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Appeal Court Confirms: Buyer's Written Notice Ends Condo Deal – Even Without the Word "Rescind"

As we reported in our newsletter late last year, an Ontario Superior Court decision in a case called *Yim v. Talon International Inc.* addressed the question of whether under condominium legislation it was legally necessary for the word "rescind" to appear in a buyer's notice attempting to rescind a condominium deal.

That case was appealed to the Ontario Court of Appeal, with that court offering additional clarity on the issue.

The facts involved two buyers of condominium units in the yet-to-be-built Trump Tower residential / hotel complex in downtown Toronto. As part of their respective purchase agreements, one of the buyers agreed to pay $860,000 for a unit, and to put down $172,000 in deposit money. The other buyer purchased a unit for $727,000, and paid $145,000 in deposits.

After several years of construction, the developer provided the buyers with prescribed statutory notice that there was a change to the condominium disclosure statement. Specifically, the developer advised of the new Hotel Unit Maintenance Agreement; when the buyers reviewed it, they concluded that it contained terms that were materially different from what was indicated in the disclosure documents, including substantial differences in the projected expenses.

Relying on those material changes, the two buyers decided to avail themselves of the provisions in the Ontario *Condominium Act, 1998*, which allowed them to terminate the deals upon written notice to the developer. Although they each sent letters advising of their intention to terminate, neither buyer actually used the word "rescind" or "rescission" in that correspondence. Both did, however, express an intent to "terminate" the deal, and both requested a "prompt response and return of deposits".

Initially, the developer did not object to the form or content of the rescission letters, but later changed its mind and refused to return the buyers' deposits. It claimed that the buyers' notices were invalid because they did not meet the strict requirements of the Act.

As part of an application launched by the buyers, the court was asked to determine whether it was fatal to the validity of the buyers' notices that their letters failed to expressly use the words "rescind" or "rescission". By extension, this required the court to rule on whether the developer was entitled to keep the deposits that the buyers had submitted.

The lower court had held that the buyers' notices were valid, since they had been given in writing, had been provided to the developer, had clearly identified that the intended rescissions were grounded on the existence of a "material change", and had made the buyers' intent to terminate their agreements perfectly clear. The lower court accordingly ordered the developer to return each of the buyers' deposits, with interest.

On appeal, the Court of Appeal confirmed that lower court decision.

The Appeal Court closely examined the provisions of Act, which govern the timing and content of buyers' notices to rescind. Specifically, section 74 provides that within 10 days of receiving either a revised disclosure statement or else a notice of change that is material, the buyers had the right to rescind an agreement after giving the developer "notice of rescission".

In terms of how that notice should be given and how the rescission right should be exercised, the court pointed out that one of the Act's significant purposes was consumer protection, so it did not make sense to apply a strict technical approach to these requirements. As the court explained:

> *The goal of consumer protection laws is to place consumers, who are average citizens engaging in business deals, on par with companies or citizens who regularly engage in business. ...*
>
> *Consumer protection legislation must be interpreted generously in favour of the consumer.*

With those principles in mind, the Appeal Court turned to the specific requirements embodied in the legislation. After comparing the manner in which notices were to be given in other similar consumer legislation, the court found no justification for imputing a requirement that the precise term "rescission" must be used in all written notices of rescission under the Act, or that the notice must be worded perfectly. In drawing this conclusion, the court said:

> *Consumers will not always be represented by counsel. Consumers will not always be familiar with words such as rescission and rescind. For consumers to be on a level playing field with developers in accessing the*

> *respective rights afforded them under the Act, they must be given considerable leeway in their use of language.*

The Act clearly required that any "notice of rescission" given by a buyer must be in writing and must be delivered to the developer or its solicitor. It also implied that the buyer needed to make clear that he or she was relying on the identified and developer-induced material change as the grounds for wanting to end the agreement.

The Court of Appeal held that these stipulations had all been met by the two buyers in this case. Although neither had used the terms "rescind" or "rescission" in their notices, this was not determinative since their purpose and intent was clear. Each had relied on a material change and both had specifically requested the return of their deposits. The court considered this sufficient, as the buyers had both fulfilled the Act's statutory requirements and had made it clear to the developer that they intended to undo their respective agreements.

The Appeal Court affirmed the lower court's order that the buyers' deposits were to be returned, with interest. See *Yim v. Talon International Inc*., 2017 ONCA 267, affirming 2016 ONSC 371 and 2016 ONSC 370.

Buyer Seeks Relief From Forfeiture of Entire $750,000 Deposit

In a recent decision, the Ontario Court of Appeal overturned a prior ruling in which a lower court had given the intended purchaser of an industrial property a break on losing the full amount of a $750,000 deposit that had been tendered as part of the deal.

The buyer had agreed to purchase a warehouse from the seller for over $10 million, with the intention of using it to set up a licensed marijuana grow-op. The Agreement of Purchase and Sale had provided for an initial deposit of $100,000 to be made on a specified date, with a series of additional deposits due in the event that the buyer was willing to waive certain conditions that had been inserted for its benefit. Because Health Canada was taking longer than expected to issue the needed approval for a license to grow marijuana, the buyer also voluntarily submitted an additional deposit of $450,000 as a gesture of good faith in return for the seller extending the closing date. Eventually the pre-closing deposits tendered by the buyer totaled $750,000.

When the buyer was unable to obtain both the needed license from Health Canada and the necessary financing, it failed to complete the deal. The seller applied to the court for a declaration that it was entitled to keep the $750,000 deposit.

On the initial application, the judge allowed the seller to keep some of the deposit, but found that $750,000 was too much in all the circumstances. Rather than award the full amount, the judge used his discretion to order that the seller was entitled to retain only $350,000. In legal terms, this was tantamount to allowing the buyer partial relief from what would otherwise have been the forfeiture of the full deposit amount.

The seller appealed, and asked for an order restoring the amount of the forfeited deposit back to $750,000 plus interest, being the amount stipulated in the original agreement and subsequent amendments.

The Court of Appeal granted the order and allowed the seller to keep the entire $750,000. It observed that to successfully establish that it was entitled to relief from forfeiture of the $750,000, the buyer had to prove two things:

1) that the proposed forfeited sum was out of proportion to the damages suffered by the seller; and

2) that it was unconscionable for the seller to keep the deposit.

In this case, the seller had not given any evidence that it suffered damages because of the aborted deal, so it was impossible to assess the proportionality of the forfeited sum. However, the court said it was still required to "step back and consider the full commercial context" in order to evaluate the unconscionability of the circumstances.

The court observed that large deposits are commonplace in such commercial real estate transactions. They are intended to motivate the parties to carry out their bargain, not to penalize them if they do not do so. The $750,000 deposit paid on this $10 million deal, representing 7% of the purchase price, was not grossly disproportionate overall.

As the court stated:

> *While in some circumstances a disproportionately large deposit…could be found to be unconscionable, this is not such a case.*

Instead, the court added that a finding of unconscionability was exceptional, and it required evaluating other factors, such as whether:

1) there was inequality of bargaining power between buyer and seller;

2) the bargain was otherwise substantially unfair;

3) the parties were sophisticated; and

4) there were negotiations made in good faith.

The gravity of the buyer's breach and the parties' overall conduct was also relevant.

Since the lower court judge had wholly failed to examine these factors, his decision to reduce the amount of the deposit that was to be forfeited was unwarranted. Moreover, when the Appeal Court applied a more fulsome evaluation it concluded that there was no unconscionability here. The buyer's large deposit was commercially reasonable in the larger context of this transaction, and its breach of the agreement entitled the seller to keep the funds.

The appeal was therefore allowed and the amount of the forfeited deposit was increased from $350,000 to $750,000, with accrued interest payable to the seller, plus costs. See *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282.