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Restrictive Covenant

Rights of purchasers in cancelled condominium projects

By **Ray Mikkola**

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(July 2, 2019, 3:03 PM EDT) -- Recently, a number of residential condominium developments have been terminated by the developer. In a rising market, purchasers whose agreements have been cancelled have been left behind by increasing purchase prices. The *Condominium Act* is consumer protection legislation and accordingly, it is given a broad application and interpretation by the courts to achieve this goal. But the Act contains limited constraints on a developer's entitlement to terminate residential purchase agreements.

The reasons for which a condominium developer can terminate a purchase agreement can vary.

For example, in early 2017, a residential condominium project called the Icona went to market in Vaughan, Ont. In September 2018, the developer cancelled the project, citing financial reasons. In accordance with the Act, all deposits were returned to purchasers. The termination stemmed from the inability of the developer to obtain the discharge of a restrictive covenant that prohibited the development of the property for any purpose other than a hotel, meeting and banquet facilities.

The developer brought an application pursuant to s. 61 (1) of the *Conveyancing and Law of Property Act* for an order deleting the restrictive covenant from its lands. The court refused to do so: see *Icona Hospitality Inc. v. 2748355 Canada Inc*. [2018] O.J. No. 4080.

Interestingly, earlier this year the developer negotiated the discharge of the restrictive covenant thereby clearing the way for development.

Are purchasers without a remedy when a condominium project is cancelled? In *Reddy v. 1945086 Ontario Inc.* 2019 ONSC 2554, 605 purchasers who had entered into pre-construction purchase agreements to purchase 454 condominium units in a project called Cosmos Towers brought an application for a determination of their rights. In 2018, two years after entering into the purchase agreements, the purchasers were notified that the developer was exercising its rights under a particular early termination condition on the basis that financing satisfactory to the developer could not be arranged.

The purchase agreements contained the standard form Tarion addendum which entitled the developer to exercise a right of termination in the event that the developer is not in receipt of financing arrangements on terms satisfactory to the vendor. The addendum also provided that the vendor must take all commercially reasonable steps within its power to satisfy an early termination condition.

The purchase agreement included an early termination condition addendum which set out a confusing clause requiring that the determination of the vendor as to the satisfaction of the condition would be in the vendor's sole, absolute and unfettered discretion.

The purchasers argued that reserving to the vendor its sole, absolute and unfettered discretion went beyond the permitted termination entitlement under the Tarion addendum, and therefore the entire

termination clause should be deleted from the purchase agreement. This would have left the developer with no entitlement to terminate, resulting in damages to the purchasers due to the general increase in condominium unit prices since the execution of the purchase agreements in 2016.

The purchasers were ultimately unsuccessful. The court found that the vendor's termination entitlement set out in the addendum merely authorized a "type" of early termination condition based on the absence of satisfactory financing, and that the Tarion addendum itself did not specify the required wording for such a clause.

The overriding provision of the addendum required the vendor to take all reasonable steps to satisfy any early termination condition. Importantly, the court in *Reddy* noted that the reasonableness and good faith of the vendor's termination on the basis that satisfactory financing could not be arranged was not in question.

The court also found that had the purchasers been successful, the vendor would have been put in the commercially absurd position of being required to proceed with the development for which it had no financing.

The principal protection afforded by the Act to purchasers whose agreement has been terminated is the mandatory holding of deposits in trust by the developer's lawyer or authorized trustee, thereby ensuring that should a project be cancelled, the deposits should always be available for return to the purchasers, together with interest, if applicable.

Urbanation, a market research firm, reported that in 2018, 15 condominium projects comprising more than 4,500 units were cancelled in the greater Toronto region, up from 1,678 units in 2017 and 379 units in 2016 (as reported in the *Brampton Guardian* on March 20, 2019). The result has been a call by some disappointed purchasers for statutory or regulatory protection.

Proposals include limiting the time during which the agreement may be cancelled by a developer, requiring proof of attempts by a developer to satisfy the condition, the flagging of developers who routinely terminate agreements by Tarion, giving buyers a registrable, and possibly a priority, interest in the developments lands, a high interest payment obligation on returned deposits, and enhanced disclosure obligations highlighting the developer's termination entitlement. Each of these presents legal and practical limitations and complications.

In the meantime, purchasers should recognize the inherent risks of purchasing a pre-construction property, one of which is being left behind in a rising market if the project is cancelled.

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