CITATION: Ram v. Talon, 2015 ONSC 5660
COURT FILE NO.: 8633-12
DATE: 2015-09-18

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
DR. GANESH RAM and GFUNK INC.	)	Mavis Butkus, for the Plaintiffs
Plaintiffs	)	
– and –	)	
TALON INTERNATIONAL INC.	)	Mark Klaiman, for the Defendant
Defendant	)	
	)	**HEARD:** August 5, 2015 at London

HEENEY R.S.J.:

[1] The plaintiffs agreed to purchase a hotel condominium in the Trump International Hotel & Tower in Toronto, which was being developed by the defendant. The plaintiffs allege that the transaction did not close by the deadline specified in the amendment to the Agreement of Purchase and Sale (the "APS"), and therefore the transaction is at an end and they are entitled to the return of the substantial deposit that was paid. The defendant alleges that the plaintiffs were in breach of contract by failing to close the transaction, such that the deposit is forfeited.

The Facts:

[2] To the great credit of counsel, the evidence in this case came entirely from a Statement of Agreed Facts, marked as Ex. #1, together with a Document Brief marked as Ex. #2. For the sake of completeness, and because the Statement of Agreed Facts is not unduly lengthy, it is reproduced here in full:

> The parties agree that, for the purposes of this proceeding only, the following facts may be accepted by the Court as true without the necessity of calling evidence as proof:
>
> ***The Parties***
>
> 1. The Plaintiff, Ganesh Ram ("Ram") is a physician currently resident in the City of Toronto. The Plaintiff, GFunk Inc. ("GFunk") is Ram's corporation.

2. The Defendant, Talon International Inc. ("Talon") was the developer of the Trump International Hotel & Tower Toronto (the "Trump Hotel").

Terms of the Agreement of Purchase and Sale

3. On February 17th, 2009 Ram and GFunk, as purchasers and Talon, as vendor entered into an Agreement of Purchase and Sale (the "APS") pursuant to which Ram and GFunk agreed to purchase Hotel Unit No. 15, Level No. 15 (Suite No. 1515) in the yet to be constructed Trump Hotel for a purchase price of $913,000.00.

4. The purchase price was payable as follows:

a. $91,300 on signing the APS;

b. $45,650 on a date 180 days following the date of execution of the APS;

c. $45,650 on a date 365 days following the date of execution of the APS;

d. $45,650 on a date 545 days following the date of execution of the APS;

e. $0.0 on the Closing Date, as defined in the APS; and

f. the balance of the purchase price on the Unit Transfer Date.

5. The APS further provided, in paragraph 2(a), that Ram and GFunk would assume occupancy of the Hotel Unit on August 1st, 2010 or on such extended or accelerated date, pursuant to the terms of the APS that the Hotel Unit was substantially completed by Talon for occupancy, by Ram and GFunk in accordance with paragraph 13 of the APS.

6. The date on which occupancy was assumed was defined, in paragraph 2(a) of the APS, as the "Closing Date".

7. According to paragraph 2(b) of the APS, transfer of title to the Hotel Unit would be completed on the later of the Closing Date or a date established by Talon in accordance with paragraph 13 of the APS.

8. The date on which title to the Hotel Unit was to be transferred to Ram was defined, in paragraph 2(b) of the APS, as the "Unit Transfer Date".

9. Paragraph 13 of the APS provided:

> *"The transaction of purchase and sale shall be completed on the Closing Date or any extension thereof as may be permitted under this Agreement, at which time vacant possession of the Unit will be given to the Purchaser. If the Vendor shall be unable to provide occupancy on the Closing*

> *Date for any reason whatsoever, the Vendor may extend the Closing Date one or more times as may be required by the Vendor, all extensions in the aggregate not to exceed twenty-four (24) months. The Vendor shall be entitled upon giving at least sixty (60) days notice to the Purchaser or his solicitor, to accelerate the Closing Date provided the Unit is substantially complete and fit for occupancy on such earlier date.*
>
> *Upon registration of the Condominium, the Vendor's solicitor shall not less than ten (10) days after registration of the Creating Documents designate a date as the Unit Transfer Date by delivery of written notice of such date to the Purchaser or his/her solicitor."*

10. Ram paid all of the deposits required by the APS.

11. On September 28th, 2011 Ram, GFunk and Talon executed an Amendment to the Agreement of Purchase and Sale which contained the following clause:

> *"INSERT*
>
> *Paragraph 13 of the Agreement of Purchase and Sale, insert the following:*
>
> *The parties agree that the Closing Date (i.e. occupancy date) shall be January 31, 2012, provided that the Vendor may further extend the Closing Date one or more times as may be required by the Vendor, all such extensions in the aggregate not to exceed two (2) months. The foregoing provision shall apply notwithstanding anything to the contrary herein in this paragraph 13."*

12. On February 6th, 2012 the Defendant's solicitor, Jeffery Silver of Harris, Sheaffer LLP ("Silver") wrote to the Plaintiffs' former solicitor, Jonathan Griffiths, Barrister and Solicitor enclosing a Statement of Adjustments for a closing date of February 14, 2012.

13. On February 17th, 2012 Silver wrote to the Plaintiffs' then solicitor, Michael A. Lake of McKenzie Lake LLP ("Lake") advising him that documentation required to complete the "occupancy closing" on an interim occupancy closing scheduled for February 24, 2012 was available on the internet.

14. On February 21st, 2012 Lake wrote to Silver advising him that the Disclosure Statement delivered to Ram and GFunk provided that the Common Expenses attributable to unit, which was the subject of the APS, were $1,775.43 whereas the interim occupancy statement provided by Silver stipulated that the Common Expenses for the Unit were $2,472.87 per month. Lake further advised Silver that the 40% increase in Common

Expenses constituted a material change to the Disclosure Statement requiring the production, by Talon, of a revised Disclosure Statement.

15. On February 23rd, 2012 Lake's assistant, Lisa Dobson ("Dobson") emailed Silver requesting a response to Lake's letter of February 21st, 2012.

16. On February 23rd, 2012 Silver emailed Dobson stating that he would review the matter with his client and then respond.

17. On February 24th, 2012 Silver left a voicemail message for Lake advising him that he had not spoken to his client and Silver stated: "*I don't think anything is going to transpire if this goes over a few days until we sort this out so don't be concerned with having to do anything for tomorrow I guess it is.*"

18. Interim occupancy was not delivered to Ram and GFunk on February 24th, 2012.

19. On March 6th, Dobson again emailed Silver asking if he had had an opportunity to speak with his client.

20. Silver did not respond to the Dobson email of March 6th.

21. On March 20th, 2012 Dobson again emailed Silver asking if he had had an opportunity to discuss the matter with his client.

22. On April 13th, 2012 Lake wrote to Silver confirming that he had not communicated his client's position and Lake demanded the return of Ram and GFunk's deposit. On April 13, 2012 Ram and Gfunk terminated the APS.

23. Silver did not respond.

24. On April 26th, 2012 Dobson emailed Silver requesting a response to Lake's letter of April 13th, 2012.

25. On April 25th, 2012 Silver responded to Dobson. Silver left the following voicemail for Lake:

"Oh hi Michael it's Jeff Silver, Michael in Toronto at Harris Sheffer hope your good 416-250-3697 I was in meetings most of the day today so not sure you're there now but I thought I would call you in connection with the message that Lisa Dobson sent and I responded to earlier. So maybe tomorrow if you have some time give me a call and we can I guess we can get back on track and discuss what we're gonna do about this issue you raised, ok um I got confused with the message cause I think we had left things that we were gonna connect again and I guess we didn't. I will wait to hear from you or I'll follow up but maybe call me, ok, thanks, bye."

26. On May 1st, Silver left the following voicemail message for Lake:

> "*Oh hi Michael, it's a Jeff Silver. I just picked up your message and I've been trying to get through to you but uh you're I guess tied up um maybe you could let me know, and I have to run out to a meeting but maybe we should actually to pick a time tomorrow and we can chat for a few minutes to discuss the process um and just to avoid some confusion no I think I did receive your letters but I think what happened was um I just don't think we I think we both fell off the radar on both of our ends after you returned, uh I'll leave you more details though, as I recall you had written about the expenses being increased and I mentioned to you about the inflation factor and the budget and you were I think somewhat concerned or confused about that and I think that's where we left off but anyway in any event having said that because we are proceeding to the registration process um we're revising the documents and uh maybe the way to discuss this is for me to actually put you in the hands of with updated versions of everything or whatever um rather you got the budget and you can make your client can make a decision and again nothing um nothing you know all without prejudice or whatever so um but my suggestion maybe message me back or have your assistant message back with some times tomorrow cause we're having some trouble connecting ok um when you might be around for like 15 minutes or so or 10 minutes um I have a meeting in the afternoon around 3 so will be out of the office 3-5 so um maybe sometime before then that would be helpful I'm at 416-250-3697, nice talking to you, bye."*
>
> 27. On June 13th, 2012 Lake and Silver participated in a telephone call. The only notes of that call were made by Lake. Lake's notes confirm that Silver advised Lake that he would get instructions from his client to advise within a few days as to whether his client wanted to "go to court" to determine the issues raised by Lake or "*allow us out of the deal"*.
>
> 28. Silver never communicated any further with Lake.
>
> 29. *Neither party tendered on the other.*
>
> 30. Talon has refused to return the deposits paid by Ram and GFunk.
>
> 31. Ram is seeking the return of his deposits of $228,250 with prejudgment interest.
>
> 32. Talon has issued a counterclaim, seeking a declaration that the deposits are forfeit.

Analysis:

[3] The plaintiffs' claim rests upon para. 19 of the APS. The relevant part of that paragraph provides as follows:

> In the event that this Agreement is terminated through no fault of the Purchaser, all deposit monies paid by the Purchaser towards the Purchase Price, together with any interest required by law to be paid, shall be returned to the Purchaser…

[4] The plaintiffs' argument is that a closing date was established by the defendant, through its lawyer Mr. Silver, of February 24, 2012. When the plaintiffs received the Interim Statement of Adjustments in advance of closing, it showed a 40% increase in the Common Expenses, as compared to the original Disclosure Statement. Mr. Lake pointed out the plaintiffs' concern in this regard in a letter to Mr. Silver dated February 21, 2012. He took the position that it constituted a material change to the Disclosure Statement, which required production of a Revised Disclosure Statement. Mr. Silver's response was to extend the closing date to an unspecified date in the future until they "sort this out". Over the weeks that followed, Mr. Silver failed to address the issue despite repeated communications from the plaintiffs' lawyer. While the plaintiffs were waiting for a response to their concerns, the deadline for closing of March 31, 2012, which had been established in the amendment to para. 13, expired without the transaction having closed. At that point, the APS was terminated. Since the transaction failed to close through no fault of the plaintiffs, they submit that they are entitled to a return of their deposit.

[5] The "closing date" is defined by para. 2(a) of the APS, and is the date upon which the keys are delivered and the purchaser assumes occupancy. The Unit Transfer Date is a different and later date, and is the date upon which formal transfer documents are registered, following registration of all of the enabling documents that create the condominium. For our purposes it is only the closing date that is relevant.

[6] The closing date was specified to be August 1, 2010 in para. 2(a) of the APS. However, para. 13 of the APS gave the defendant the unilateral right to extend the closing date, provided that all extensions in the aggregate did not exceed 24 months. A deadline for closing of August 1, 2012 was thereby established.

[7] However, para. 13 was amended by the Amending Agreement of September 28th, 2011, which is reproduced at para. 11 of the Statement of Agreed Facts. That document established a closing date of January 31, 2012, but again gave the defendant the unilateral right to extend closing provided that "all such extensions in the aggregate not to exceed two (2) months". This amendment therefore established a deadline for closing of March 31, 2012. Since this amendment "shall apply notwithstanding anything to the contrary herein", it is clear that it supersedes anything in the original agreement, and establishes a firm deadline by which the transaction must close.

[8] Establishment of the closing date was entirely in the discretion of the defendant, since it was the defendant who had the unilateral right to extend closing. Mr. Silver, on behalf of the defendant, delivered a Statement of Adjustments indicating a closing date of February 14, 2012, but then on February 17, 2012 wrote to the solicitor for the plaintiffs, Mr. Lake, establishing a closing date of February 24, 2012.

[9] When the plaintiffs discovered that the Common Expenses attributable to the unit had increased by 40%, Mr. Lake wrote to Mr. Silver on February 21, 2012, bringing this to his attention, and took the position that this constituted a material change to the Disclosure Statement, requiring the defendant to produce a Revised Disclosure Statement.

[10] Mr. Silver's response is set out in para. 17 of the Statement of Agreed Facts. I find as a fact that he assured the plaintiffs that they did not have to be concerned about closing as originally scheduled. The effect of his voicemail message was to extend the closing date to an unspecified date in the future, while they sorted out the plaintiffs' concerns.

[11] The defendant argues that the closing date of the transaction was not, in fact, extended by Mr. Silver, and that the plaintiffs were in breach of contract in failing to close on February 24, 2012. Three arguments were presented in this regard.

[12] The first is that Mr. Silver had no power to verbally extend the closing date. In that regard, reliance is placed on para. 31 of the APS, which reads as follows:

> The Vendor and the Purchaser agree that there is no representation, warranty, collateral agreement or condition affecting this Agreement or the Property or supported hereby other than as expressed herein in writing.

[13] This argument can be quickly dismissed. The "entire agreement" clause is written in the present tense, and provides that there "is" no representation, warranty, agreement or condition affecting the agreement other than as expressed in writing in the APS. However, that does not foreclose the prospect that representations or agreements may be made in the future that could affect the agreement. Indeed, the letter from Mr. Silver that established a closing date of February 24, 2012 was not a term expressed in writing in the body of the APS, yet there is no dispute that he had the authority to establish that date on behalf of the defendant. Similarly, I find, he had the authority to extend that closing date, and did so.

[14] The second argument advanced on behalf of the defendant is that the plaintiffs are, in effect, relying on promissory estoppel in making their argument, but it is submitted that they cannot do so because there was no detrimental reliance.

[15] The classic statement of the rule regarding promissory estoppel is expressed in Snell's *Principles of Equity*, 27th ed. (1973), p. 563, quoted with approval in *Sola Developments Ltd. v. ICI Canada Inc.*, [2009] O.J. No. 1300 (S.C.J.) at para. 15:

> Where by his words or conduct one party to a transaction makes to the other an unambiguous promise or assurance which is intended to affect the legal relations between them (whether contractual or otherwise) and the other party acts upon it, altering his position to his detriment, the party making the promise or assurance will not be permitted to act inconsistently with it.

[16] In my view, Mr. Silver's voicemail was an unambiguous assurance that the plaintiffs did not have to be concerned with closing the transaction as originally scheduled, and that the closing of the transaction would go over for a few days until the plaintiffs' concerns were sorted out. It was intended to affect the legal relations between the parties, in that it amounted to an extension of the closing date of the transaction. It was acted upon by the plaintiffs, in that they took no steps to close the transaction on February 24, 2012.

[17] The defendant argues that the plaintiffs did not act upon Mr. Silver's assurance to their "detriment". However, the defendant argues at the same time that the plaintiffs were in breach of contract in failing to close on February 24, 2012 and have thereby forfeited their deposit. Clearly the plaintiffs acted on Mr. Silver's assurance to their detriment, because by failing to close on the specified date they put themselves in a position where they would otherwise have been in breach of contract but for the verbal extension.

[18] Furthermore, the plaintiffs are relying on Mr. Silver's assurance as a "shield" not a "sword", in that they are relying on it as a defence to the allegation that they were in breach of contract in failing to close on February 24, 2012. The plaintiffs are, in my view, entitled to do so.

[19] The third argument is that the plaintiffs should have either commenced an application to the Superior Court or rescinded the APS, pursuant to ss. 74(5) and (6) respectively of the *Condominium Act, 1998*, S.O. 1998, Chapter 19, within 10 days of receiving the Interim Statement of Adjustments that disclosed a 40% increase in the Common Expenses. Since they did not do so, it is argued that they were obligated to close the transaction, and were in breach of contract in failing to do so.

[20] Section 74 provides as follows:

> 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.
>
> **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.

Contents of revised statement

(3) The revised disclosure statement or notice required under subsection (1) shall clearly identify all changes that in the reasonable belief of the declarant may be material changes and summarize the particulars of them.

Time of delivery

(4) The declarant shall deliver the revised disclosure statement or notice to the purchaser within a reasonable time after the material change mentioned in subsection (1) occurs and, in any event, no later than 10 days before delivering to the purchaser a deed to the unit being purchased that is in registerable form.

Purchaser's application to court

(5) 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.

Rescission after material change

(6) 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.

Notice of rescission

(7) To rescind an agreement of purchase and sale under this section, a purchaser or the purchaser's solicitor shall give a written notice of rescission to the declarant or to the declarant's solicitor.

> **Declarant's application to court**
>
> (8) Within 10 days after receiving a notice of rescission, the declarant may make an application to the Superior Court of Justice for a determination whether the change or the series of changes on which the rescission is based constitutes a material change, if the purchaser has not already made an application for the determination under subsection (5).
>
> **Refund upon rescission**
>
> (9) A declarant who receives a notice of rescission from a purchaser under this section shall refund, without penalty or charge, to the purchaser, all money received from the purchaser under the agreement and credited towards the purchase price, together with interest on the money calculated at the prescribed rate from the date that the declarant received the money until the date the declarant refunds it.
>
> **Time of refund**
>
> (10) The declarant shall make the refund,
>
> (a) within 10 days after receiving a notice of rescission, if neither the purchaser nor the declarant has made an application for a determination described in subsection (5) or (8) respectively; or
>
> (b) within 10 days after the court makes a determination that the change is material, if the purchaser has made an application under subsection (5) or the declarant has made an application under subsection (8).

[21] This section gives a purchaser certain rights, upon receiving a revised disclosure statement or a notice delivered to a purchaser under this section. The purchaser can, within 10 days, apply under ss. 74(5) to the Superior Court for a determination as to whether the changes disclosed in the revised disclosure statement or notice constitute a "material change". Alternatively, the purchaser can rescind the agreement of purchase and sale. That step must be taken within 10 days of the latest of the three dates specified in ss. 74(6)(a) to (c). If the purchaser does elect to rescind the agreement, the vendor has the option under ss. 74(8) of applying to Superior Court within 10 days for a ruling as to whether the change relied upon is a material one.

[22] It is important to recognize that the triggering event for the exercise of the purchaser's rights is the delivery to the purchaser of "a revised disclosure statement or a notice delivered to a purchaser under this section". Mr. Klaiman, for the defendant, advises that Revised Disclosure Statements were apparently delivered to other purchasers involved in similar transactions with the defendant, but concedes that there is no evidence that a Revised Disclosure Statement was ever delivered to the plaintiffs, despite Mr. Lake's request for one. It is conceded that the onus of proving such delivery falls on the defendant.

[23] He argues, though, that Mr. Silver's letter of February 17, 2012, which enclosed the Interim Statement of Adjustments that disclosed a 40% increase in the Common Expenses, constituted a "notice" of the material change that triggered the plaintiffs' rights under s. 74.

[24] I do not agree.

[25] Subsection 74(1) provides for the delivery of either a revised disclosure statement or "a notice delivered to a purchaser *under this section*" (emphasis added). I am advised that there is no caselaw which interprets the meaning of these italicized words. Applying basic principles, there is a presumption that the words are intended to mean something, and are not mere surplusage.

[26] Since the giving of a notice "under this section" triggers certain specified statutory rights on the part of the purchaser, to which attach certain specified time limits during which those rights must be exercised, it seems to me to be essential that the notice bring home to the purchaser that s. 74 of the Act is thereby being engaged. Words such as "this notice is being delivered to you pursuant to s. 74 of the *Condominium Act*" would be necessary and sufficient to put the purchaser on notice that the time limit for exercising his or her rights under s. 74 has now begun to run.

[27] Mr. Silver's letter of February 17, 2012 contained nothing to indicate that the information contained therein constituted a notice to the purchaser under ss. 74(1) of the Act.

[28] It is true that Mr. Silver's letter did serve to bring to the plaintiffs' attention that there had been a substantial increase in the Common Expenses from those disclosed in the original Disclosure Statement. However, merely bringing something to the attention of the purchaser is quite a different thing than serving a notice "under this section". This is made clear by examining ss. 74(6)(a) to (c). That section provides that the purchaser must exercise his right of rescission within 10 days after the latest of:

- the date on which he receives the revised disclosure statement or "the notice";

- the date on which the purchaser "becomes aware of a material change", if the vendor has not delivered either a revised disclosure statement or a notice under s. 74(1); or,

- the date on which the Superior Court makes a determination as to whether the change is material.

[29] While Mr. Silver's letter of February 21, 2012 did serve to make the plaintiffs aware of the material change, that is a separate and distinct triggering event from the delivery of a notice under ss. 74(1). If any document that made them aware of the material change was sufficient to constitute a notice under ss. 74(1), there would have been no need for the distinction in ss. 74(6). Furthermore, the words "under this section" in ss. 74(1) would be rendered meaningless.

[30] I find that the defendant did not deliver either a revised disclosure statement or a notice under s. 74. Accordingly, the time period for the exercise of the plaintiffs' rights under ss. 74(5) never began to run.

[31] Although Mr. Silver's message indicated that the closing of the transaction would go over for a few days until the plaintiffs' concerns were sorted out, he failed thereafter to either

address the plaintiffs' concerns or establish a new closing date. Two emails from Mr. Lake were sent and were not responded to.

[32] The deadline for closing of March 31, 2012 arrived without Mr. Silver having set a new date for closing. The transaction did not close by that date. No further extension to the closing deadline was ever agreed to by the parties. The plaintiffs had no contractual obligation to close the transaction after that date. Neither party tendered on the other. The transaction came to an end and was terminated.

[33] Was the transaction terminated through no fault of the plaintiffs? Their lawyer certainly made efforts to move matters forward, but his two emails went unanswered. It appears clear that the defendant and their lawyer did not begin to address the plaintiffs' concerns until after the deadline for closing had expired. Significantly, the defendant never advised the plaintiffs that their concern about the increase in Common Expenses was untenable, that it did not amount to a material change, and that they were obligated to close the transaction. In other words, they never advised the plaintiffs that they were at fault for not closing the transaction on February 24, 2012.

[34] The definition of a material change is set out in ss. 74(2), and that section has been interpreted by the Ontario Court of Appeal in *Abdool v. Somerset Place Developments of Georgetown Ltd.*, [1992] O.J. No. 2115 (C.A.). It is clear that a 40% increase in the Common Expenses significantly increases the monthly carrying costs of the unit. It is certainly arguable that a reasonable purchaser would regard this change as sufficiently important to his or her decision to purchase that, had the initial Disclosure Statement contained that information, the purchaser would not likely have gone ahead with the transaction, or would have exercised a right of rescission.

[35] In Mr. Silver's voicemail of May 1, 2012 he referred to the "inflation factor" in the budget. That refers to the budget statement for the Common Expenses contained in the original Disclosure Statement. It contains the following proviso:

> If registration of the declaration and description occurs after January 31, 2008, then the budget statement shall be read as increased by an inflation rate of 6.0% per annum.

[36] The suggestion implicit in Mr. Silver's message is that the 40% increase in Common Expenses disclosed in the Interim Statement of Adjustments was not greatly in excess of the 6% per annum inflationary factor. That is a valid point, although I can take judicial notice of the fact that the actual rate of inflation was nowhere near 6% per annum from 2008 to 2012.

[37] It is not, however, necessary to determine whether this increase did or did not constitute a material change. The question instead is whether the plaintiffs can be faulted for raising it as a concern and requesting an Amended Disclosure Statement. In my view, they cannot.

[38] I am satisfied that the transaction did not close by the deadline of March 31, 2012, through no fault of the plaintiffs. They raised a valid concern about the increase in the

Common Expenses. Mr. Silver extended the closing date to an indefinite date in the future, "until we sort this out". He took no steps whatsoever to sort things out. He never established a new closing date. He did not even communicate with the plaintiffs' lawyer until after the deadline for closing had expired on March 31, 2012.

[39] I note that the APS does not contain a "time is of the essence" clause. A defence based on the lack of such a clause, such as was discussed by Epstein J.A. in *Schneeberg v. Talon International Development Inc.*, [2011] O.J. No. 4923 (C.A.) at para. 56, was neither pleaded in the Statement of Defence, nor was it argued by counsel for the defendant at trial. In any event, it is an agreed-upon fact that neither party ever tendered on the other, so the APS is well and truly dead.

[40] Having concluded that the APS was terminated through no fault of the plaintiffs, para. 19 entitles them to the return of all deposits paid with interest. Counsel agree that the prescribed rate of interest payable pursuant to s. 82 of the Act is 0%. Thus, prejudgment interest is payable pursuant to the *Courts of Justice Act* only. I am advised by counsel that the applicable rate is 1.3% per annum, and that interest to August 5, 2015 amounts to $7,698.49. The daily rate thereafter is $8.13. Forty-four days from August 5 to the present date adds an additional $357.72 in interest, bringing the total to $8,056.21.

[41] The plaintiffs shall have judgment against the defendant in the amount of $228,250, plus prejudgment interest in the amount of $8,056.21.

[42] I encourage counsel to resolve the issue of costs. If they cannot do so, I will receive brief written submissions from the plaintiffs within 30 days, with the defendant's response to follow within 15 days thereafter, and any reply within 10 days thereafter. Failing that, the parties will be deemed to have resolved the issue of costs as between themselves.

"T. A. Heeney R.S.J."

T. A. Heeney R.S.J.

Released: September 18, 2015

CITATION: Ram v. Talon, 2015 ONSC 5660
COURT FILE NO.: 8633-12C

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

DR. GANESH RAM and GFUNK INC.

Plaintiffs

– and –

TALON INTERNATIONAL INC.

Defendant

REASONS FOR JUDGMENT

T. A. Heeney R.S.J.

Released: September 18, 2015