> 1.Whether there was substantial evidence for the Consumer Protection Division to find that the Shahs submitted a "written claim" within the meaning of the FOBC that was produced by the Consumer Protection Division in response to the Appellants' discovery requests.
>
> 2. Whether the Consumer Protection Division abused its discretion when it found that there was not substantial evidence in the record before it that the documents purportedly submitted by the Shahs were submitted prior to the Consumer Protection Division's filing of the Notice of Claim, which is required pursuant to the FOBC for an agreement to arbitrate to exist, and then delegated determination of when the materials were submitted and thus whether a claim arbitrate with the Shahs exists to the arbitrator.

against Mitchell & Best, some or all of its principals, and a number of its affiliates, including appellants. The allegations in the complaint involved Mitchell & Best's practices in its business of building and selling homes in Maryland. Several months later, the parties settled. The settlement was documented in a final order by consent dated October 19, 2016 which was signed by Mitchell & Best, the other respondents, and Willian Gruhn, the chief of the Division.

Among the many provisions in the consent order were two which required Mitchell & Best to resolve by arbitration claims made by dissatisfied customers against certain affiliates, including appellants. In paragraph 63, Mitchell & Best agreed to arbitrate claims arising out of leaky windows. The maximum recovery by any homeowner was capped at $20,000. This is the process that the Shahs are attempting to use. But the universe of eligible claims was finite. Paragraph 63 states that, among other criteria, arbitrable claims were limited to those:

> that were filed in writing with the [Division] and produced by the Division in response to Respondents' document request in the pending proceeding, prior to filing of the Statement of Charges.

Paragraph 64 sets out an arbitration process for owners who have claims for structural damage. Mitchell & Best's aggregate liability for both types of claims is capped at $300,000.

Paragraph 72 of the consent order provides that the Chief of the Division "shall" resolve any disputes regarding the interpretation of the consent order and that such decisions are subject to judicial review pursuant to State Government Article § 10-222.

After the consent order was signed, appellants took the position that they were not obligated to arbitrate their dispute with the Shahs. They asserted that the Shahs never filed a claim with the Division and, even if they did, there was no way of telling whether the claim was filed before April 21, 2016, which was the date of the filing of the Statement of Charges. On October 10, 2018, Mr. Gruhn signed a supplemental order addressing these contentions.

Mr. Gruhn concluded that the Shahs had filed a claim with the Division. He explained:

> 13. Although there must be a written consumer claim, the [consent order] does not require that the consumer claim take any particular form.
>
> 14. Here, the parties agree that (1) the [Division] received a written timeline and written emails between the Shahs and the [appellants], (2) that the [Division] produced to the [appellants] the timeline and emails, and (3) that the Shahs were specifically identified in the [consent order] as consumers who complained to the Division about defective windows.
>
> 15. The seven page timeline that the Shahs provided, which starts in 2006 and runs into 2011, clearly shows the problems that they encountered. That timeline was supported by emails between the Shahs and the [appellants] reflecting their communications relating to the problems that the Shahs were experiencing and the pictures that were taken of their house. The documents are clearly sufficient to establish that the Shahs had a claim that their windows were defective and therefore constitute a written consumer claim in accordance with Paragraph 63 [of the consent order].
>
> 16. While the undisputed facts are sufficient to establish that the Shahs satisfy the "written claim" requirement . . ., the [appellants]s contest whether the written claim was submitted "prior to the filing of the Statement of Charges The materials produced by the [Division] to the [appellants] do not show when they were provided to the Division. The [appellants]s argue that the Shahs were not mentioned in the statement of charges and that "the [d]ocuments pertinent to the complaint by [Ms. Shah] produced in supplemental discovery response on September 23, 2016. . . . The [Division] contends that an affidavit submitted by investigator establishes that the claim was submitted prior to the filing of a statement of charges.

> 17. The determination of when the Shahs submitted their claim to the Division requires resolution of a factual dispute. That factual dispute is capable of resolution as part of the arbitration proceeding itself. Accordingly the question of whether the Shahs submitted a claim prior to the filing of the Statement of Charges should be determined in the first instance by the arbitrator.[Footnote]
>
> [Footnote] It is unnecessary that all of the materials precede the following of the statement of charges. As long as the materials that were submitted prior to the filing of the Statement of Charges reflect that the Shahs experienced a problem with the windows, the requirements of Paragraph 63 are satisfied. For example, the timeline standing alone satisfies the written claim requirement of Paragraph 63.

Dissatisfied with these rulings, appellants filed a petition for judicial review. As we have related, the circuit court affirmed Mr. Gruhn's decision.

Analysis

1.

Appellants present several contentions to support their position that they did not agree to arbitrate their dispute with the Shahs. Most of them start with the premise that questions as to the existence and enforceability of arbitration agreements are matters for the courts to decide. Because of this, appellants say, Mr. Gruhn had no authority to resolve their contention that the emails that the Shahs forwarded to the Department did not constitute a "claim" for the purposes of the consent order. Ancillary to this contention is their argument that Mr. Gruhn erred in delegating responsibility for deciding whether the Shah's emails were timely received by the Department. According to appellants, only a court can decide these issues.

Appellants are certainly correct that, in Maryland, it is the role of courts to resolve disputes as to the validity or enforceability of arbitration agreements. *See, e.g.*, *Holmes v. Coverall North America, Inc.*, 336 Md. 534, 546 (1994); *Gannett Fleming, Inc. v. Corman Constr., Inc.*, 243 Md. App. 376, 390 (2019). However, this general principle doesn't assist appellants in the case before us.

The fatal difficulty with appellants' argument is the language of the consent order. It requires appellants to arbitrate a narrowly-defined group of claims. The consent order also states that the chief of the Division "shall resolve any disputes that arise concerning" the terms of the consent order. The consent order identifies the Shahs by name as persons who complained to the Division about Mitchell & Best's business practices. Whether the Shahs' communications with the Division constitute a "claim" for the purposes of the arbitration provision certainly "concerns" the terms of the consent order. Having agreed to a dispute resolution process that explicitly *authorizes* and *requires* the chief of the Division to resolve such disagreements, appellants are not in a position to ask us to change the parts of the consent order that they don't like.

In light of the clear and unambiguous language in the consent order, the only way that appellants could prevail on this issue would be to show that parties are prohibited by law or public policy from agreeing that disputes pertaining to arbitrability can be resolved in a manner other than by resort to the courts. Because appellants didn't make this argument, much less substantiate it, there is no reason for us to further explore the issue.

Finally, appellants can hardly be surprised by the fact that the Shahs are seeking arbitration. As Mr. Gruhn noted in the supplemental order, the Shahs are specifically mentioned in the consent order as an example of homeowners allegedly injured by appellants' failure to make timely and effective repairs. If appellants didn't want to resolve their dispute with the Shahs through arbitration, then they should have refused to sign the consent order. We will not permit appellants to engage in unilateral after-the-fact rewriting of the terms of the consent order.[3]

2.

This brings us to appellants' second contention, which is that we should set aside Mr. Gruhn's ruling that the material submitted by the Shahs to the Division constituted a "claim" for purposes of the consent order.

Appellants assert that we should review Mr. Gruhn's decision for clear error. We do not agree. Whether Mr. Gruhn was correct in deciding that the Shahs' emails constituted a claim is more appropriately classified as a question of law, which we review under the less deferential *de novo* standard. *Christopher v. Montgomery County Department of Health & Human Services*, 381 Md. 188, 198 (2004). However, in conducting a *de novo* review, we

[3] The consent order's dispute resolution process—a decision by the chief of the Division or his or her designee, coupled with recourse to a judicial review proceeding if either party is dissatisfied—offers the advantages of a prompt resolution at the agency level coupled with a relatively inexpensive process of judicial review. This seems reasonable, particularly in light of the modest amounts of money at stake. The alternative, which would be for appellants to file a petition to a stay of proceedings pursuant to Courts & Jud. Proc. § 3-209 would quite possibly take longer and be more expensive.

ordinarily "respect . . . and give weight to" an agency's expertise when it interprets a statute that it regularly 'administers.'" *Id.*

We have previously set out Mr. Gruhn's reasoning in deciding that the material submitted by the Shahs to the Division constituted a "claim." When read as a whole, the emails are clear as to the Shahs' position: their $1,000,000 plus brand new home leaked, among the defective components were at least some of the windows, it was the builder's obligation to fix the leaks, the builder wasn't doing so, and the leaks damaged the interior of the house and some of their personal property. The emails are also clear as to what the Shahs' wanted the builder to do: fix the leaks, repair the damage to the interior, and reimburse the Shahs for the damaged contents. These emails were accompanied by photographs of the problems and the damage done. Additionally, the Shahs documented the problems and their interactions with Mitchell & Best as time progressed in a seven-page timeline. Mr. Gruhn did not err in concluding that these materials were "clearly sufficient to establish that the Shahs had a claim that their windows were defective and therefore constitute a written consumer claim."

In arguing otherwise, appellants rely largely on *Klein v. Fidelity Deposit and Guaranty Co.*, 117 Md. App. 317 (1997). *Klein* is not particularly helpful to their case. Klein owned and controlled a woefully mismanaged savings and loan that he eventually sold to another financial institution under pressure from state regulators. Klein asserted that a series of letters directed to an insurance company constituted notices of claims for purposes of a claims-made directors and officers liability policy. The common theme of the letters was

that some of the business practices of the savings and loan were problematic. They spoke of "potential claims" and claims that might be asserted against Klein that would trigger the policy. None of the letters specifically stated that suit would be filed against him and, in fact, no suits that would be covered by the policy were ever filed against Klein. About a year after the policy expired, Klein demanded that the insurer reimburse him for his expenses incurred in the sale of the savings and loan on the theory that the sale prevented claims from being made against him and the other insureds and that the insurer had been unjustly enriched by his efforts. *Id.* at 327–28.

The relevant issue before us was whether the letters that spoke of possible lawsuits against Klein constituted notice of a "claim" under the policy. We held that they did not. First noting that "claim" was not a defined term on the policy, we turned to dictionary definitions of the word:

> In the context of insurance, Webster's defines a "claim" as "a demand for something due or believed to be due . . . ." Webster's Seventh New Collegiate Dictionary 203 (G. & C. Merriam Co. 1981). Black's supplies a more technical legal definition of "claim": "[t]o demand as one's own or as one's right; to assert; to urge; to insist. Cause of action." Black's Law Dictionary 224 (5th ed. 1979).

Id. at 333.

We also noted that a claims-made policy:

> provides that if an insured becomes aware and gives notice to an insurer during the policy period of the occurrence of a specific wrongful act or if circumstances that could give rise to a claim, a claim subsequently made arising out of such wrongful act or circumstances will be deemed made during the policy period.

Id. at 334–35 (cleaned up) (quoting *In re Ambassador Group, Inc. Litigation*, 830 F. Supp. 147, 157 (E.D.N.Y.1993)).

Our conclusion that the letters in question were not notices of a claim for the purposes of the insurance policy was also based upon the language of the policy itself (emphasis in original):

> Paragraph 6(a) in Fidelity's policy plainly distinguishes between notice to the insurer that it is the intention of a party to hold an officer or director responsible for wrongful acts and "claims which may subsequently be made against the Directors and Officers" for wrongful acts. Under Paragraph 6(a), *if* there is a notice of a potential claim given to the insurer within the policy period and *if* there later is a claim filed, the notice of potential claim shall be treated as a "claim made" during the policy. If a "claim" and a notice of the intention to make a claim were the same, then the claims after termination provision (Paragraph 6(a)) would be superfluous.

Id. at 335.

Appellants urge us to apply the same reasoning to the Shahs' emails. They assert:

> [N]either the letters in *Klein* nor the timeline, emails and photographs referencing the Shahs made an actual demand for anything. The timeline, emails, and photographs produced by the Division that reference the Shahs, like the letters at issue in *Klein* do not constitute "claims" within the ordinary meaning of the word.

Accepting for purposes of analysis that appellants' reading of *Klein* is correct, their argument is completely unpersuasive for two reasons.

First, appellants' contention that the emails did not "make an actual demand for anything" is unsupported by the record. Consider, for instance, Ms. Shah's June 3, 2007 email to various employees of Mitchell & Best (formatting in original):

> **The connector room leak . . . was known by Mitchell & Best to be problematic . . . and all damages related to this is the sole responsibility of Mitchell & Best along with the proper restoration of all damages [including the] computer. Mitchell & Best can pay the insurance deductible or the cost of the computer, nothing more and nothing less.**

We do not know whether defective windows played a role in the connector room leak. If they didn't, then we can look to an email dated March 12, 2008, in which Ms. Shah stated (formatting in original):

> Your response to simply ignore and wash your hands of any responsibility for selling us . . . a defective house knowing of its water leaking issues **is totally unacceptable**, unethical and quite frankly disgraceful. . . . We are simply asking for justifiable compensation.
>
> I have mailed . . . the receipt of my computer replacement and expect Mitchell & Best **to do the right thing**.

And on September 8, 2008, Ms. Shah wrote:

> We had a leak in the 3rd floor back bedroom window this past Saturday during the storm. I will need someone to come and take a look first thing Monday morning. . . . The 2nd floor master bedroom window sill . . . also had yellow droplets.
>
> * * *
>
> As this new leak takes primary concern, every item on this list is just as important and needs to be addressed to our satisfaction.

If Ms. Shah's emails aren't "claims" as the concept is defined in *Klein*, and "actual demands," we don't know what would be.

Second, as Mr. Gruhn noted, the consent order did not "require[s] a consumer complaint to take any particular form." Certainly there is nothing, either in common sense or the law, that required Mr. Gruhn to hold the Shahs or any other consumer to the standard of specificity required to assert a claim in a directors and officers liability policy. As the

chief of the Division, Mr. Gruhn administers the Maryland Consumer Protection Act. In deciding whether his decision was correct, we "respect . . . and give weight to" his expertise. *Christopher*, 381 Md. at 198. We find no error in his decision.

3.

Finally, appellants dispute whether the Shahs' emails were received by the Department before April 21, 2016, which was the date of the filing of the Statement of Charges. They argue that the record is unclear as to when the Shahs' emails were received by the Division and that is unclear who submitted them to the Division. In response to these concerns, the Division submitted an affidavit from Joshua Schafer, an investigator for the Division, which states that he received the emails from Ms. Shah on March 21, 2015 at 7:51 a.m. Appellants regard this as insufficient and bemoan the fact that they were unable to cross-examine Mr. Schafer.

Noting the dispute, Mr. Gruhn ordered that the issue "should be determined in the first instance by the arbitrator." Crying foul, appellants argue that the issue must be decided by a court. This argument fails because, as we have explained, the consent order provides that all disputes arising out of the order shall be decided by the chief of the Division. Thus, Mr. Gruhn could have resolved the issue himself. His decision to allow the arbitrator to decide this factual issue after an evidentiary hearing was reasonable, fair, and well within the scope of the authority that appellants vested in him when they signed the consent order.

To the extent that there is any doubt about the matter, "Maryland's public policy favor[s] the use of arbitration to resolve disputes, [so] courts should resolve doubts about

the scope of arbitrable issues in favor of arbitrability." *Gannett Fleming*, 243 Md. App. at 400–01 (citing *The Redemptorists v. Coulthard Services*, 145 Md. App. 116, 150–51 (2002).

Because we conclude that this issue is one for the arbitrator to decide, we do not reach appellants' contention that there is no evidence demonstrating that the Shahs submitted their claim to the Division prior to the filing of the Statement of Charges.

THE JUDGMENT OF THE CIRCUIT COURT FOR MONTGOMERY COUNTY IS AFFIRMED. APPELLANTS TO PAY COSTS.

The appendix is on the following pages.

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MB MAPLE LAWN LLC, et al.	*	
Petitioners	*	
	*	
v.	*	**Case No. 457564-V**
	*	
CONSUMER PROTECTION DIVISION	*	
Respondent	*	

MEMORANDUM OPINION AND ORDER

This matter came before the Court for oral argument on April 26, 2019. Upon consideration of Petitioner's Memorandum in Support of Petition for Judicial Review (DE #12), Respondent's Answer to Petitioner's Memorandum in Support of Petition for Judicial Review (DE #14), Petitioner's Reply in Support of Petition for Judicial Review (DE #16), and the arguments of counsel, the Court issues the following Opinion and Order.

I. Background

On April 21, 2016, the Consumer Protection Division ("Division") filed a Statement of Charges against Mitchell & Best Homebuilders, LLC ("Mitchell & Best Homebuilders"), Mitchell Best Homes, LLC ("Mitchell Best Homes"), MB Maple Lawn, LLC ("Maple Lawn"), MB Oak Creek, LLC ("Oak Creek"), MB Holly House Meadows, LLC ("Holly House Meadows"), R. Michael Boies, John B. Corgan, Linda M. Ellington, Robert L. Mitchell, Jr., and Kristine M. Sullivan, collectively referred to herein as "Mitchell & Best." The Statement of Charges alleges that Mitchell & Best violated the Maryland Home Builder Registration Act ("HBRA") (codified at Md. Code Ann., Bus. Reg. §§ 4.5-101 through 4.5-801), the Maryland Consumer Protection Act ("CPA") (codified at Md. Code Ann., Com. Law §§ 13-101 through 13-501), and Maryland Code Annotated, Real Property §10-203.

On July 14, 2016, the Division filed an Amended Statement of Charges which added references to specific consumers. Paragraph 19 of the Amended Statement of Charges provides:

19. The homes that Respondent Maple Lawn sold to consumers permitted infiltration of water and other elements into the homes through the windows Maple Lawn installed in the homes. The Division received at least thirteen (13) complaints from consumers stating the defective windows resulted in damage to the structure and interior of the residences; were reported to Respondents with requests for repairs; and were not corrected or repaired by Respondents. The Division notified the Respondents of the complaints filed by consumers. By way of example, complaints to the Division include, but are not limited to, the following:

    i. Chhaya Patel Shah and Tushar Kanaiyalal Shah entered into a contract with MB Maple Lawn LLC for the construction of a new home at 11368 Duke Street, Fulton, MD 20759. Mr. and Mrs. Shah took title to the home on February 9, 2007. The Shahs immediately experienced problems of extreme water and air infiltration through the windows in their residence that was so severe that the interior of the home and its contents suffered damage. The Shahs requested that the defects be corrected by Respondents. The defects in the Shah residence remain uncorrected as of the time of the filing of this Amended Statement of Charges…

(Record, Ex. 19, ¶ 19).

On August 22, 2016, the instant Petitioners propounded requests for production of documents on the Division. On September 6, 2016, the Division responded to Petitioners' document requests and filed a supplemental response on September 23, 2016. Petitioners' Request No. 42 and the Division's response are as follows:

> REQUEST NO. 42: All documents related to Chhaya Patel Shah and Tushar Kanaiyalal Shah, including but not limited to:
>
> a. All communications between the Division or Unit with Chhaya Patel Shah and Tushar Kanaiyalal Shah;
> b. All documents received from Chhaya Patel Shah and Tushar Kanaiyalal Shah;…
>
> ANSWER: The Division objects to this request because it seeks information that is privileged and is not discoverable under the attorney work product doctrine. Subject to and without waiving the foregoing objection, see the documents produced and referred to in response to REQUEST NO. 1. In addition, see documents contained in Respondents' records provided to the Division pertinent to Lot 137, with pertinent contract documents commencing at bates MB066993.

(Record, Exs. 27, 29, 44, and 80). In response to Request No. 42, the Division produced a 7-page timeline, emails between the Shahs and the instant Petitioners, and pictures.

On October 18, 2016, the parties agreed to and executed a Final Order by Consent ("FOBC"). Paragraphs 20, 63, and 72 of the FOBC provides as follows:

> 20. The homes that Respondent Maple Lawn sold to consumers permitted infiltration of water and other elements into the homes through the windows Maple Lawn installed in the homes. The Division received at least thirteen (13) complaints from consumers stating the defective windows resulted in damage to the structure and interior of the residences; were reported to Respondents with requests for repairs; and were not corrected or repaired by Respondents. The Division notified the Respondents of the complaints filed by consumers. BY way of example, complaints to the Division include, but are not limited to, the following:
>
> i. Chhaya Patel Shah and Tushar Kanaiyalal Shah entered into a contract with MB Maple Lawn LLC for the construction of a new home at 11368 Duke Street, Fulton, MD 20759. Mr. and Mrs. Shah took title to the home on February 9, 2007. The Shahs immediately experienced problems of extreme water and air infiltration through the windows in their residence that was so severe that the interior of the home and its contents suffered damage. The Shahs requested that the defects be corrected by Respondents. The defects in the Shah residence remain uncorrected as of the time of the filing of this Amended Statement of Charges…
>
> 63. For a period of one (1) year following execution of this Final Order by Consent, Respondent Maple Lawn agrees to submit to the Office of Administrative Hearings, under the Rules of the Office of the Attorney General, Consumer Protection Division's Arbitration Program, including the Maryland Arbitration Act, consumer claims for actual loss due to window defects that were filed in writing with the Consumer Protection Division, and produced by the Division to Respondents in response to Respondents' document request in the pending proceeding, prior to filing of the Statement of Charges. The maximum award that can be made by any claimant for any individual home shall be twenty thousand dollars ($20,000.00) and the awards are subject to the maximum aggregate that Respondents will be required to pay as provided in ¶ 64. If the Office of Administrative Hearings is unable to hear these claims, Respondent Maple Lawn agrees to submit the claims to binding arbitration under the Rules of the Office of the Attorney General, Consumer Protection Division's Arbitration Program, including the Maryland Arbitration Act…

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> 72. The Chief of the Division, or his designee, shall resolve any disputes that arise concerning this Final Order by Consent and may enter any orders needed to effectuate the terms of this Consent Order. Any order or decision of the Chief of the Division pursuant to this paragraph of the Final Order by Consent is subject to judicial review in accordance with Md. Code Ann., State Gov't § 10-222…

(Record, Ex. 69).

The parties agreed to extend the one-year time period for Petitioners to submit to arbitration under ¶ 63, and the Arbitration Unit of the Division has attempted to schedule mediations and arbitrations pursuant to that Paragraph. However, the instant Petitioners have refused to proceed with arbitration of the Shah claim.

On October 9, 2018, the Division entered a Supplemental Order on Arbitrability ordering that the Shah claim be submitted to arbitration in accordance with the FOBC. Paragraphs 12 through 17 of the Supplemental Order on Arbitrability provide as follows:

> 12. Paragraph 63 of the FOBC provides for arbitration of "consumer claims for actual loss due to window defects that were filed in writing with the Consumer Protection Division, and produced by the Division to Respondents in response to Respondents' document request in the pending proceedings, prior to filing the Statement of Charges."
>
> 13. Although there must be a written consumer claim, the FOBC does not require that the consumer claim take any particular form.
>
> 14. Here, the parties agree that (1) the Proponent received a written timeline and written emails between the Shahs and the Respondents, (2) that the Proponent produced to the Respondent the timeline and emails, and (3) that the Shahs were specifically identified in the FOBC as consumers who had complained to the Division about defective windows.
>
> 15. The seven-page timeline that the Shahs provided, which starts in 2006 and runs into 2011, clearly shows the problems that they encountered. That timeline was supported by emails between the Shahs and the Respondents reflecting their communications relating to the problems that the Shahs were experiencing and pictures that were taken of their house. The documents are clearly sufficient to establish that the Shahs had a claim that their windows were defective and therefore constitute a written consumer claim in accordance with Paragraph 63.

16. While the undisputed facts are sufficient to establish that the Shahs satisfy the "written claim" requirement of Paragraph 63, the Respondents contest whether the written claim was submitted "prior to filing of the Statement of Charges." The materials produced by the Proponent to the Respondents do not show when they were provided to the Division. The Respondents argue that the Shahs were not mentioned in the Statement of Charges and that the "[d]ocuments pertinent to complaint by consumer Chhaya Shah" were produced in a supplemental discovery response on September 23, 2016. Consumer Protection Division's Supplemental Response to Respondent's Request for Discovery. The Proponent contends that an affidavit submitted by an investigator establishes that a claim was submitted prior to the filing of the Statement of Charges.

17. The determination of when the Shahs submitted their claim to the Division requires resolution of a factual dispute. That factual dispute is capable of resolution as part of the arbitration proceedings itself. Accordingly, the question of whether the Shahs submitted a claim prior to the filing of the Statement of Charges should be determined in the first instance by the arbitrator.

(Record, Ex. 82, p. 4-6).

On November 7, 2018, Petitioners filed a Petition for Judicial Review of the Orders of the Consumer Protection Division (DE #1). On December 11, 2018, Respondent filed a Response to the Petition for Judicial Review (DE #7). On February 6, 2019, Petitioners filed a Memorandum in Support of their Petition for Judicial Review (DE #12). On March 18, 2019, Respondent filed an Answer to Petitioners' Memorandum in Support of their Petition for Judicial Review (DE #14). On March 25, 2019, Petitioners filed a Reply in Support of their Petition for Judicial Review (DE #16). The Court heard oral argument on this matter on April 26, 2019.

In their Petition for Judicial Review, Petitioners initially objected to the appointment of Debra Salim as arbitrator. However, counsel stated on the record during oral argument that this issue had been resolved and that the Consumer Protection Division had entered an Order approving the new arbitrator that the parties agreed upon. Therefore, the Court will only address the issue of arbitrability.

II. Standard of Review

The decision of an administrative agency must be reviewed "in the light most favorable to the agency, since decisions of administrative agencies are *prima facie* correct and carry with them the presumption of validity." *Bulluck v. Pellham Wood Apts.*, 283 Md. 505, 513 (1978) (internal citations and quotations omitted). Furthermore, it is "the province of the agency to resolve conflicting evidence" and "where inconsistent inferences from the same evidence can be drawn, it is for the agency to draw the inferences." *Id.* An administrative agency's order "must be upheld on review if it is not premised upon an error of law and if the agency's conclusions on questions of fact or on mixed questions of law and fact are supported by substantial evidence." *Harford County v. McDonough*, 74 Md. App. 119, 122 (1988). Substantial evidence exists "if reasoning minds could reasonably reach the conclusion reached by the agency from the facts in the record." *Liberty Nursing Ctr., Inc. v. Dep't of Health and Mental Hygiene*, 330 Md. 433, 443 (1993). When the issue appealed is purely a question of law, courts conduct a *de novo* review of the agency's findings. *Id.*

III. Discussion

Under the FOBC, the Petitioners agreed to arbitration of consumer claims for actual loss due to window defects if those claims were: (1) filed in writing with the Consumer Protection Division; (2) produced by the Division in response to document requests in the pending proceeding; and (3) filed with the Division prior to the filing of the Statement of Charges. Petitioners challenge the following findings in the Division's Supplemental Order on Arbitrability: (1) that the Shahs satisfied the "written claim" requirement of the FOBC; (2) that the Shahs' written claim was produced by the Division in response to document requests; and (3) that the factual dispute of whether the Shahs' written claim was filed with the Division prior to the filing of the

Statement of Charges should be determined by the arbitrator. For the following reasons, the Court affirms the Division's Supplemental Order on Arbitrability.

1. "Written Claim" Requirement

Petitioners argue that the Division's finding that the Shahs had satisfied the "written claim" requirement of the FOBC is not supported by substantial evidence. Petitioners assert that "[a] written complaint means a written complaint" and that the timeline relating to the Shahs "cannot constitute a 'written complaint' any more than a timeline of [an] event can substitute for filing a complaint in a civil action before that statute of limitations expires." (DE #12, p. 18). Petitioners note that the timeline does not show the author of the document, when it was prepared, or how it was transmitted to the Division. Petitioners further argue that emails between them and the Shahs cannot constitute a written complaint filed with the Division as the communications were not directed to the Division. Although Petitioners do not argue that the Shahs needed to use the complaint form offered to consumers by the Division, Petitioners maintain that the information elicited from such forms would have provided them with sufficient information to put them on notice of the Shahs' claim. Petitioners suggest that the emails and timeline simply show a history of dealings between the Petitioners and the Shahs and that they do not amount to a "written claim" that could be subject to arbitration under the FOBC.

Respondent argues that the Division's finding that the Shahs had satisfied the "written claim" requirement of the FOBC is supported by substantial evidence. The Shahs submitted to the Division a 7-page timeline that was supported by pictures and emails between the Shahs and Petitioners regarding the problems the Shahs were experiencing with their windows. Respondent argues that these writings were sufficient to give the Division and Petitioners notice of the Shahs' claim. Respondent suggests that Petitioners are attempting to impose on the Division, and insert

into the language of the FOBC, a requirement that the Division only accept complaints from consumers on a specific form. Respondent notes that the Shahs' claim was one of two claims that were specifically referenced in the FOBC and argues that this is clear evidence that the Shahs' claim was contemplated by the parties as one of the claims that may be eligible for arbitration under the FOBC.

The Court agrees with the Respondent. The Division's finding that the Shahs filed a written claim is supported by substantial evidence in the record. The 7-page timeline that the Shahs submitted shows the problems that they encountered, and that timeline was supported by emails between the Shahs and the Petitioners with communications relating to the problems that the Shahs were experiencing and pictures that were taken of their house. The documents are sufficient to establish that the Shahs had a claim that their windows were defective and are sufficient to put the instant Petitioners on notice of the Shahs' claim. Therefore, the Court will affirm the Division's finding that the Shahs filed a written claim with the Division in accordance with the FOBC.

2. Whether the Written Claim was Produced in Response to Document Requests

Having affirmed the Division's finding that there was a written claim submitted by the Shahs to the Division, and the parties having agreed that the Division turned over the components of that written claim (i.e. the timeline, emails, and pictures) to the instant Petitioners in discovery, the Court will affirm the Division's finding that the Shahs' written claim was produced to Petitioners in response to their document requests.

3. Referral of the Factual Dispute of Time of Filing to the Arbitrator

Petitioners argue that it was legal error for the Division to refer to the arbitrator the determination of whether the Shahs' written complaint was submitted prior to the filing of the Statement of Charges. Petitioners argue that an arbitrator cannot decide the issue of whether or not

the Shahs' claims are eligible for arbitration. Rather, Petitioners argue that the Court has to determine the existence of an agreement to arbitrate. Petitioners suggest that absent clear and unmistakable evidence, the Court should not assume that parties agreed to arbitrate the issue of arbitrability. Petitioners assert that there is nothing in the FOBC to indicate that the parties intended to expressly delegate to the arbitrator the determination of which claims are subject to arbitration.

Respondent argues that it was not legal error for the Division to refer to the arbitrator the determination of whether the Shahs' written complaint was submitted prior to the filing of the Statement of Charges. Respondent notes that the Court's role is limited to resolving one issue – is there an agreement to arbitrate the subject matter of a particular dispute? Respondents assert that once the Court determines that the subject matter is, or might be, covered by an arbitration agreement, the issue of arbitrability is for the arbitrators to decide and arbitration must be compelled. Respondent suggests it is undisputed that there is an arbitration agreement at paragraphs 63 and 64 of the FOBC, and that the agreement clearly provides that the subject matter for arbitration are claims related to "window defects" and non-window "defective workmanship." Respondent suggests it is also undisputed that the Shahs' claim is related to window defects. Thus, the arbitration agreement in this matter covers the subject matter of the particular dispute here. Respondent further argues that the arbitrator can determine whether conditions precedent to arbitration have been met, such as time of filing.

The Court agrees with Respondent. The threshold question of whether an arbitration agreement exists is a matter to be determined by the Court. *See Barclay Townhouse Associates v. Stephen L. Messersmith*, 67 Md. App. 493, 497 (1986). If the Court determines that the subject matter of a particular dispute clearly falls within the language of an arbitration agreement, then arbitration must be compelled. *See NRT Mid-Atlantic, Inc. v. Innovative Properties, Inc.*, 144 Md.

App. 263, 283 (2002). The Court finds there is an arbitration agreement at paragraphs 63 and 64 of the FOBC. The Court finds that the agreement clearly provides that the subject matter for arbitration are claims related to "window defects" and non-window "defective workmanship." The Shahs' claim is related to window defects in their home and thus, the arbitration agreement in the FOBC covers the subject matter of the particular dispute here. This Court also finds that the time of filing of the Shahs' claim relative to the filing of the Statement of Charges is a subject matter which also falls within the scope of the instant arbitration agreement.

It is unclear to this Court whether the arbitration agreement encompasses the additional subject matter in dispute here – whether or not the Shahs filed their written claim prior to the filing of the Statement of Charges. The Court looks to the reasoning laid forth by the Court of Appeals in *Bel Pre Medical Center, Inc.* for guidance:

> "…[W]hen the language of an arbitration clause is unclear as to whether the subject matter of the dispute falls within the scope of the arbitration agreement, the legislative policy in favor of the enforcement of agreements to arbitrate dictates that ordinarily the question of substantive arbitrability initially should be left to the decision of the arbitrator. Whether the party seeking arbitration is right or wrong is a question of contract application and interpretation for the arbitrator, not the court, and the court should not deprive the party seeking arbitration of the arbitrator's skilled judgment by attempting to resolve the ambiguity. Under such circumstances, arbitration should be compelled."

Bel Pre Medical Center, Inc. v. Frederick Contractors, Inc., 21 Md.App. 307, 321 (1974). In light of the strong public policy in favor of the enforcement of arbitration agreements and Maryland law, the issue of whether the Shahs filed their claim prior to the Statement of Charges is a question of arbitrability that should be left to the decision of the arbitrator. Therefore, there is no error in the Division's finding that the arbitrator should resolve this factual dispute before arbitration proceeds and accordingly, the Court will affirm and compel arbitration.

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IV. **Conclusion**

For the aforementioned reasons, it is this 26TH day of APRIL, 2019, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that the Consumer Protection Division's Supplemental Order on Arbitrability entered on or about October 9, 2018 is AFFIRMED; and it is further

ORDERED, that the parties be compelled to submit to arbitration pursuant to the arbitration agreement in the Final Order by Consent entered by the Consumer Protection Division on October 10, 2016; and it is further

ORDERED, that the arbitrator shall resolve the factual dispute of whether the Shahs submitted their written complaint prior to the filing of the Statement of Charges; and it is further

ORDERED, that the costs of this appeal shall be paid by Petitioners.

Debra L. Dwyer, JUDGE
Circuit Court for Montgomery County, Maryland

ENTERED

APR 30 2019

Clerk of the Circuit Court
Montgomery County, Md.

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