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Case Law Update

by
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Introduction

As real estate law has been around for centuries, it is not surprising that changes in the common law are rare. Most reported residential real estate decisions are highly fact-driven. The issues at play are typically not the law, but the facts and, perhaps, how the law applies to those facts.

It is, thus, not surprising that all but one of the cases discussed in this paper are not common law cases; they are statutory. The *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 ("*REDMA*"), is relatively new legislation. It, along with the *Real Estate Services Act*, S.B.C. 2004, c. 42, replaced the *Real Estate Act*, R.S.B.C. 1996, c. 397.

During most of the 2000s, the real estate market throughout most of British Columbia was on a meteoric rise. Many took advantage of increasing prices by locking in a price for a pre-sale condo. By closing time, prices had gone up dramatically. If a purchaser could not complete, developers were happy to return deposits, re-sell the unit and take advantage of the rising market. If a purchaser was not happy with the unit, he or she might still close and immediately flip it for a profit. Money and value were abundant.

In 2008 the market suddenly crashed. There were no longer simple economic solutions for purchasers who could not or did not want to close their deals. Litigation ensued.

REDMA has seen a considerable amount of judicial interpretation since early 2009. There remain many ongoing cases and undoubtedly there will be more … until prices skyrocket again. As stated by Côté J.A. of the Alberta Court of Appeal:

> " … Only a malcontent or crank would do [seek to enforce his or her statutory rights] if the transaction was profitable for him or her. The person whose shares go up will not complain that he or she did not get a prospectus."[1]

[1] *Hi Hotel Limited Partnership v. Holiday Hospitality Franchising Inc.*, 2008 ABCA 276 at para. 108

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I. Forfeiture of Deposits

A. The Case: *Tang v. Zhang*

In *Tang v. Zhang*, [2012] B.C.J. No. 270 (S.C.) ("*Tang*"), the court was asked to interpret the standard form residential contract of purchase and sale. The issue was whether a deposit paid by a buyer was forfeited without proof of damages in the instance when a buyer fails to complete the contract.

The facts were not in dispute. Upon removing subjects, the buyer paid a deposit of $100,000. In breach of the contract, the buyer failed to complete the purchase. The sellers subsequently sold the property at a higher price than originally agreed. As a result, the sellers suffered no damages.

The court's decision required interpretation of clause 12 of the standard form contract of purchase and sale: It stated:

> **TIME:** Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the *Real Estate Services Act*, on account of damages, without prejudice to the Seller's other remedies.

Relying on *Agosti v. Winter*, [2009] B.C.J. No. 2220 (C.A.) ("*Agosti*"), the buyer argued that, absent proof of damages, the deposit was not automatically forfeited and had to be returned to the buyer.

Relying on *Williamson Pacific Developments Inc. v. Johns, Southward, Glazier, Walton and Margetts* (1997), 35 B.C.L.R. (3d) 180 (C.A.) ("*Williamson*"), the sellers argued that the deposit was absolutely forfeited irrespective of damages. While in *Williamson* the deposit was stated to be "non-refundable", cases following *Williamson* came to the same conclusion where the deposit was not expressly stated to be "non-refundable".

The sellers argued that *Agosti* did not stand for the proposition that damages must be proven. *Agosti* concerned a seller's right to an unpaid deposit. In that case, the buyer failed to pay a

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deposit when due and, pursuant to clause 2 of the standard form contract of purchase and sale, terminated the contract. The seller then sued for payment of the unpaid deposit.

In *Agosti*, the Court of Appeal held that, under the terms of the contract, the seller was not entitled to payment of the unpaid deposit. To buttress this conclusion, the Court of Appeal referred to clause 12 of the contract as evidence of how the contract deals with deposits generally. Without referring to *Williamson* and the line of cases following it, the Court of Appeal noted that clause 12 required proof of damages. It particularly noted the phrase "on account of damages" in clause 12. Interestingly, counsel accepted the Court's interpretation, notwithstanding contradictory case law. As a result, the Court of Appeal in *Agosti* appears to have been unaware that it was, in effect, stating that a number of cases decided since *Williamson* were decided wrongly.

The sellers further argued that *Agosti* could not have overturned *Williamson*, as it was decided by a three-member panel. Generally, a five-member panel is required to overturn an earlier decision of the Court of Appeal.

The court in *Tang* concluded that it was bound to follow *Agosti*. It distinguished *Agosti* and *Williamson* on the basis that, in *Williamson*, the contract referred to the deposit as being "non-refundable".

B. What this Means for the Future

Tang has been appealed. The appeal is set to be heard on January 17, 2013. A request for a five-member panel was denied.

Unless the decision is overturned, sellers will now have to prove damages in order to claim any amount of a deposit. This obviously benefits buyers. In a rising market, this may mean breaches without consequence.

Since *Agosti*, the market has been fairly flat. Real estate litigation tends to increase with market volatility. The impact of this decision on the volume of litigation and settlement remains to be seen.

In the meantime, clause 12 of the standard form contract of purchase and sale has been updated. The updated version expressly refers to the deposit as "non-refundable". The new clause now reads:

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> **TIME:** Time will be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreements to pay the balance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event, the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller in accordance with the *Real Estate Services Act,* on account of damages, without prejudice to the Seller's other remedies. [emphasis added]

When advising clients, it is very important to pay close attention to which version of the standard form contract of purchase and sale is used.

II. The Continuing Evolution of *REDMA*

A. Triggering the Application of *REDMA* or, But I didn't think I was marketing!

1. *Mazarei v. Icon Omega Developments Ltd.*

While *REDMA* only applies to developers who "market" development properties, the definition of that word received little to no attention until the decision in *Mazarei v. Icon Omega Developments Ltd.*, [2012] B.C.J. No. 929 (S.C.) ("*Mazarei*"). This is not surprising. In most cases, there is no dispute that *REDMA* applies. The question is whether the developer breached *REDMA*.

Section 2 of *REDMA* expressly provides that it applies to a developer who markets in British Columbia, irrespective of where the development property is located. The focus of the dispute in *Mazarei* was whether the developer marketed in British Columbia, thus triggering the application of *REDMA*.

The facts in *Mazarei* are somewhat unique. The developer was an Alberta corporation developing a phased condominium development in Edmonton, Alberta. It was not registered extra-provincially in British Columbia and had no business operations or address in British Columbia. It advertised units for sale in Alberta and utilized an Alberta real estate agent.

Mr. Nasseri, a director and principal of the developer, had befriended Ms. Nouri, a British Columbia Realtor operating out of the Lower Mainland. Over a course of years they would run into one another at social events. Their discussions would often turn to real estate. In early

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2007 they ran into each other at a social function. Mr. Nasseri told Ms. Nouri about the development in Edmonton. The court described that meeting as follows:

> [17] In 2007 she ran into Mr. Nasseri at a social function in Vancouver where he told her about the Development. He explained the deposit structure required to purchase an Icon unit. He described the location of the Development and told her that the location and pricing were very good because of Edmonton's growing economy. He said he could arrange an opportunity for her and her friends and associates to purchase units. Ms. Nouri was interested. Mr. Nasseri gave her the Icon website address and e-mailed her a price list.

It was later agreed that Ms. Nouri would be paid $5,000 for each sale she helped arrange. Ms. Nouri then told her family and friends about the development. Many, including the plaintiffs, expressed interest. Ms. Nouri helped them select a unit. The developer's Alberta real estate agent forwarded to Ms. Nouri disclosure statements ostensibly in compliance with Alberta legislation and pre-signed, pre-dated contracts for execution by the purchasers. The contracts stipulated that the Alberta real estate agent was the dual agent of the purchaser(s) and the developer.

In 2010 each of the plaintiffs delivered a notice rescinding the contracts and demanding return of their deposits on the basis that the developer failed to comply with *REDMA*. The developer refused to return the deposits.

The plaintiffs commenced actions alleging that *REDMA* applied and the developer breached it. The developer defended arguing that it did not market in British Columbia and, therefore, *REDMA* did not apply. It also argued that *REDMA* was constitutionally inapplicable.

The court found that the developer did market in British Columbia. It stated:

> [59] The definition of marketing in *REDMA* is very broad and encompasses the activities in this case. What happened went beyond social chit chat amongst real estate friends. One of the directors of the company, through a series of verbal and e-mail exchanges, contracted with Ms. Nouri to promote Icon's project in British Columbia. In fact, this relationship between Mr. Nasseri and Ms. Nouri was, somewhat surprisingly, the sole reason the plaintiffs knew about and decided to purchase the Icon units. Considering the definition of marketing in *REDMA*, which includes, "to engage in any transaction or other activity that will

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> or is likely to lead to a sale or lease", and that the impugned activity in this case was the *only* cause of the sales, it is inescapable that Icon marketed the Development in British Columbia, as defined in *REDMA*.

The court also found that *REDMA* was constitutionally applicable, stating:

> [90] *REDMA* places a burden on the developer who markets its development in British Columbia; that is, it will be subject to the consumer protection legislation contained in *REDMA*. The value of the development units at issue here is in the millions of dollars. It is no excuse that the developer was imprudent in its dealings in British Columbia. *REDMA* does not act as a "trip wire" as suggested by the defendant; but if it is a "trip wire", then it is set in British Columbia, and developers can avoid it by not entering the marketplace.
>
> [91] *REDMA* regulates the real estate development business in British Columbia. The developer's liability arose out of its conduct in British Columbia. Icon rendered itself subject to the regulatory provisions of *REDMA* and the penalties imposed. The statutory obligations of *REDMA* impacted Icon only because it chose to market its development in British Columbia. It reaped the benefits of selling these properties through Ms. Nouri in British Columbia; it is not unfair that Icon is subject to the duties imposed by the British Columbia legislation as it applies to the Development. Simply put, as in *Thomas Equipment*, Icon entered the market in British Columbia so it is required to comply with the rules of the game.

2. What this Means for the Future

This decision has been appealed. A hearing date has not yet been set.

This case may have a significant impact on the marketing of developments on federal and native land. The proposed development at the southern end of the Burrard Bridge comes to mind. Developers building on federal or native land who seek to avoid the strictures of *REDMA* must be very careful to no inadvertently "market" in British Columbia and trigger the application of *REDMA*.

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B. Misrepresentation, or Close only counts in horseshoes and hand grenades

In the past year, there were three decisions which considered the definition of "misrepresentation" in *REDMA*. As "misrepresentation" is a defined term, the analysis must begin with a review of the definition.

Section 1 of *REDMA* states:

> **"misrepresentation"** means
>
> (a) a false or misleading statement of a material fact, or
>
> (b) an omission to state a material fact;
>
> **"material fact"** means, in relation to a development unit or development property, any of the following:
>
> (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
>
> …
>
> (d) any other prescribed matter;

When a developer becomes aware of a misrepresentation it must immediately file a new or amended disclosure statement and, within a reasonable time thereafter, provide a copy of same to each purchaser.[2]

It is the requirement to file and deliver an amended disclosure statement that has been the focus of most *REDMA* litigation.

1. *299 Residential Limited Partnership v. Essalat* - Late is late.

299 Burrard Residential Limited Partnership v. Essalat, 2012 BCCA 271 ("*Essalat*"), is the leading case with respect to the test to be applied in determining when a change in a material fact (specifically, estimated construction dates) constitutes a misrepresentation.

[2] *REDMA*, s. 16

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Ms. Essalat entered into a contract of purchase and sale on August 12, 2007. She was given a copy of the original disclosure statement dated May 12, 2006 and the only amendment dated December 6, 2006. The original disclosure statement provided for an estimated completion date of September 2009. The amended disclosure statement did not change that date.

At the time of purchase Ms. Essalat, via her husband, was told that the project would probably not be completed until December 2009. The trial judge also found as a fact that by March of 2007 the developer had sufficient information to conclude that the final completion of the project would probably not occur until November or December 2009.

Despite this knowledge, the developer did not file an amendment to the disclosure statement restating the completion date. The development was not fully completed until April 2010. However, the City of Vancouver issued an occupancy permit for the unit on January 25, 2010. Ms. Essalat refused to close the purchase of the subject strata lot on the stipulated closing date of January 27, 2010. The developer sued seeking forfeiture of the full deposit that she had agreed to pay.

At trial, Sewell J. relied on *Sharbern Holding Inc. v. Vancouver Airport Centre Ltd.*, [2011] 2 S.C.R. 175 ("*Sharbern*"), a decision under the *Real Estate Act*, in determining the proper analysis to be applied. This required applying the common law definition of misrepresentation. Sewell J. held that the change in the completion would not have had actual significance in the deliberations of a purchaser. He thus awarded forfeiture of the deposit already paid.[3]

Mr. Justice Donald, for the Court of Appeal, overturned the trial decision and held as follows:

> [24] The judgment under appeal also fails to give effect to the language in s. 16 (1) of *REDMA* obliging the developer to file an amendment immediately when it becomes aware that the Statement is incorrect on a material fact. As the judge found, the respondent knew in March 2007 that the September 2009 completion date was wrong. Informal updates and newsletters do not satisfy the Act.

The Court of Appeal specifically held that the *Sharbern* analysis was contrary to the Court of Appeal's earlier decision in *Chameleon Talent Inc. v. Sandcastle Holdings Ltd*., 2010 BCCA 300 ("*Chameleon*"). *Sharbern* was not "a binding precedent" since the legislature in passing the *REDMA* "expressly covered both materiality and falsity" in the definition section whereas

[3] *299 Burrard Residential Limited Partnership v. Essalat*, 2011 BCSC 996

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section 75 of the *Real Estate Act* did not contain any definition as to what constituted a "material false statement" in a prospectus.

The Court declined the invitation to give guidance on the appropriate margin for error in estimating the completion date of a development. Rather, the Court suggested that this is something the Superintendent of Real Estate might address since "enough litigation has been fought over the word 'estimate' in policy statement number one".

Finally, at paragraph 25, the Court directly addressed the need to balance rigorous consumer protection measures while allowing the developers the necessary flexibility to adjust to unforeseen circumstances. This is accomplished by providing developers with an open opportunity to amend the disclosure statement as often as necessary. However, the strictness of the filing regime must be maintained in order for the protection to be meaningful to the consumer.

The developer has sought leave to appeal the decision of the Court of Appeal to the Supreme Court of Canada. The parties expect to receive the decision of the Supreme Court of Canada on the application for leave before the end of this year.

2. *Bosa Properties (Edgemont) Inc. v. Ban* – Early is not late.

The issue of whether an inaccurate completion date is a misrepresentation also arose in the case of *Bosa Properties (Edgemont) Inc. v. Ban*, 2012 BCSC 94 ("*Bosa*"). In that case the argument advanced on behalf of the purchasers was that the contract was unenforceable because the estimated completion date was early as opposed to late. There was contradictory evidence at trial concerning the completion date because the estimated date of completion, as set out in the disclosure statement, did not state a specific date or even a month but rather tied the completion date to the date when construction of the development was to commence (which itself was unclear).

Paragraph 5.1 of the disclosure statement dated February 10, 2007, read as follows:

> The developer intends to commence construction of the development by May 2007. The estimated date for substantial completion of the construction is twenty-nine months after commencement of construction.

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The developer's evidence was that "by May 2007" meant by May 31, 2007. As such, construction was estimated to commence sometime between February 10 and May 31, 2007 – a window of over 3 ½ months.

In any event, construction commenced on February 12, 2007 and completion occurred on April 1, 2009; less than 26 months later.

The first argument advanced on behalf of the purchasers was that the language of s. 5.1 provided a range, not a date, and therefore was non-compliant with s. 5.1 of Policy Statement #1. As the completion date was tied to a specific commencement date, and no such commencement date was provided, the disclosure failed to provide the "actual or estimated completion date" as required by the Superintendent of Real Estate.

The alternative argument advanced on behalf of the purchasers was that even if a "range of dates" was compliant with Policy Statement #1, the developer missed the range by more than three months. The purchasers argued that if a developer is entitled to give itself a date range rather than a specific date for completion of construction, it must complete construction within that date range or file and amended disclosure statement. In that case, the developer did neither.

During the course of the *Bosa* trial the decision in *Essalat* came down. Accordingly, the trial judge, Cullen A.C.J., had to consider the decision of Sewell J. in *Essalat* as well as the Court of Appeal decision in *Chameleon,* which counsel for the purchasers maintained was the controlling authority.

Cullen A.C.J. distinguished both lines of authority on the basis that all of the cases decided to that point, including *Chameleon* and *Essalat* involved a delay in completion of the development, whereas the construction completion date in *Bosa* was accelerated. In his view, this was an answer to both the indefinite language of paragraph 5.1 as well as the failure to amend.

At paragraph 212, Cullen A.C.J. stated:

> … The essential distinction between an accelerated completion date and a delayed one as evidenced in the case at bar is that an accelerated completion date does not have an inevitable or irredeemable effect on the 'price to be paid for, the value that may be in, and the use of condominium that is to be purchased'. If completion is delayed there is a period of time which is

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> unrecoverable and that has an inevitable impact on the criteria in paragraph (a) of the definition of material fact in REDMA.

With respect to the learned Associate Chief Justice, this analysis fails to take into account Policy Statement #1, which provides that the construction commencement and completion dates are prescribed matters and, therefore, material facts.

While not entirely clear on a reading of the judgment, it appears Cullen A.C.J. asked the question set out in *Sharbern*. That is, would the change have been material to a reasonable purchaser. Support for this assertion is found at paragraph 218 of the reasons for judgment:

> As I see it, the critical fact here is that there was an acceleration rather than a delay in completion of the project. The plaintiff's failure to identify the estimated or actual dates of construction, either at the outset or by amendment may well have infringed the provisions of s. 14(2)(b) in the context of a delay in completion, given the precept that a developer is not able to insulate itself "from disclosing material deviations" once aware of them. The key concept, however, is materiality which, in the context of *REDMA*, is a function of the value, price and use of the condominium. Delay manifestly affects those criteria and would be in the mind of a reasonable person as such; acceleration is qualitatively different than delay and would not similarly influence the mind of a reasonable person.

The *Bosa* decision was appealed but subsequently settled following the decision of the Court of Appeal in *Essalat*. In light of the Court of Appeal's decision, it is questionable whether the reasoning of Cullen A.C.J. in drawing a distinction between the acceleration of a completion date and the delay of a completion date is a valid distinction at law.

3. *Esprit II (Inc.) v. Kim, 2012 BCSC 1013* – The Developer was not in "Hot Water".

The third case that addressed the issue of "misrepresentation" under the *REDMA* did not deal with an inaccurate construction date but rather what constitutes "a misrepresentation" and what evidence is required to establish a breach of *REDMA*.

Esprit II (Inc.) v. Kim, 2012 BCSC 1013 ("*Kim*") involved two purchasers, both of whom did not complete. When the developer brought a claim for damages, including the forfeiture of substantial deposits, it was met with the defence that the agreements of purchase and sale were unenforceable by reason of an alleged breach by the plaintiff of s. 14 and/or s. 16 of

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REDMA. The alleged misrepresentation related to the type of hot water heating system in the units and the resulting costs of maintaining the units and/or failing to immediately file an amendment to the disclosure statement upon becoming aware of a misrepresentation in the disclosure statement.

The plaintiff's response was to acknowledge a change in the heating system but to deny that the change was a misrepresentation. That is, the manner in which the units were heated was not a material fact; it was not something that could reasonably be expected to affect, the value, price, or use of the unit.

The plaintiff prepared and filed with the Superintendent of Real Estate disclosure statements as required by *REDMA* and delivered them to the purchasers. The purchasers acknowledged receiving the disclosure statements in a timely way, as required under *REDMA*. The alleged misrepresentation was found in marketing materials provided before the contracts were signed, which listed as one of the amenities, a "central gas – fired hot water system". At some point in the construction a decision was made by the developer that the townhouse units, which the purchasers had agreed to purchase, would ultimately receive in-suite hot water tanks instead of being part of any central gas-fired system which provided hot water to the high rise portion of the development.

The developer led evidence at trial that the change in the hot water delivery system was made on the recommendation of its engineer and general contractor to avoid a degradation or shortage in the hot water to the townhouses because the hot water had to travel some distance to reach the townhouses. There was conflicting evidence at trial as to whether the change in the hot water delivery system was an improvement or a drawback for the townhouses. The change in how the hot water would be supplied was not communicated to the purchasers, nor was any amendment filed to the disclosure statement.

The key issue at trial was whether there was a requirement on the part of the developer to file an amendment to the disclosure statement when it became aware that there would be a change in how hot water was provided to the townhouses. In a thorough and well-reasoned judgment Sigurdson J. canvassed all of the evidence in great detail and concluded that the purchasers had failed to establish that the change in the hot water system affected the value, price or use of the unit or the development.

In particular, he found that the evidence did not establish that the change in the hot water system affected the use of the unit. He also found, as a fact, that there was no evidence to show that the drop in value of the units was anything other than a general drop in the value of

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the units in the development and other similar developments. In coming to this conclusion he noted that there was no expert evidence that this change could reasonably be expected to affect the value or price of the townhouses.

In dismissing the case Sigurdson J. concluded:

> [114] I recognize that *REDMA* is consumer protection legislation and disclosure of material facts must be made, but on the evidence before me, the defendants have not demonstrated that this change, which was a type that could be made by the plaintiff, was material in that it did not affect the use, value or price of the unit. Accordingly, the plaintiff, in not disclosing the change, did not breach its obligations under *REDMA.*

4. **What this Means for the Future?**

Unless *Essalat* is overturned by the Supreme Court of Canada, the *Sharbern* analysis has no application to *REDMA* cases.

Anything less than a true *de minimus* delay in completion triggers a requirement to immediately file an amendment.

The filing regime of *REDMA* must be strictly maintained in order for its consumer protection measures to be meaningful.

REDMA cases are all about the knowledge of the developer and its ongoing obligation to immediately and formally disclose and correct, by way of an amendment, all misrepresentations. Individual circumstances and the specific knowledge of purchasers is of no moment as such analysis would invariably lead to inconsistent results within the same development.

C. The Right of Rescission After Completing the Purchase

1. The Case: *Woo v. ONNI Ioco Road Five Limited Partnership*

In many ways the decision in *Woo v ONNI Ioco Road Five Limited Partnership*, [2012] B.C.J. No. 1032 (S.C.) ("*Woo*"), is unremarkable. There was no dispute that the purchasers did not get an

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amended disclosure statement that had been filed with the Superintendent of Real Estate. This is a clear breach of Part 2 of *REDMA*.

Were it not for the fact that the plaintiffs had taken title to their units, this likely would have been resolved quickly. However, the plaintiffs did take title to their units. About 10 months after taking title, the plaintiffs became aware that they had not received one of the amended disclosure statements. They then waited a further seven months before delivering notices of rescission.

While the right of rescission had been addressed in earlier court decisions, those cases focused on whether there was a misrepresentation, not the language of the rescission right. Section 21(3) states:

> **21** …
>
> (3) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission on the developer.

The developer argued that the rescission right could only be exercised while the contract was executory. It further argued that because a purchaser has no right of rescission upon receipt of an amendment, the failure to deliver an amendment could not provide such a right.

The court found that both of those arguments are not supported upon a proper reading of *REDMA*. Section 21(3) expressly provides that a purchaser may rescind "[r]egardless of whether title … has transferred … at any time". Furthermore, the court stated that s. 21 "creates separate and distinct rights to rescind where a purchaser receives a disclosure statement and where the purchaser does not receive a disclosure statement or amendment".

As stated, this decision is somewhat unremarkable. The court applied the clear wording of *REDMA* to the facts.

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Perhaps more notably, the court held that the purchasers did not owe any occupation rent for the time they had owned the strata lots. By the time of the decision, this was approximately 30 months after they took title.

The court looked at the jurisprudence with respect to occupation rent and held that, because *REDMA* is silent with respect to an accounting or occupation rent, none was owing. The developer was obligated to re-take title to the strata lots and return the full purchase price.

2. What this Means for the Future

As with many *REDMA* decisions, this case is being appealed. The developer claims to be a single-purpose entity without assets. As such, rescission has not yet occurred. The plaintiffs continue to attempt to collect on the judgment and proceed with rescission.

This case may have a significant impact going forward. Generally, once title is conveyed, both developers and purchasers assume the deal is done and there is no turning back. While there may be claims for damages, the purchasers are stuck with their strata lots. This is no longer the case.

It remains to be seen whether the courts will impose any time limits on the rescission remedy. If not, so long as there is not a re-sale of the property, a purchaser may be able to rescind years after taking title. This, of course, would come with practical difficulties. The developer may no longer exist, thus making rescission a hollow remedy, unless the court allows for equitable tracing of the proceeds of sale into the pockets of the parent of the single-purpose entity. Furthermore, real estate is over the long term an appreciating asset. The functioning of the market will likely make rescission years after the sale unattractive in most cases.

What *REDMA* issues are yet to be decided?

REDMA is still relatively new legislation. While many provisions have simply been carried forward from the *Real Estate Act*, the courts have clearly signaled that *REDMA* is consumer protection legislation and a different legislative scheme than the *Real Estate Act*.

The comments of Savage J. in *Lee v. Georgia Properties Partnership*, 2012 BCSC 1484, are apposite:

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> [27] These cases suggest that while *REA* and *REDMA* share many similarities, there are also significant differences. Care is needed when drawing on *REA* jurisprudence to decide *REDMA* cases.

It remains to be seen whether *Chambers v. Pennyfarthing Dev. Corp.*, (1985) 64 B.C.L.R. 145 (C.A.), and the cases following it – which stand for the proposition that waiver and estoppel may provide a defence for developers – are applicable to the rescission (s. 21) and unenforceability (s. 23) provisions of *REDMA*.

Can pre-sale purchasers, who have successfully exercised a right of rescission, obtain an equitable tracing order/accounting to recover the fruits of their lawsuit from the ultimate recipient of the proceeds of sale?

Can developers rely on the terms of a pre-sale contract to avoid the provisions of s. 6 of the *Property Law Act*?

Who is a "developer" under *REDMA* and therefore obligated to sign a disclosure statement? Are corporations set up for the sole purpose of holding land in trust for a contracting developer (i.e. the vendor on the purchase agreement) required to sign the disclosure statement?

What constitutes "completion" of a development or, more accurately, when is the construction of a development finished? Is it when an occupancy permit is issued for all units or some other date?

These and other issues have yet to be addressed by the courts.

Two Take Away Points

When advising pre-sales purchasers concerning their rights and obligations vis-à-vis a developer, it is critical to not conflate the contractual rights and obligations with the statutory rights and obligations of the parties.

Do not confuse completion (finishing/final occupancy) of the development with completion (closing) of the purchase of the individual unit.

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