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Pre-Construction Risk, Redefined: Ontario Courts Limit Developer Disclosure Obligations

In the Ontario Superior Court's most recent decision affecting developers, *De Bartolo v Icona Developments Inc*, the Court held that neither the standard form agreements of purchase and sale nor the *Condominium Act, 1998* obliged the developer of the Icona condominium project in Vaughan to disclose a restrictive covenant registered on title. Together with the Ontario Court of Appeal's recent decision in *Shiralian v Wyldewood Creek Inc*, the ruling confirms that courts will give full effect to well-drafted contractual provisions that allocate risk in pre-construction transactions.

The *De Bartolo* decision reinforces a growing trend in the case law that circumscribes purchaser claims and upholds the commercial bargain the parties have struck. It also serves as a stark reminder to purchasers of pre-construction condominiums that there is an inherent risk the condominium may not be built and that the purchasers' sole remedy may be limited to the return of their deposit, plus interest.

The Facts

Beginning in 2017, Icona promoted the sale of pre-construction condominium units in the City of Vaughan. The project sold out, with all 647 purchasers entering into standard form agreements of purchase and sale (APS). At the time of sale, a time-limited restrictive covenant registered on title since 2005 still encumbered the property, prohibiting its use for any purpose other than a hotel with meeting and banquet facilities. The Disclosure Statement provided to purchasers contained general references to "easements, rights of way, restrictions, agreements, notices and other encumbrances currently registered against title to the Lands."

During the development phase, the developers pursued the removal of the covenant on multiple fronts. Due to increased construction costs at the time, the cost to develop the project increased materially and the project was no longer profitable. As a result, Icona was denied financing and terminated the project under the financing condition in the Tarion Addendum,

returning all of the purchasers' deposits with interest. The purchasers sued, seeking damages to reflect the market increase of as-built condominiums.

The Legal Issue: Was Disclosure Required?

The central question before the Court was whether the developer was obliged to disclose the existence of the restrictive covenant – either under the terms of the APS or pursuant to the *Condominium Act, 1998*.

The Decision: No Obligation to Disclose

Justice Sutherland found there was no obligation, either under the APS or the *Condominium Act, 1998*, for the respondents to disclose the existence of the restrictive covenant.

The Court identified two key provisions in the APS:

- **"Permitted Encumbrances" Clause**: Purchasers agreed to accept title subject to "any obligation, restrictive covenant, easement, right-of-way, or other agreement with any adjoining landowner."
- **Section 19(2)**: The vendor disclosed it was "currently finalizing its development approvals relating to the Lands."

The Court held that entering into the APS did not create a false impression that the units would be built, observing that "[i]n 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."

Turning to the statutory framework, Justice Sutherland analysed sections 72 and 74 of the *Condominium Act, 1998*:

- **The "General Description" Requirement**: Section 72(3)(d) requires a "general description of the property or proposed property including the types and number of buildings, units and recreational and other amenities." The Court interpreted "general description" narrowly, holding that it requires "a representation of the main elements and features of the proposed condominium," not "a specific representation of title or the construction process required to build the condominium."
- **The Material Change Provisions**: With respect to section 74's material change provisions, the Court held a restrictive covenant registered on the title since 2005,

which had not changed, did not constitute a “material change” within the meaning of the Act.

Legal History and Context

The decision engages with a substantial body of Ontario case law that has, over time, defined and refined the scope of developer disclosure obligations and, more recently, the enforceability of contractual mechanisms that allocate risk in pre-construction transactions.

The principles governing the limits of disclosure were addressed in *Abdool v Somerset Place Developments of Georgetown Ltd*. Although *Abdool* dealt with disclosure obligations under the predecessor of the current Act, its principles remain instructive. The Ontario Court of Appeal held that the standard for measuring compliance with disclosure requirements is one of materiality, and that not every defect in a disclosure statement will render an agreement non-binding. The Court of Appeal emphasized the need for a “broad and flexible approach” that balances consumer protection with the commercial realities of the condominium industry – a principle that has proved durable and that developers can draw comfort from.

More recently, in *Ritchie v Castlepoint Greybrook Sterling Inc*, the Court addressed a strikingly similar fact pattern: a developer who pre-sold 179 condominium units and subsequently cancelled the project, citing rising construction costs and financial unviability, returned deposits with interest. The Court granted summary judgment in favour of the developer, finding that the contractual early termination provisions and exculpatory clauses were enforceable, and that the Tarion Addendum did not preclude the parties from agreeing to limit liability upon termination to the return of deposits with interest. Just weeks before *De Bartolo*, the Ontario Court of Appeal reinforced this approach in *Shiralian*, upholding a limitation of liability clause in a pre-construction APS and confirming that pre-construction condominium purchases are inherently speculative in nature – and that parties may freely allocate risk on that basis.

Why This Decision Matters

De Bartolo is significant for property developers in several respects.

1. It provides clear guidance on the scope of disclosure under section 72(3)(d) of the *Condominium Act, 1998*,

confirming the “general description” requirement does not extend to specific encumbrances on title such as restrictive covenants. For developers assembling land for condominium projects, this is a meaningful clarification: it confirms the statutory disclosure regime does not impose a granular obligation to enumerate every encumbrance or impediment to construction.

2. The decision confirms the existence of a known but undisclosed encumbrance does not, without more, constitute a “material change” under section 74 of the Act. Justice Sutherland’s reasoning suggests the material change obligation targets changes in the factual situation, not a developer’s evolving assessment of its own ability to overcome pre-existing obstacles.

3. The decision reinforces the principle – also affirmed in *Shiralian* – that pre-construction condominium purchases are inherently speculative and that the standard form APS and Tarion Addendum reflect those risks. Taken together, these decisions confirm the courts will hold purchasers to the terms of their agreements, including provisions accepting title subject to permitted encumbrances and clauses limiting developer liability upon termination, and will not lightly rewrite the allocation of risk that the parties have agreed to.

A Word of Caution

These recent decisions do not give developers carte blanche; they simply confirm the disclosure and contractual frameworks operate as drafted. Purchasers, on the other hand, must be mindful that there are no guarantees when purchasing a pre-construction condominium. A purchaser may take comfort in the knowledge that deposits will be returned with interest if the project is not built, but these decisions make clear that the contractual remedies in the APS may well define the outer limits of recovery.

Lenczner Slaght’s Monique Jilesen, Andrew Parley, and Alex Tuccillo represented the respondents, Icona Developments Inc., Steve Gupta, The Gupta Group Inc., and 1966711 Ontario Inc., in this matter.