CITATION: Trivedi v. 2607305 Ontario Inc., 2025 ONSC 72
COURT FILE NO.: CV-24-62370
DATE: 2025-01-08

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
Chirag Jitendrabhai Trivedi and Priyankaben Chirag Trivedi	)	S. Joshi, for the Applicants
Applicants	)	
– and –	)	
2607305 Ontario Inc. o/a Urbane Communities	)	J. Bennett, for the Respondent
Respondent	)	
	)	**HEARD:** November 29, 2024

THE HONOURABLE JUSTICE J. R. HENDERSON

REASONS FOR DECISION ON APPLICATION

INTRODUCTION

[1] The applicants entered into an agreement of purchase and sale dated March 16, 2022 (the "Agreement") with the respondent ("Urbane"), whereby the applicants agreed to purchase a residential condominium unit in Urbane's condominium development at 7549 Kalar Road, Niagara Falls, Ontario.

[2] At or around the time of the Agreement, Urbane provided the applicants with a disclosure statement in accordance with the *Condominium Act*, 1998, S.O. 1998, c. 19 (the "Act"). The plans showed that the applicants' unit, described as unit 316, was on the third floor, which was the top floor of the condominium development.

[3] On February 22, 2024, Urbane delivered a revised disclosure statement ("RDS") to the applicants by email. Among other things, the RDS informed the applicants that Urbane had changed the condominium development so that it would now include a fourth floor. The letter from Urbane that accompanied the RDS informed the applicants that the change would not affect the location of the applicants' unit.

[4] In response, by email dated March 19, 2024, the applicants requested clarification from Urbane. On March 20, 2024, Urbane's lawyer confirmed that the applicants' unit will be on the third floor and that there will be a fourth floor. Thereafter, the applicants, Urbane, and their counsel exchanged emails that can be described as negotiations about this issue.

[5] In an email dated June 3, 2024, counsel for the applicants wrote that if there was no response from Urbane by June 5, 2024, he would recommend that the applicants rescind the Agreement. This was the first mention of a possible rescission of the Agreement.

[6] On June 12, 2024, the applicants commenced this application. The applicants request a declaration that the addition of the fourth floor to the condominium development constitutes a material change that entitles the applicants to rescind the Agreement pursuant to the provisions of the Act. In the alternative, the applicants request a declaration that Urbane has fundamentally breached the Agreement such that the applicants are entitled to terminate the Agreement at common law. Further, the applicants request an order that the applicants' deposit be returned to them with interest.

[7] Urbane's position is that the addition of the fourth floor is not a material change within the meaning of the Act. In the alternative, Urbane submits that, if the addition constitutes a material change, the applicants are not entitled to rescind the Agreement because the applicants failed to exercise their right to rescind within the 10-day period prescribed by s.74 of the Act. Urbane further submits that the change to the condominium development is not a fundamental breach of the Agreement.

[8] Therefore, the issues on this application are:

> 1. Does the addition of the fourth floor to the condominium development constitute a material change within the meaning of the Act?
>
> 2. If so, have the applicants lost their right to rescind the Agreement by reason of the time limits set out in s.74 of the Act?
>
> 3. In the alternative, if the provisions of the Act do not assist the applicants, do the applicants have the right to terminate the Agreement pursuant to the common law doctrine of fundamental breach?

THE CONDOMINIUM ACT

[9] Section 72(1)(a) of the Act provides that the declarant under the Act (hereinafter called the "developer") shall deliver to every person who purchases a unit or a proposed unit from the developer a copy of the current disclosure statement for the corporation of which the unit or proposed unit forms part. I find that in this case the disclosure statement was properly provided by Urbane at or around the time of purchase.

[10] Section 74(1) provides that whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under s. 72(1), the developer shall deliver an RDS.

[11] Section 74(2) defines "material change" as follows:

> "material change" means a change or a series of changes that a reasonable purchaser, on an objective basis, would have regarded collectively as sufficiently important to the decision to purchase a unit or proposed unit in the corporation that it is likely that the purchaser would not have entered into an agreement of purchase and sale for the unit or the proposed unit or would have exercised the right to rescind such an agreement of purchase and sale under section 73, if the disclosure statement had contained the change or series of changes.

[12] Section 74(6) provides a purchaser with a right of rescission in certain cases upon the delivery of an RDS. It reads as follows:

> If a change or a series of changes set out in a revised disclosure statement or a notice delivered to a purchaser constitutes a material change or if a material change occurs that the declarant does not disclose in a revised disclosure statement or notice as required by subsection (1), the purchaser may, before accepting a deed to the unit being purchased that is in registerable form, rescind the agreement of purchase and sale within 10 days of the latest of,
>
> (a) the date on which the purchaser receives the revised disclosure statement or the notice, if the declarant delivered a revised disclosure statement or notice to the purchaser;
>
> (b) the date on which the purchaser becomes aware of a material change, if the declarant has not delivered a revised disclosure statement or notice to the purchaser as required by subsection (1) with respect to the change; and
>
> (c) the date on which the Superior Court of Justice makes a determination under subsection (5) or (8) that the change is material, if the purchaser or the declarant, as the case may be, has made an application for the determination.

[13] In the present case, the applicants rely on s.74(6)(c) to support their argument that the applicants' 10-day window for exercising their right of rescission has not yet commenced, as the Superior Court of Justice has not yet determined if the change is material.

[14] However, Urbane submits that the applicants cannot rely upon s.74(6)(c) because the applicants failed to commence the application to the Superior Court of Justice within the 10-day period set out in s.74(5), which reads as follows:

> Within 10 days after receiving a revised disclosure statement or a notice under subsection (1), a purchaser may make an application to the Superior Court of Justice for a determination whether a change or a series of changes set out in the statement or notice is a material change.

DOES THE ADDITION OF A FOURTH FLOOR CONSTITUTE A MATERIAL CHANGE?

[15] The test for determining whether a change that is set out in an RDS is a material change can be described as an objective materiality test.

[16] In *Abdool v. Somerset* (1992), 10 O.R. (3d) 120 (C.A.), regarding an earlier version of the legislation, the Ontario Court of Appeal considered whether the changes in that case amounted to a material amendment to the disclosure statement. At para. 47 the court wrote:

> To discharge this onus and prove the materiality of the complaint, in my opinion, the purchaser is obliged to establish objectively that had the information that was not disclosed, or that was inaccurately or insufficiently disclosed, been properly disclosed in the disclosure statement at the time it was delivered to the purchaser, a reasonable purchaser would have regarded the information as sufficiently important to the decision to purchase that he or she would not likely have gone ahead with the transaction but would instead have rescinded the agreement before the expiration of the ten-day cooling off period.

[17] In *Gallow v. HPH (Broadview) Limited*, 2013 ONSC 6804, the court considered the applicability of the present legislation in circumstances where a developer had changed the original plans for a residential condominium unit by replacing a loft with a staircase. Relying on *Abdool*, Greer J. found such a change to be a material change as defined in s.74(2), and wrote at para. 43:

> In my view, a "reasonable purchaser, on an objective basis," as set out in the definition of material change in subsection 74(2) of the Act, would see the disappearance of the Loft into a staircase, sufficiently important to the decision of the purchase of the Unit, that the purchaser likely would "not have entered into an agreement of purchase and sale for the unit."

[18] Further, in *Talon International Inc. v. Jung*, 2013 ONSC 2466, again relying on *Abdool*, MacKinnon J. considered the definition of material change under s.74(2) and described the test at para. 10 as follows:

> Would a reasonable purchaser regard the change or amendment as sufficiently important to his or her decision to purchase that, had the disclosure statement contained the new or amended information at the time it was delivered, the purchaser would not likely have gone ahead with the transaction, but would have rescinded the agreement….

[19] Applied to the circumstances of this case, the test as to whether the addition of the fourth floor constitutes a material change, as defined in the Act, can be stated as follows: Would a reasonable purchaser regard the change as sufficiently important to their decision to purchase the unit that, had the change been in place at the time of the initial Agreement, it is likely that the purchaser would not have entered into the Agreement or would have rescinded the Agreement within the 10-day cooling off period?

[20] The applicants submit that they entered into the Agreement because, in part, they wanted to reside on the top floor of the condominium development. The change to the building now means they will not reside on the top floor. Therefore, the applicants submit that, objectively, there has been a material change.

[21] Urbane submits that, in cross-examination on his affidavit, the applicant, Chirag Jitendrabhai Trivedi ("Chirag"), could not provide any objective reason for his desire to reside on the top floor. Chirag agreed in cross-examination that it was his preference to live on the top floor, but that he had not always lived on the top floor of a building.

[22] I note that the pricing of these units was such that the price increased by $10,000 per floor. That is, the applicants agreed to pay $10,000 more for unit 316 than they would have paid for an identical unit on the second floor.

[23] Given Chirag's answers on cross-examination, counsel for Urbane submits that the applicants may subjectively believe that the addition of a fourth floor is a material change to them, but that there is no evidence as to why this change is objectively material. With respect, this argument is not determinative of the key issue.

[24] In my view, purchasers generally make purchases for subjective reasons. As examples, one purchaser may like a westerly view, another may prefer larger windows, or another may prefer a ground-floor unit. Ultimately, purchasing decisions are subjective. Often purchasers are unable to fully enunciate the reasons for their purchasing decisions.

[25] The test here does not require the court to determine what this particular purchaser would have done in the circumstances, but rather what a reasonable purchaser in these same circumstances would have done.

[26] I find that the circumstances in the present case are very different from those in *Talon*. In *Talon* the purchaser bought commercial units in the middle floors of a proposed 70-story building. In addition to some other changes, the height of the building was later reduced to 60 stories. It was held, on an objective basis, that the changes did not materially affect the location of the purchaser's units in the building. Thus, the court held that these changes did not constitute a material change and that the purchaser was not entitled to rescind.

[27] In the present case, I find that the location of the applicants' unit on the top floor of the condominium development is important. That is, in my view, the original location of unit 316 on the top floor is an important characteristic of the unit. Although this condominium development is not a tall building, the top level of the development can still be described as the penthouse floor. Objectively, a penthouse unit can be considered to provide additional privacy, less interference from neighbouring units, a more peaceful environment, and increased status within the building.

[28] Therefore, although the applicants cannot point to specific objective reasons for preferring a top floor unit, I find that the location of unit 316 on the top floor is objectively material. That is, I find that a reasonable purchaser in this case would regard the addition of a fourth floor as sufficiently important to his decision to purchase a third-floor unit that, had the change

been in place at the time of purchase, it is likely that the purchaser would not have entered into the Agreement.

[29] For these reasons, I find that the addition of the fourth floor to the condominium development, in this case, is a material change.

RESCISSION UNDER THE CONDOMINIUM ACT

[30] I reject the submission made by counsel for the applicants that Urbane did not provide timely fulsome disclosure of the change to the development. I find that on February 22, 2024, Urbane provided the applicants with a lengthy RDS and a letter. The RDS clearly stated, more than once, that a fourth floor had been added to the building.

[31] I also reject the applicants' submission that they were not fully aware that the third-floor unit would no longer be on the top floor until sometime in March 2024 when Urbane's counsel confirmed that the applicants' unit would remain on the third floor and that the development would include a fourth floor. As noted above, I find that it was clear from the RDS that a fourth floor would be added above the applicants' third-floor unit.

[32] Moreover, in the RDS at schedule E, I find that Urbane provided the applicants with a copy of the wording of s.74, including s.74(5) and s.74(6), which contained references to the 10-day window during which a purchaser may exercise a right of rescission.

[33] In summary, s.74 provides a purchaser with a right of rescission in the event of a material change. Once a purchaser receives an RDS that discloses a material change, that purchaser is entitled to rescind the agreement to purchase. In the circumstances of this case, as set out in s.74(6)(a) and s.74(6)(c) respectively, that right of rescission must be exercised within 10 days of the latest of either the date on which the purchaser received the RDS or the date on which the Superior Court of Justice makes a decision as to whether the changes set out in the RDS constitute a material change.

[34] It is important to note that if the purchaser wishes to rely on s. 74(6)(c), the purchaser must also comply with s. 74(5), which states that the purchaser may apply to the Superior Court of Justice for a determination within 10 days after receiving the RDS.

[35] Therefore, in the present case, when the applicants received the RDS on February 22, 2024, the applicants acquired the right to rescind the Agreement. They had a 10-day window in which to exercise or preserve their right to rescind. They could have exercised their right by rescinding the Agreement within 10 days of February 22, 2024, or they could have preserved their right by making an application to the Superior Court of Justice within the same 10 days. If the applicants did not exercise or preserve their right, as set out above, within 10 days, the applicants' right of rescission under the Act is lost.

[36] I reject the applicants' argument that the negotiations between the parties in May and June 2024 caused the 10-day window, set out in the Act, to be suspended until the negotiations failed in early June 2024. In my view, the Act does not contemplate a suspension of the 10-day window except in circumstances where the RDS is insufficient or where the applicants

had not been made aware of the material change in question. Neither of those exceptions apply in this case.

[37] For all these reasons, I find that the applicants received the RDS regarding a material change on February 22, 2024, but the applicants did not attempt to exercise or preserve their right to rescind until June 12, 2024, when this application was commenced. The applicants have not complied with the time limits under s.74(5) or s.74(6), and therefore the applicants are no longer entitled to rescind under the Act.

THE COMMON LAW

[38] The Act is remedial consumer protection legislation. It provides the consumer (the applicants here) with certain specific rights regarding disclosure and rescission as discussed above. However, the Act does not usurp the common law. See *Lizotte v. Aviva Insurance*, 2016 SCC 52, 2 S.C.R. 521, at para. 56.

[39] Given my finding that the applicants are not entitled to exercise their right of rescission under s.74 of the Act, the applicants are left with a binding agreement for the purchase and sale of unit 316. The common law of contract applies to the Agreement. Therefore, in the alternative, the applicants submit that, pursuant to the common law, the addition of the fourth floor to the building constitutes a fundamental breach of the Agreement by Urbane that entitles the applicants to terminate the Agreement.

[40] At common law, in the context of a sales contract, if one party breaches the contract in a way that is so serious or fundamental that the breach goes to the root of the contract, the offending party is considered to have repudiated the contract. See *Guarantee Co. of North America v. Gordon Capital Corp*., [1999] 3 S.C.R. 423, at paras. 44-47; and *968703 Ontario Ltd. v. Vernon* (2002), 58 O.R. (3d) 215, (C.A.), at para. 14.

[41] If a contract is repudiated by a fundamental breach, the innocent party has an election. They may choose to treat the contract as still being in full force, or they may choose to accept the repudiation and terminate the contract. Although there is a debate about the proper terminology, the right of the innocent party to terminate the contract has often, perhaps incorrectly, been called a right of rescission. In my view, this terminology debate is irrelevant to my decision in this case.

[42] If the innocent party elects to terminate a contract as a result of a fundamental breach, then both parties will be discharged from their future obligations under the contract. See *Guarantee Co*. at para. 40; *Brown v. Belleville*, 2013 ONCA 148, 114 O.R. (3d) 561, at para. 44; and *Tse v. Sood*, 2015 ONSC 755, at para. 19.

[43] The issue in the present case is whether Urbane's decision to add a fourth floor onto the condominium development constitutes a fundamental breach of the Agreement for the purchase and sale of the applicants' unit.

[44] Fundamental breach has been described in many ways. The preferred description is stated by Wilson J. in *Hunter Engineering Co. v. Syncrude Canada Ltd*., [1989] 1 S.C.R. 426, at para. 137, as follows:

> A fundamental breach occurs "Where the event resulting from the failure by one party to perform a primary obligation has the effect of depriving the other party of substantially the whole benefit which it was the intention of the parties that he should obtain from the contract" (emphasis added). This is a restrictive definition and rightly so, I believe.

[45] The *Hunter* case involved contracts for the supply of mining gearboxes to be used to drive conveyor belts in Syncrude's oil sands project. It was discovered that the gearboxes were defective as they failed in less than two years, whereas it had been anticipated that they would last for 10 years. Further, the repair cost of the faulty gearboxes was estimated at approximately 86 percent of the contract price.

[46] In these circumstances, the trial judge held that the supplier of the gearboxes had not deprived the purchaser of substantially the whole benefit of the contract, and thus had not fundamentally breached the contract. Ultimately, the majority of the Supreme Court of Canada upheld the trial judge's decision. In support of the finding that there had not been a fundamental breach, at para. 138, Wilson J. approved of statements made by the trial judge, specifically that "The contract between the parties was still a contract for gearboxes. Gearboxes were supplied. They were capable of performing their function and did perform it for in excess of a year."

[47] In the *Tse* case, the purchaser of a condominium unit refused to close the purchase because the vendor had incorrectly warranted that the common expense charges for the unit were less than the actual charges, and that there were no contemplated special assessments. In considering the issue of fundamental breach, Perell J. found, at para. 21 of *Tse*, that the vendor had breached no fundamental promises that would give the purchaser the right to refuse to close.

[48] In the case of *2072467 Ontario Inc. v. Dr. Matthews P.C.*, 2020 ONSC 2739, the trial judge held that the fact that the premises had problems with insect infestation, mold, the HVAC system, and roof leaks did not amount to a fundamental breach of the lease agreement.

[49] In the Alberta case of *Labiuk v. 603558 Alberta Ltd. (Saturn Saab of Edmonton West)*, 2010 ABPC 62, the trial judge held that where a vendor had breached a contract for the sale of a new motor vehicle by delivering a used vehicle, the breach was not a fundamental breach as the purchaser received principally what they had bargained for.

[50] These cases all illustrate that the principles of fundamental breach have a very restricted application. I accept that the applicants in the present case expected to receive a condominium unit that was on the top floor of the building. However, I find that the addition of a fourth floor, so that the applicants' unit was no longer on the top floor, does not amount to a fundamental breach of the Agreement.

[51] The Agreement in the present case provides for the applicants to receive a specific well-defined residential unit on the third floor of the condominium development. The residential unit that the applicants will receive on closing will have the same layout, the same specifications, the same location, and the same size as the unit described in the Agreement.

Therefore, I reject the applicants' submission that Urbane's addition of a fourth floor has deprived them "of substantially the whole benefit which it was the intention of the parties that he (they) should obtain from the contract."

[52] For these reasons, I find that Urbane has not committed a fundamental breach of the Agreement, and consequently that the applicants are not entitled to terminate the Agreement at common law.

CONCLUSION

[53] In summary, I find that the applicants do not have a right to rescind the Agreement pursuant to the provisions of the Act, and similarly the applicants do not have the right to terminate the Agreement at common law. Therefore, the application is dismissed.

[54] The parties agreed upon the quantum of costs at the hearing of the application. In accordance with that agreement, the applicants shall pay the costs of the respondent fixed at $25,000 all-inclusive.

J. R. Henderson J.

Released: January 8, 2025

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