

The Trump Tower: Not All Developer Documents are Created Equal

Like its namesake – US presidential candidate Donald Trump – the Trump International Hotel and Tower in Toronto (the "Hotel") and its developer Talon International Inc. ("Talon") have been mired in controversy. Earlier this year, Donald Trump, Talon and a series of related companies were hit with 24 lawsuits from purchasers alleging they had been duped.

At the heart of these proceedings are certain preliminary documents received by the purchasers from Talon, called "Estimated Return on Investment", which set out hypothetical revenue streams from the occupancy of the Hotel units and anticipated expenses to predict a return on investment (the "Estimates"). After hearing from two of these plaintiffs in *Singh v. Trump*,¹ a test case decided on summary judgment, Justice Perell of the Ontario Superior Court of Justice (the "Court") dismissed their claims on July 10, 2015, absolving the defendants of liability.

Singh sends a clear message to prospective real estate purchasers: not all documentation furnished by developers can be relied upon by buyers, and 'buyer beware' remains the law in Ontario with respect to real estate transactions. While Justice Perell agreed with the plaintiffs that the Estimates were "deceptive documents" replete with misrepresentations,² he found that the plaintiffs had no objective right to rely on these materials as a basis for establishing a claim for

¹ 2015 ONSC 4461 [*Singh*].

² *Ibid* at para 212.

negligent misrepresentation, because the Estimates were "for discussion purposes"; they were "not a guaranteed investment program" and they were extraneous to the documentation package binding the parties.

In addition to being a cautionary tale for buyers, Singh also offers some insights into potential exposure for developers. In particular, it highlights how developers, who may have the benefit of a prospectus exemption from the securities regulator, may nevertheless be found by a court to be in violation of such exemption. It also illustrates the court's willingness to entertain concurrent common law and statutory claims made by plaintiffs in real estate litigation.

Plaintiffs' Claims

The plaintiffs advanced various claims for rescission and damages, briefly summarized as follows:

Plaintiffs' Common Law and Equitable Misrepresentation Claims

Prior to signing their respective purchase agreements, the plaintiffs received the Estimates pertaining to their respective Hotel unit. The Estimates were in part intended to assist buyers in their purchase decision if they elected to enroll their unit in the Hotel's reservation program, an optional service that rents participants' units to the public with the stated goal of helping defray the costs of ownership.

The plaintiffs alleged that their Estimates contained misrepresentations and that they relied on the Estimates in making their decision to purchase. In brief, compared to actual financial performance, the Estimates were wildly inaccurate; the Hotel units generated less than half the anticipated revenue and incurred much higher expenses than stated in the Estimates. As a result, the plaintiffs sought either damages under the common law for negligent misrepresentation or the equitable remedy of rescission for misrepresentation.

Plaintiffs' Statutory Claims Under the Condo Act and Securities Act

Insofar as real estate litigation is concerned, the plaintiffs' claim under the Condominium Act, 1998³ was straightforward and conventional. Section 72 of the Condo Act mandates and prescribes the form of disclosure required of developers. Should the mandated disclosure contain false or misleading statements, s. 133 of the *Condo Act* entitles a purchaser to recover damages for losses resulting from reliance on the mandated information.

The statutory misrepresentation claim under the Securities Act⁴ requires additional background. The success of this claim hinges on whether the sale of Hotel condominium units, specifically those units that participate in the Hotel reservation program, qualifies as an investment contract and, therefore, requires a prospectus.⁵ Justice Perell never fully answers this question, nor was he required to answer, as Talon effectively volunteered an affirmative answer by requesting a prospectus exemption from the Ontario Securities Commission ("OSC") in 2004.⁶

The OSC granted this exemption subject to a number of conditions, including providing purchasers with an offering memorandum instead of a prospectus⁷ and refraining from emphasizing the anticipated economic benefits of the reservation program when marketing the Hotel condominium units.⁸ The statutory basis for the misrepresentation claim under the Securities Act is grounded in s. 130.1, which provides a right of action for damages against the issuer should the offering memorandum contain a misrepresentation, regardless of whether the purchaser actually relied on this

³ SO 1998, c 19 [**Condo Act**].

⁴ RSO 1990, c S5.

⁵ In the absence of an exemption, securities issued to the public require a prospectus.

⁶ *Singh*, *supra* note 1 at para 52.

⁷ The offering memorandum (called a Disclosure Statement or Disclosure Document) was to be constituted by the Disclosure Statement required under the Condo Act augmented by some of the requirements of Form 45-906F of the *Securities Act* (British Columbia).

⁸ For a full list of conditions, see *Singh*, *supra* note 1, at paras 55-56.

misrepresentation. A strict limitation period applies to this claim, however.⁹

Plaintiffs' Claim on the Basis of Illegal Contract Theory

Coupled with their statutory claim under the Securities Act, the plaintiffs also argued that Talon's alleged violation of the conditions accompanying the exemption order vitiated the prospectus exemption granted by the OSC. Accordingly, the plaintiffs claimed that the purchase agreements were investment contracts made without the benefit of a prospectus and were therefore void, entitling the plaintiffs to rescission and damages restoring them to their pre-contractual position.

Plaintiffs' Claim for Liability of Trademarks' Licensors

The plaintiffs' remaining claim centered on the fact that Talon acquired the right to use the TRUMP brand for the Hotel after entering into license agreements with an affiliate of Mr. Trump, Trump Marks Toronto LP ("Trump Marks"), the Canadian licensor of various trademarks owned by Mr. Trump. On this basis, the plaintiffs alleged that, in licensing the TRUMP brand to Talon, a rookie developer, Mr. Trump misrepresented Talon's capacity to build the Hotel in a competent and professional manner, a claim rooted in the prestige associated with the TRUMP brand. The plaintiffs further alleged that Mr. Trump's failure to properly vet and supervise licensed users of his brand created an actionable harm foreseeable by Mr. Trump himself.

Court Decision

Common Law and Equitable Misrepresentation Claims

Justice Perell found that the Estimates did, indeed, contain actionable misrepresentations: they overestimated revenue, underestimated

⁹ *Supra* note 4 at s. 138.

expenses and were "essentially just pick-a-number speculation".¹⁰ Nevertheless, Justice Perell held that a key element of the common law claim of negligent misrepresentation was missing in the present case: reasonable reliance on the part of the plaintiffs. According to the Court, although the plaintiffs "may have **subjectively** relied on the Estimates in deciding to purchase the Hotel units, their subjective reliance was objectively unreasonable."¹¹

The Court observed that the Estimates explicitly stated that they were "for discussion purposes" and "not a guaranteed investment program".¹² The Court also noted that neither plaintiff consulted a lawyer before signing their respective purchase agreement despite repeated warnings of the risks associated with this type of investment. Given this factual background, the Court determined that there was a clear absence of reasonable reliance by the plaintiffs on the Estimates. Accordingly, the Court concluded the plaintiffs' claim for negligent misrepresentation under common law had to fail.

Similarly, the Court found that the equitable remedy of rescission sought by the plaintiffs could not succeed either. For this equitable remedy to be available, the plaintiffs had to establish that they were induced by the Estimates to enter into their respective purchase agreements. However, as they had failed to show reasonable reliance on the Estimates (seemingly a lower threshold than inducement, in the eyes of the Court), their rescission claim was bound to fail as well.¹³

The Court went even further in bolstering its findings against the plaintiffs' misrepresentation-based claims. It referred to the entire agreement clause and the other exculpatory provisions of the purchase agreements and the related disclosure material as an additional basis for precluding the plaintiffs' claims centering on

¹⁰ *Singh*, *supra* note 1 at para 213.

¹¹ *Ibid* at para 227 [emphasis added].

¹² *Ibid* at para 228.

¹³ *Ibid* at para 234.

misrepresentation.¹⁴ A careful read of the Talon form of documents would have clearly indicated that the Estimates did not form part of the corpus of purchase documents signed by the plaintiffs (which documents have the statutory protections detailed in the Condo Act); it would have likewise revealed the explicit acknowledgement of the plaintiffs that neither Talon nor any other developer party were making any representations whatsoever as to the projected rental income of the Hotel units. As the Court could not identify any public policy reasons to suspend or relax the application of the entire agreement clause and the other exculpatory provisions, it again confirmed its verdict that the plaintiffs had no valid common law misrepresentation claims.

Statutory Claims Under the Condo Act and Securities Act

Justice Perell concluded that the statutory misrepresentation claim advanced under the Condo Act was not available to the plaintiffs as this remedy is limited to misrepresentations in the disclosure documents mandated by the Condo Act. Neither plaintiff alleged false or misleading statements in respect of this disclosure package mandated by the Condo Act. Their misrepresentation claims emanated from the contents of the Estimates, a document that Justice Perell found to be extraneous to the disclosure documents required under the Condo Act.

Justice Perell reached a similar conclusion regarding the statutory misrepresentation claim pursuant to s.130.1 of the Securities Act. The Estimates did contain misrepresentations, but this document was not part of the disclosure in the offering memorandum mandated by the OSC.

Insofar as the misrepresentation claims were concerned, the conventional common law and equitable claims of damages and rescission were the only remedies available to the plaintiffs, and both failed on their merits.

¹⁴ *Ibid* at para 235.

Illegal Contract Theory Claim

Justice Perell held that the OSC did not intend to revoke Talon's prospectus exemption if it breached the conditions laid out in the OSC's exemption ruling. Rather, the OSC explicitly stated that, in the event of a breach, purchasers were to have recourse to the statutory misrepresentation remedies set out in the Condo Act and s. 130.1 of the Securities Act, as well as the purchaser's rights at common law and in equity for damages or rescission.¹⁵ Consequently, a breach of these conditions would not void the purchase agreements.

In any case, Justice Perell held that Talon did not breach these conditions. While inaccurate, the Estimates were not a rental forecast, guarantee or projection in the manner contemplated by the OSC. In short, there was no financial commitment from Talon, a point the plaintiffs conceded and which Justice Perell found fatal to their argument.¹⁶

Justice Perell agreed with the defendants that the Estimates were simply an illustration of how the rental reservation program **might** work. Indeed, this explanation was essential to the disclosure; the OSC could not have intended that the details of a reservation system, itself a distinguishing feature of the development, be withheld.¹⁷

Liability of Trademarks' Licensors

Justice Perell found the claim against Mr. Trump to be "devoid of any merit".¹⁸ Mr. Trump did not make an express representation that Talon had the experience to build the Hotel in a "competent,

¹⁵ *Ibid* at para 122.

¹⁶ *Ibid* at para 115.

¹⁷ *Ibid* at para 99.

¹⁸ *Ibid* at para 31.

professional manner”¹⁹ nor can such a representation be implied simply because Mr. Trump is an icon whose name is a brand.

The Court further held that a licensee's negligence, as egregious as it may be, does not provide a basis in law for imposing liability on the licensor. Mr. Trump's liability can only be determined by reference to his own contractual or tort duties to the plaintiff, of which he had none. Mr. Trump did not grant a license to Talon, Trump Marks did; as with Mr. Trump, the decision to grant this license was not a representation of Talon's abilities as a developer.

Practical Implications

While developers can view the Court's decision in *Singh* as a victory for them, there are certain cautionary signals in this case that developers should heed as well.

A Positive Decision for Developers

A principal implication of this decision is that reliance by purchasers on the documentation received from developers (or vendors more generally) must be **objectively reasonable**. Purchasers have to be judicious in how they interpret and categorize the various sale documentation they receive from developers. Not everything that is written on a piece of paper (even if written and signed by the developer) is equally important from a legal standpoint when making the decision on whether to sign the purchase agreement. Purchasers cannot cherry pick the documents they want to rely upon if they want any judicial protection from misrepresentation. Ordinarily, other than statutorily required documents under regulatory schemes like the Condo Act, only those documents the developer specifies as binding will be available to the purchaser as a basis for a misrepresentation claim. Undoubtedly, this is a welcome result for developers (and real estate vendors more generally), as it stresses

¹⁹ *Ibid.*

that the burden of diligence is squarely on the purchasers, thereby reaffirming the 'buyer beware' principle.

A related implication of this ruling is the importance of a well-crafted entire agreement clause in purchase agreements and related purchaser documentation. While these clauses are typically generic, developer's counsel should understand that a well-articulated entire agreement clause can give the developer some extra ammunition to convince the court against a finding of misrepresentation.

Conversely, purchaser's counsel should, at a minimum, flag these clauses for the purchaser and ideally discuss with the purchaser if he/she is entering into the transaction based on some other information that is excluded by the entire agreement clause.

Court's Determination as to Violation of Prospectus Exemption

Talon's decision to seek a prospectus exemption from the OSC for the Hotel units enrolled in the reservation program appears like a prudent move as it seems in line with the OSC's position in the 2006 matter of Harry Stinson and Sapphire Tower Development Corp.²⁰ In that matter, the OSC held that the sale of condominium units that also offer an investment in real estate, *together with an opportunity to profit through the purchaser's participation in a reservation program*, are securities pursuant to the Securities Act. Such investments cannot be marketed or sold without the developer having obtained exemptive relief from the OSC pursuant to subsection 74(1) of the *Securities Act*.

However, the decision in *Singh* appears to suggest that in determining whether a prospectus exemption granted by the OSC has been violated, the Court may conduct its own analysis on this point, regardless of OSC's decision to refrain from taking regulatory action against the developer. Justice Perell disagreed with Talon's position that the plaintiffs were estopped from advancing a claim based on a violation of the OSC's exemption ruling merely because

²⁰ See: https://www.osc.gov.on.ca/en/Proceedings_enr_20061220_stinson.jsp.

the OSC had issued a public statement that it would not be pursuing regulatory action against Talon. The plaintiffs should be able to litigate this point during these proceedings, the Court held, as they were not a party to the exemption arrangement with the OSC and had not been given an opportunity to present their case during Talon's dealings with the OSC.²¹

The Court's preparedness to conduct its own analysis on the question of exemption violation seems to suggest that a common law claim that fails for want of reasonable reliance might nevertheless succeed under the Securities Act if the Court, through its own examination, concludes that the developer breached the conditions of its prospectus exemption.

Interplay Between Common Law and Statutory Claims

The Court's position in *Singh* also supports the notion that common law and statutory claims are not mutually exclusive in real estate litigation; instead, they can be packaged together as complementary submissions by plaintiffs. As noted by Justice Perell, a statutory misrepresentation claim under s. 130.1 of the Securities Act "does not involve the proof of reasonable reliance".²² Had Justice Perell concluded that that the Estimates formed part of the disclosure in the offering memorandum, the plaintiffs *may* have succeeded notwithstanding Justice Perell's finding that relying on these Estimates was not reasonable and that the plaintiffs were not induced by them.

²¹ *Ibid* at para 93.

²² *Singh*, *supra* note 1 at para 9. Pursuant to s. 130.1(1) of the *Securities Act*, liability for misrepresentation in an offering memorandum is determined "without regard to whether the purchaser relied on the misrepresentation".

What Next?

While *Singh* has been a largely positive decision for developers, an appeal has been filed with the Ontario Court of Appeal and Justice Perell's various holdings are likely to be tested. Stay tuned.

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a cautionary note

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