

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

<b>BETWEEN:</b>	)	
	)	
Patricia De Bartolo, Melissa Leone, Roberto	)	
M. Paniccia and the applicants listed in	)	
Schedule “A” attached to the Notice of	)	
Application	)	
	)	Theodore Charney, Caleb Edwards and John
Applicants	)	DeVellis for the Applicants
	)	
Icona Developments Inc., Steve Gupta, The	)	
Gupta Group Inc. and 1966711 Ontario Inc.	)	
	)	Monique Jilesen, Andrew Parley and
Respondents	)	Alexandra Tuccillo, for the Respondents
	)	
	)	
	)	
	)	
	)	<b>Heard:</b> October 6-8, 2025

**DECISION ON MOTION TO CONVERT and THE APPLICATION**

**SUTHERLAND J.:**

**INTRODUCTION**

- [1] There are 647 applicants. The applicants all entered into Agreements of Purchase and Sale to purchase condominium units from Icona Developments Inc. (“Icona”).
  
- [2] The respondents have brought a motion to convert this application into an action and an order setting a schedule for the exchange of pleadings in the action. The applicants seek a finding in the application that non-disclosure of the restrictive covenant was a breach of contract, specifically that the respondents owed a duty of good faith and were in breach of that duty and their obligations under the *Condominium Act, 1998*<sup>1</sup> (“the Act”).

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<sup>1</sup> S.O. 1998, c. 19.

- [3] The application was commenced on November 14, 2019. The Notice of Application was amended in December 2020 and then again on September 22, 2021. In the Amended Amended Notice of Application, the applicants seek:
- (a) An order declaring that Icona breached its contracts with the Applicants by breaching its duty to disclose the existence of the Restrictive Covenant when entering into termination of all of the agreements of purchase and sale; by breaching its duty to disclose material events impacting its ability to perform the contracts; and/or by cancelling the project ostensibly for lack of satisfactory financing when in fact the cause of the cancellation was Icona's failed efforts to remove the Restrictive Covenant, contrary to Sections 6(b) and 6(f) of the Tarion Addendum.
  - (b) An order declaring that the Respondents breached their disclosure obligations to the Applicants as set out in sections 72 and 74 of the *Condominium Act*, 1998 by failing to disclose the existence of the Restrictive Covenant in the Disclosure Statement and by failing to notify the Applicants of material changes in its ability to remove the Restrictive Covenant during its performance of the contract.
  - (c) An order declaring that the Respondent, Icona was negligent when it proceeded with marketing and selling units within the Icona Project (defined below) in spite of the Restrictive Covenant (defined below).
  - (d) An order declaring that the Respondents negligently misrepresented to Applicants the state of the Property and the intended condominium project.
  - (e) In the event that this Honourable Court grants the relief requested in paragraph [1]1 of the application, that there be a trial of an issue to determine whether the respondents Steve Gupta, The Gupta Group Inc., and 1966711 Ontario Inc. induced Icona to breach the agreements of purchase and sale.
  - (f) In the event that this Honourable Court grants the relief requested in paragraphs 1, 2, or 4 of the application that there be a trial of an issue to determine the applicants' damages against the respondents for breach of contract, breach of their statutory disclosure obligations, negligence and negligent misrepresentation.
- [4] The respondents allege that there were many new allegations contained in the Amended Notice of Application that were not pled in the original Notice of Applications such as claims of negligence. The respondents argued that the causes of action have expanded greatly in the Amended Notice of Application with up to sixteen different theories of liability.
- [5] I intend to consider the motion and application separately in these reasons.
- [6] For the reasons that follow:
- (a) I grant the relief requested that the Amended Amended Application be converted into an action.

(b) On the Amended Amended Application, I find there is no duty to disclose.

### **FACTUAL BACKGROUND**

- [7] This proceeding relates to the cancellation of a condominium project known as the Icona Project (“the Project”). The Project encompassed two 55-storey residential condominium towers with a 46-storey mixed use tower, which included a 17-storey hotel, a 29-storey component of residential units and a convention centre. Each of the applicants were pre-construction purchasers. They were advised by the developer that the Project was cancelled because of a lack of financing. The applicants claim otherwise. Each of the applicants in this proceeding received the return of their deposits with interest.
- [8] Beginning in or about 2017, the respondents promoted the sale of pre-construction condominium units in three proposed towers known as the “Icona Condominiums”.
- [9] The Icona Condominiums project was marketed as a project of “The Gupta Group”.
- [10] The Icona Project quickly sold out, meaning all condominium units available for sale were sold to the applicants and other purchasers, prior to the proposed condominium being constructed. All applicants signed a standard form agreement of purchase and sale with Icona (“the Agreements”). All applicants provided a deposit and made all requisite installment payments/deposits in accordance with the Agreements.
- [11] Under the *Act*, at the time of purchase, the respondents provided each purchaser with a disclosure statement (the “Disclosure Statement”) and other attached documents (together with the Disclosure Statement which will be referred to as the “Disclosure Package”).
- [12] The Disclosure Statement described in detail the intended condominium with a description of the two towers and the amenities, which were to include a pool, change room, kids’ playroom, theatre, lounge/party room, private dining rooms and associated kitchen/warming facilities.
- [13] The Agreements failed to close as the Project was cancelled by Icona for a lack of financing.
- [14] At the time of sale, the property was encumbered by a restrictive covenant (“the Restrictive Covenant”).
- [15] The Restrictive Covenant was registered on title when Icona Hospitality Inc. (now known as the Respondent 1966711 Ontario Inc.) purchased the Property. The Restrictive Covenant was registered to the Property on April 29, 2005. Unless vacated, the Restrictive Covenant runs until April 29, 2045. That is 40 years from the date of registration and during that time, it prohibits the Property from being used for any purpose other than the construction, development, operation and management of a hotel with meeting and banquet facilities and any services ancillary thereto.
- [16] In February 2017, the respondents, or one or more of them, entered into negotiations with 2748355 Canada Inc. (“274 Canada”) and QuadReal Property Group Limited Partners

(“QuadReal”) to delete the Restrictive Covenant, but the negotiations failed in or about November 2017.

- [17] Thereafter, on November 14, 2017, Icona Hospitality Inc. (which is the predecessor in title to 1966711 Ontario Inc. in respect of the Property) brought an application to the Ontario Superior Court of Justice for an order removing/deleting the Restrictive Covenant.
- [18] In reasons dated March 29, 2018, the court rejected the application.
- [19] On or about September 14, 2018, each of the purchasers received a letter (“the Termination Letter”) from Icona stating:

[T]he Icona project has been cancelled because of circumstances beyond our control that make the project un-financeable.

In accordance with Section 7 of the Purchase Agreement, this letter represents formal notice that the Purchase Agreement is hereby terminated.

- [20] The applicants claim that the real reason for the termination was the existence of the undisclosed Restrictive Covenant which was known to the respondents before the Project was marketed and units were put up for sale.

### **Motion to Convert**

#### **Positions of the Parties**

- [21] The respondents argue that this proceeding cannot proceed as an application or, for that matter, at all. The applicants have sixteen causes of action. They are seeking substantial damages with complex issues for causation and assessment per each of the 647 respondents. Further, the respondents argue there are numerous issues of credibility. The applicants assert numerous allegations of intentional wrongdoing on the part of the respondents. These allegations require specific findings of subjective intent and consideration of the respondents’ state of mind. None of these numerous issues and causes of action can be effectively adjudicated in an application. The proceeding must be converted into an action. The question remains, as the respondents suggest, whether this is a general action or a class action. The number of applicants, with the consideration of each of their unique factual matrix in assessing damages, make this matter proceeding as a general action unworkable. The applicants have made a strategic decision not to proceed as a class action for, as the respondents assert, they would not be successful in certifying this matter as a class action. The applicants are left with the process they have chosen: an unworkable application process or a complex multi-staged action.
- [22] The applicants argue that the motion should be dismissed for there are “core issues” that can be adjudicated by application while others can be adjudicated later by an action. The core issues are (1) whether the restrictive covenant should have been disclosed prior to the offering of the units for sale and (2) whether Icona should have offered the units at all knowing that the restrictive covenant was registered on title to the Property. Once those core issues are determined then the next stage is to assess damages and this can be done

separately. In effect, the applicants wish to have the proceeding be bifurcated: (1) liability of failure to disclose or to proceed to sale at all and (2) the assessment of damages.

Analysis and Conclusion

[23] Rule 14.05(3) of the *Rules of Civil Procedure*<sup>2</sup> reads:

(3) A proceeding may be brought by application where these rules authorize the commencement of a proceeding by application or where the relief claimed is,

(a) the opinion, advice or direction of the court on a question affecting the rights of a person in respect of the administration of the estate of a deceased person or the execution of a trust;

(b) an order directing executors, administrators or trustees to do or abstain from doing any particular act in respect of an estate or trust for which they are responsible;

(c) the removal or replacement of one or more executors, administrators or trustees, or the fixing of their compensation;

(d) the determination of rights that depend on the interpretation of a deed, will, contract or other instrument, or on the interpretation of a statute, order in council, regulation or municipal by-law or resolution;

(e) the declaration of an interest in or charge on land, including the nature and extent of the interest or charge or the boundaries of the land, or the settling of the priority of interests or charges;

(f) the approval of an arrangement or compromise or the approval of a purchase, sale, mortgage, lease or variation of trust;

(g) an injunction, mandatory order or declaration or the appointment of a receiver or other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application;

(g.1) for a remedy under the *Canadian Charter of Rights and Freedoms*;  
or

(h) in respect of any matter where it is unlikely that there will be any material facts in dispute requiring a trial. R.R.O. 1990, Reg. 194, r.14.05 (3); O. Reg. 396/91, s. 3; O. Reg. 537/18, s. 2.

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<sup>2</sup> R.R.O. 1990, Reg. 194 (“RCP”).

[24] The parties agree that the Court is to examine four factors when deciding whether to convert an application into an action.<sup>3</sup> These four factors are:

- a. Whether material facts are in dispute;
- b. The presence of complex issues that require expert evidence and/or weighing of evidence;
- c. Whether there is a need for pleadings and discoveries; and
- d. The importance and impact of the application and of the relief sought.

[25] The Ontario Court of Appeal emphasized in *Maurice v. Alles*, 2016 ONCA 287, 130 O.R. (3d) 452, at para. 32:

...An application is also a summary process. Its use is restricted, pursuant to rule 14.05(3), to situations where an application is permitted under the Rules or in cases where certain enumerated relief is claimed. Evidence is generally supplied through affidavits and cross-examinations conducted [page 461] out of court. Where there is conflicting evidence that requires credibility determinations on central issues, the application must be converted to an action: see *Baker v. Chrysler Canada Ltd.* (1998), 1998 CanLII 14672 (ON SC), 38 O.R. (3d) 729, [1998] O.J. No. 531 (Gen. Div.). If a proceeding is capable of being resolved as an application, it should be, as that is the most expeditious and least expensive determination of the proceeding on its merits. There is no utility in layering on to this summary process another summary process.

[26] The applicants argue that subrule (h) is not a condition that applies to all grounds under r. 14.05(3) but is a “catch-all” phrase to allow matters to be brought by way of an application if the matter does not fall within subparagraphs (a) to (g). The Court may allow an application to continue even if there are material facts in dispute.<sup>4</sup>

[27] The Divisional Court in *Castillo v. Xela Enterprises Ltd.*<sup>5</sup> reviewed the application Judge’s decision not to convert the application requesting an oppression remedy to an action. The Divisional Court reviewed the Supreme Court of Canada decision of *Hryniak v. Mauldin*<sup>6</sup> and concluded at paragraph 29:

A trial does not automatically follow because one party denies the allegations of the other. That would require a trial for every piece of contested litigation. Consideration must be given to the substance of the alleged dispute, and whether it needs a finding of credibility. The judge may also conclude that the facts are not really in dispute, or that that the disputed

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<sup>3</sup> *Przysuskiv v. Optical Holdings Inc.*, 2013 ONSC 5709, at para. 10.

<sup>4</sup> *McKay Estate v. Love*, (1992) 6 O.R. (3d) 511 (S.C.), aff’d 6 O.R. (3d) 519 (C.A.).

<sup>5</sup> 2016 ONSC 6088 (Div. Ct.).

<sup>6</sup> 2014 SCC 7, [2014] 1 S.C.R. 87.

aspects of the facts are not relevant or material to the question to be decided. A disagreement as to the conclusions that should be drawn on the facts is not a material disputed fact and needs no trial.

- [28] The Divisional Court upheld the judge's decision not to convert the application into an action and that on the evidence presented, the application judge was able to decide the issues of the application.
- [29] The application before this Court has many facets. There is the issue of whether the respondents had an obligation to disclose the existence of the Restrictive Covenant before starting the sale and selling the units. There is also the issue that if the respondents did breach such an obligation, which of the respondents breached such an obligation and what are the damages, if any, that flow to the 647 respondents from this breach of the obligation.
- [30] The applicants agree that there are multiple facets in the proceeding but that the core issue of whether an obligation existed and whether that obligation was breached is an issue that the Court may decide since there are no material facts in dispute. Further, this issue involves the interpretation of the contractual obligations between Icona and the applicants and Icona's statutory obligation under the *Act*. The applicants do not disagree that the issues of responsibility for any damages claimed, which of the respondents are responsible and the amount for each of the applicants are issues that the Court cannot adjudicate by way of an application. These issues require a trial through an action.
- [31] The question for this Court to decide is not whether there should be a conversion to an action but whether the whole application should be converted into an action or just the remaining issues if the Court decides that Icona had an obligation to disclose the Restrictive Covenant.
- [32] On this question, I agree with the applicants. The "core" issue of whether an obligation exists can be determined on the record before me. There are no material facts in dispute on that issue.
- [33] The other issues on which of the respondents the obligation applies to, whether the failure to disclose was critical to the 647 applicants entering into their Agreements of Purchase and Sale and whether any damages flow to any of the applicants along with the quantification of any damages, are issues that cannot be determined by way of an application. I come to this conclusion because:
- (a) There are questions of credibility on the intentions of the applicants in entering their separate Agreements of Purchase and Sale which includes if they were aware of the Restrictive Covenant.
  - (b) The disputed facts on the motivation of each of the applicants and their specific dealings with Icona and their entering into their respective Agreements of Purchase and Sale. Would disclosure of the Restrictive Covenant have made any difference?
  - (c) Whether there is causation to any damages claimed by the applicants specifically.

- (d) The quantification and assessment of damages claimed by each of the applicants. On what date should damages be assessed for each applicant?<sup>7</sup>
- (e) The liability of each of the respondents that did not enter into a contract with the applicants.
- (f) There may be the requirement of expert opinion evidence on issues which include the assessment of damages.<sup>8</sup>
- (g) Whether the respondents acted appropriately in seeking to have the Restrictive Covenant removed and in securing financing.

[34] I agree with the respondents that these issues can only be determined at a trial and the procedure provided for a trial is an action. I do not accept the assertions of the applicants that the multiple issues can be determined in an application with multiple installments of trials. Judicial resources mandate that the Court must take the most efficient and least costly means to adjudicate, and in my view, this is through an action.

[35] Thus, I find that there are issues in the application that can only be determined by a trial with oral testimony and cross examinations and, further, that the most efficient and least costly means to adjudicate the issues is through an action. I therefore order that an action is appropriate for those issues which include all issues except the issue on whether the respondents had an obligation to disclose.

#### **The Application – Duty to Disclose**

[36] The applicants urge the Court to decide on whether the duty to disclose the existence of the Restrictive Covenant existed before marketing and selling the units and when the units were being sold.

[37] The applicants indicate that this is a core issue of the litigation. If there is no such duty to disclose, the litigation would be at an end. If there is such a duty to disclose, then the litigation would proceed, as I have determined, as an action. The applicants argue that on the question of duty to disclose there are no material facts in dispute. The question is a legal one determined on the undisputed facts in this application.

[38] The respondents argue that the applicants cannot piecemeal this proceeding. The entire application must be determined. Further, they argue that there is no duty to disclose, and the applicants have no cause of action against the respondents.

[39] I agree with the applicants that the sole question of a duty to disclose is a question that involves contract and statutory interpretation. This type of question is one that is fully

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<sup>7</sup> *Rougemount Capital Inc. v. Computer Associates International Inc.*, 2016 ONCA 847, 410 D.L.R. (4<sup>th</sup>) 509, at paras 43-54.

<sup>8</sup> The respondents indicated that there are affidavits filed in the application from five experts.

suited to be determined by application as set out in r. 14.05 (3)(d) and (h). I am satisfied that I can make such a determination on the record before me.

### The Restrictive Covenant and Chronology

- [40] The Restrictive Covenant Agreement dated April 26, 2005 was registered on the title of the Property on April 29, 2005. In the Restrictive Covenant, the Covenantor is 14066284 Ontario Inc. and the Covenantee is 2748355 Canada Inc. There is no issue that the “Burdened Lands” in the Restrictive Covenant being the Property, are the lands in which the Icona Project was to be constructed. Terms of the Restrictive Covenant include:

#### **Section 1 Use of Burdened Land**

The Subject Site shall not be used for any purpose other than the construction, development, operation and management of a hotel with meeting and banquet facilities and any purposes ancillary or incidental thereto including without limitation, restaurant and lounge facilities. Without limiting the generality of the foregoing, the Burdened Land shall not be used for the purposes of operating a movie theatre.

#### **Section 2 Construction of Improvements of the Burdened Land**

The Covenantor shall not construct or erect on the Burdened Land or any part thereof any building or other improvements without first complying with the provisions of the Schedule “C” hereto.

- [41] Schedule “C” of the Restrictive Covenant has additional restrictions with respect to any application for development approval on the burdened land. Specifically, paragraph 2 of Schedule “C” states that,

“Unless specifically permitted in writing by the Approving Agent, no person (including, without limitation, the Covenantor) will apply for development approval or a building permit with respect to the Burdened Land...without first”:

- a. “Providing the Approving Agent reasonably detailed plans and specifications of the Improvements including...”
- b. “Obtaining the approval of the Approving Agent in writing; and which the Approving Agent will use its reasonable best efforts to provide within five (5) Business Days of the application therefor...”

- [42] Though the provisions of the Restrictive Covenant applied for 40 years, after 20 years, for example in 2025, 1966711 Ontario Inc (“196 Ontario”) could apply to modify the terms of the Restrictive Covenant, and 274 Canada could not “unreasonably withhold or delay its consent.”

[43] However, prior to 2025, any changes to the Restrictive Covenant could only be affected if 274 Canada “in its sole and absolute discretion” agreed to waive, modify or cancel any of the restrictive covenants.

[44] Chronology of some of the milestone events are as follows:

- (a) In 2005, Icona buys the lands with the Restrictive Covenant.
- (b) On April 29, 2005, the Restrictive Covenant is registered.
- (c) In 2005, the Property is designated as an office and commercial space by the Vaughan Official Plan Amendment No. 320.
- (d) In 2010, Vaughan Metropolitan Centre Secondary Plan is created, which calls for the development of the area including Hwy 7 between Hwy 400 and Jane Street.
- (e) In November 2016, 196 Ontario advises a holder of the Restrictive Covenant, QuadReal, of its intention to develop the lands.
- (f) On November 23, 2016, Gupta Group enters into an agreement that Montana Steele Marketing will manage the promotion and marketing of the Icona Project.
- (g) In January 2017, pre-construction sales begin.
- (h) On January 25, 2017, the VIP Broker sales event happens.
- (i) On January 27, 2017, the Paniccia Purchase Agreement is entered into.
- (j) On January 31, 2017, the Bertolo Purchase Agreement is entered into.
- (k) On January 2017, Icona, through Mr. Gupta, speaks to HSBC and RBC regarding financing.
- (l) QuadReal indicates a willingness to negotiate.
- (m) In February 2017, the First Submission of the Site Development Application is submitted.
- (n) On March 2, 2017, the Leone Purchase Agreement is entered into.
- (o) The Second Site Development Application with amended architectural drawings are submitted on September 1, 2017.
- (p) In November 2017, negotiations with QuadReal break down.
- (q) On November 14, 2017, an application to the Superior Court of Justice to remove the Restrictive Covenant is filed.

- (r) From November 2017 to July 6, 2018, steps to proceed with the Icona Project continues.
- (s) On June 19, 2018, the Vaughan City Council meeting approves the Icona Project subject to various conditions.
- (t) On July 6, 2018, Justice Cavanagh dismissed the application to remove the Restrictive Covenant.
- (u) On August 18, 2018, HSBC advises rejecting financing.
- (v) Finnegan Marshall's report regarding finances indicates for the first time a projected loss in excess of \$50 million dollars.
- (w) On August 9, 2018, RBC advises rejecting financing.
- (x) On September 14, 2018, letters regarding termination are sent to all prospective purchasers.

**Positions of the Parties**

- [45] The applicants assert and the respondents agree that:
- (a) The Restrictive Covenant prohibited the construction of a residential condominium.
  - (b) The respondents did not request approval in writing from the Approval Agent prior to applying for the development approval of the Icona Project.
  - (c) The respondents did not request from 274 Canada to modify or waive the Restrictive Covenant before offering the Icona Project condominium units for sale to the public.
- [46] The respondents were advised by 274 Canada and QuadReal that the property could only be used for a hotel with meeting and banquet facilities.
- [47] Notwithstanding this warning, the respondents continued to market and proceed with the Icona Project knowing that the Restrictive Covenant was registered on the Property which prevented the respondents from building a residential condominium on the Property.
- [48] The respondents did not indicate in the Site Plan Application of February 2017 that there was a Restrictive Covenant registered on title and that there was no consent obtained to permit the building of residential condominium units on the Property. Further, the existence of the Restrictive Covenant was not disclosed in the disclosure statement.
- [49] The applicants contend that the respondents deliberately decided not to disclose the Restrictive Covenant to the public, which include prospective purchasers such as the applicants and the City. The applicants contend that a duty to disclose the existence of the Restrictive Covenants to prospective purchasers, like the applicants, exists in law. The

obligation to disclose is mandated by the *Act* and the terms of the Agreements. Icona failed to comply with the *Act* and the terms of the Agreements, failing to abide its duty of good faith.

- [50] The respondents disagree. The respondents submit that there is no legal obligation for Icona to have disclosed the existence of the Restrictive Covenant. The failure to disclose the Restrictive Covenant did not breach the *Act*. The failure to disclose the Restrictive Covenant did not breach the Agreements. Icona complied with the terms of the Agreements. Icona did not breach any duty of good faith that existed. Icona was permitted by the terms of the Agreements to cancel the Agreements due to lack of financing. Icona would have to return the deposits with interest. This is what Icona did. The actions of Icona are fully permitted by the *Act* and the terms of the Agreements.

## **ISSUES**

- [51] The issues for this Court to determine are:
- (a) Did an obligation to disclose exist in the Agreements?
  - (b) Did an obligation to disclose exist per the *Condominium Act, 1988*<sup>9</sup> (“the Condo Act”)?

### **Did an obligation to disclose exist in the Agreements?**

#### The Agreements

- [52] There is no contest that the standard terms in the Agreements are the same for the 647 applicants except for mainly the purchase price, payments due, closing date, unit number, deposits and name of the purchaser(s). There is also no contest that the Agreements and Disclosure Statements did not explicitly refer to or disclose the Restrictive Covenant.
- [53] Section 16 entitled “Permitted Encumbrances” states that the purchaser agrees to accept title subject to: “(h) any obligation, restrictive covenant, easement, right of way or other agreement with any adjoining landowner.”
- [54] Section 19, entitled “Purchaser’s Acknowledgement and Covenants”, indicates at subsection (2) that the purchaser is advised that the Vendor is currently finalizing the development approvals relating to the Lands and the purchaser covenants and agrees not to oppose any application made by the Vendor relating to the development of the Lands.
- [55] Section 29, entitled “Termination”, indicates that in the event the Agreement is terminated through no fault of the purchaser, the deposit shall be returned with interest and without deduction except as contemplated by the Occupancy License. The section further states:

The Purchaser further acknowledges that the Vendor shall not be liable for any damages or costs whatsoever incurred by the Purchaser resulting from

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<sup>9</sup> S.O. 1998, c.19.

the termination of this Agreement including, without limiting the generality of the foregoing, relocation costs, professional fees and disbursements, opportunity costs, loss of bargain or any other damages or costs incurred by the Purchaser, directly or indirectly. The Purchaser acknowledges and agrees that this provision may be pleaded by the Vendor as a complete defence to any claim which may be made by the Purchaser against the Vendor.

- [56] Section 38(4) in the General Contract Provisions of the Agreements indicate that the purchaser acknowledges and agrees that there are no representations, warranties, guarantees or other conditions in any way affecting the Agreement or condominiums other than expressed in the Agreement and/or the Disclosure Statement(s).
- [57] The Agreements included, as an Addendum, provisions and warranties mandated by Tarion. Sections 6(c) and (d) indicate that an early termination is to be satisfied by July 2, 2019 with condition #1 concerning financing.
- [58] The Disclosure Statement further included at s. 20 that the common elements and units may be subject to and have the benefit of “certain additional easements, rights of way, rights of entry and licenses generally described”, listing seven examples.

#### Legal Principles of Contractual Interpretation

- [59] In interpreting a contract, the Court must review the whole of the Agreement. The Court must examine the ordinary meaning of the wording to determine if it is clear and unambiguous. If the terms are clear and unambiguous, there is no reason to go outside the terms of the Agreement. If the terms are not clear and are ambiguous, the Court may go outside the terms of the Agreement to ascertain the intention of the signatories to the Agreement and the meaning of provisions in the Agreement.<sup>10</sup> In *Sattva Capital Corp. v. Creston Moly Corp.*, the Supreme Court of Canada confirmed that surrounding circumstances may be used in interpreting a contract, but that “they must never be allowed to overwhelm the words of that agreement.”<sup>11</sup>
- [60] In this vein, the Supreme Court of Canada, in *Earthco Soil Mixtures Inc. v. Pine Valley Enterprises Inc.*<sup>12</sup>, acknowledged the limits of language that “‘words alone do not have an immutable or absolute meaning’ and cannot by themselves, convey the commercial purpose of a contract.”<sup>13</sup> Accordingly, “ascertaining the objective intent of the parties involves not only a consideration of the actual words used in a contract but also a consideration of the factual matrix surrounding the contract.”<sup>14</sup>

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<sup>10</sup> *Glimmer Resources Inc. v. Exall Resources Inc.*, [1999] O.J. No. 1357 (C.A.), at paras. 16 and 17; *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 45-50 (“*Sattva*”).

<sup>11</sup> *Sattva*, at para. 57.

<sup>12</sup> 2024 SCC 20, 175 O.R. (3d) 240.

<sup>13</sup> *Ibid*, at para. 64.

<sup>14</sup> *Ibid*, at para. 65. Also see *Pinnacle International (One Yonge) Ltd. v. Torstar Corporation*, 2024 ONCA 755, at paras. 59-61.

Analysis

- [61] The Agreements are for the sale and purchase of preconstruction residential condominium units. As the Agreements state, there are many steps that must be overcome to have the condominium built and ready for occupancy and sale. It is stated in the Agreements that unless all these steps are completed, the sale may not take place.
- [62] The Agreements indicate that these steps include development and construction approval, financing and property title. With the many steps that must be overcome, the Agreements, in the Termination section, explicitly indicate that the Vendor is not liable for any damages or costs whatsoever if the Agreements are terminated through no fault of the purchaser.
- [63] The Agreements indicate that the Agreements may be terminated for failure of financing and that early termination may happen if the condition for financing is not satisfied by July 2, 2019.
- [64] The Agreement was terminated for lack of financing on September 14, 2018.
- [65] In addition, evidence led by way of expert evidence indicates that solicitors do not review title to the property for condominium unit purchases until just before closing since title may change and defects need to be remedied as the condominium building is being built. The Agreements do indicate that purchasers have until 10 days before purchase to search title. This evidence together lends the Court to conclude that it is not expected in the terms of the Agreements that title is not searched until just before closing. It is not a practice in the industry to search title at the time of an initial review of the Agreements.
- [66] Thus, inherent in the purchase on condominiums before construction is a risk that the condominium building may not be built due to other forces such as a change in the economy which may lead to the inability to obtain financing or failure to obtain construction approvals. These risks are known to prospective purchasers before they purchase.
- [67] The Agreements are drafted to an extent that these risks are taken into consideration, and terms are included to minimize the inherent risk to the vendor. These terms are present and known to the purchaser before the purchaser agrees to purchase a preconstruction unit.
- [68] The question remains, do the Agreements impose an obligation on the Vendor to disclose the existence of the Restrictive Covenant before the Applicants entered into the Agreement?
- [69] I find that it does not.
- [70] The mere fact of entering into the Agreements, as the Applicants submit, does not create a false impression that the units will be built. In pre-construction purchases, there are a myriad of reasons that the condominium building may not be built, and many of those reasons are outlined in the Agreements. The mere fact the Agreements and accompanying Disclosure Statements contain reference to the buildings and the amenities contained in
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those buildings does not extrapolate to an unwavering promise by the Vendor to build the buildings as outlined.

[71] Preconstruction sales have risks. They are known and apparent from reading the terms of the Agreements.

[72] I am not convinced that there existed an obligation on the Respondents pursuant to the terms of the Agreements to disclose the existence of the Restrictive Covenants on title since 2005 before offering and selling the units for sale.

**Did an obligation to disclose exist per the *Condominium Act*?**

[73] The *Act* imposes obligation on Vendors of condominium units. The *Condominium Act* requires a declarant to provide each purchaser with a copy of the current disclosure statement for the corporation of which the unit forms part.<sup>15</sup> Section 72 (3) outlines the contents of the Disclosure Statement and reads, in part, as follows:

**Contents**

(3) A disclosure statement shall be prepared in accordance with the regulations and shall contain,

(a) a table of contents prepared in accordance with subsection (4) and located at the beginning of the disclosure statement;

(a.1) a statement specifying the date on which it is made;

(b) a statement indicating,

(i) whether the corporation is a freehold condominium corporation or a leasehold condominium corporation, and

(ii) if the corporation is a freehold condominium corporation, the type of freehold condominium corporation that it is;

(c) a statement of the name and municipal address of the declarant and the mailing address of the property or the proposed property and its municipal address if available;

(d) a general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities together with all conditions that apply to the provision of amenities;

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<sup>15</sup> Section 72(1) of the *Act*.

[74] Section 74 obligates that where there is a material change in the information contained, notice must be provided to the purchaser. Section 74(1) and (2), in part, states:

**Material changes in disclosure statement**

74 (1) Whenever there is a material change in the information contained or required to be contained in a disclosure statement delivered to a purchaser under subsection 72 (1) or a revised disclosure statement or a notice delivered to a purchaser under this section, the declarant shall deliver a revised disclosure statement or a notice to the purchaser. 1998, c. 19, s. 74 (1).

**Definition**

(2) In this section,

“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, but does not include,

(a) a change in the contents of the budget of the corporation for the current fiscal year if more than one year has passed since the registration of the declaration and description for the corporation,

(b) a substantial addition, alteration or improvement within the meaning of subsection 97 (6) that the corporation makes to the common elements after a turn-over meeting has been held under section 43,

(c) a change in the portion of units or proposed units that the declarant intends to lease,

(d) a change in the schedule of the proposed commencement and completion dates for the amenities of which construction had not been completed as of the date on which the disclosure statement was made, or

(e) a change in the information contained in the statement described in subsection 161 (1) of the services provided by the municipality or the Minister of Municipal Affairs and Housing, as the case may be, as described in that subsection, if the unit or the proposed unit is in a vacant land condominium corporation. 1998, c. 19, s. 74 (2).

...

- [75] The applicants argue that “a general description of the property or proposed property” means that the respondents had an obligation to disclose “conditions that are outside of the vendor’s control, that may prohibit the vendor from construction on the property.”<sup>16</sup>
- [76] In addition, the applicants argue that under section 74, the respondents had an obligation to advise the applications of a material change “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.”
- [77] First, I do not accept the applicants’ interpretation that section 72(3) imposes an obligation upon the respondents to disclose the existence of the Restrictive Covenants that were registered on the Property since 2005. General means involving only the main elements.<sup>17</sup> Description means a spoken or written representation.<sup>18</sup> Description is also defined in the *Act* as “a description registered under section 2 and all amendments to the description.” I interpret the phrase “general description” as a representation of the main elements and features of the proposed condominium to be built with the information as outlined in section 2. It is not a specific representation of title or the construction process required to build the condominium. I thus reject the contention of the applicants that the respondents were obligated in providing in the general description the existence of the Restrictive Covenants.
- [78] This further begs the question of what is the material change that the applicants contend that respondents were obligated to reveal. There is no material change. The factual situation has not changed. The Restrictive Covenants remain on title. What may have changed is the respondents’ hope that they would have been able to remove the restrictive covenant from title but failed to do so either through negotiations or Court proceedings. This is not a material change to the general description of the Property.
- [79] However, there is the question of whether the disclosure was adequate by the respondents. In support of their contention that the disclosure was not adequate, the applicants direct the Court to *Abdool v. Somerset Place Developments of Georgetown Ltd.*<sup>19</sup> and *Grinberg v. Law Development Group (Thornhill) Ltd.*<sup>20</sup>
- [80] *Abdool* was a decision that dealt with the predecessor of the Act, the *Condominium Act*, RSO 1980, c. 84, namely section 52. The Court of Appeal had to ascertain what are the consequences of disclosures that do not in fact comply with the disclosure requirements under the *Act*. The Court of Appeal stated:

[45] If no disclosure statement is delivered, the purchaser obviously cannot be bound to the agreement. The problem, which these cases exemplify, arises when a purchaser, before final closing, seeks to rescind an agreement of purchase and sale on the ground that a disclosure statement, which on its

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<sup>16</sup> Factum of the Applicants, at para. 62.

<sup>17</sup> Oxford Dictionary of Current English, Oxford University Press, 2005.

<sup>18</sup> *Ibid.*

<sup>19</sup> 1999 CanLII 8658 (Ont. C.A.) (“*Abdool*”).

<sup>20</sup> 1996 Carswell 1821 (Ont. Gen. Div.) (“*Grinberg*”).

face purports to address the matters enumerated in s. 52 (6) and (7), does not in fact comply with those provisions. If, as I have concluded, only material departures from these provisions warrant declaring an otherwise valid agreement non-binding, when is a defect to be considered material? To invoke a common dictionary meaning of "material", when is a defect so pertinent, germane or essential as to render a disclosure statement in contravention of the Act and entitle a purchaser to cancel the transaction?

[46] I approach this question first by reference to the applicable burden of proof. In my opinion, when a purchaser who has had the opportunity afforded by the cooling-off period to consider the disclosure statement and the accompanying documentation, and has decided to go through with the transaction, subsequently seeks to resile from his or her otherwise binding agreement of purchase and sale on the basis of the deficiency of the disclosure statement, the onus is on the purchaser to show that the disclosure statement fails to satisfy the requirements of the [Act](#) to the degree that the agreement must be declared non-binding.

[47] 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 10-day cooling-off period.

[48] I shall consider later the right of a purchaser under s. 52 (2) to rescind the agreement where there has been a material amendment. At this juncture, I would move to the actual disclosure statements in these appeals.

[81] I do not find *Abdool* of much assistance. The decision relates to the predecessor statute. The issue in that case was what disclosure is material to provide the purchasers with the right to terminate the Agreement of Purchase and Sale when there was no compliance of the required disclosure. The factual situation here is quite different. Here, I have found that the respondents have not failed to comply with the disclosure provision of the *Act* in the enunciated requirements set out therein. The difference in the legislation was that there were no enumerated listings of requirements for disclosure in the predecessor legislation as opposed to what is described in the *Act*. Given that, I find *Abdool* distinguishable on its facts.

[82] *Grinberg* is a decision of Justice Sharpe that considers the failure of the developer to adhere to certain site plans, drawings and marketing materials which included depictions of an artist's conception of the unit. The purchaser agreed to buy the unit presented which showed that model containing 23 windows. When the unit was built, it only had 14 windows, 9 less. Justice Sharpe relied on the statement in paragraph 47 of *Abdool* to

determine that there was a material change in the representation of the number of windows that a reasonable purchaser would consider the number of windows sufficiently important not to proceed with the transaction.

- [83] Again, I do not find this decision helpful for I have determined that the respondents have not failed to disclose per the *Act*, and further, there was no representations made that was material to permit the applicants the right to terminate the Agreements based on the *Act*.
- [84] Consequently, I conclude that there is no obligation under the *Act* that required the respondents to disclose the existence of the Restrictive Covenants that were registered on title to the Property since 2005 in the marketing and sale of these pre-construction units.

### **CONCLUSION**

- [85] I conclude that there is no obligation in the Agreements or pursuant to the *Condominium Act* that the existence of the Restrictive Covenants registered on title since 2005 were required to be disclosed.
- [86] Given my determination, a further civil case conference will be required to ascertain the applicants' intentions with this proceeding. If the applicants intend to proceed, a timetable on the remaining issues will have to be agreed upon or ordered. The issue of costs will also have to be adjudicated.
- [87] Counsel to arrange with my judicial assistant at [karen.bunbury@ontario.ca](mailto:karen.bunbury@ontario.ca) a civil case conference with me.



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Justice P. Sutherland

**CITATION:** De Bartolo et al. v. Icona Developments Inc. et al. 2026 ONSC 1790  
**NEWMARKET COURT FILE NO.:** CV-19-142706-00  
**DATE:** 20260324

**ONTARIO**

**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

Patricia De Bartolo, Melissa Leone, Roberto M.  
Paniccia and the applicants listed in Schedule "A"  
attached to the Notice of Application

Applicants

Icona Developments Inc., Steve Gupta, The Gupta  
Group Inc. and 1966711 Ontario Inc.

Respondents

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**DECISION ON MOTION**

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Sutherland J

**Released:** March 24, 2026