The Ebbs and Flows of Pre-Sale Litigation

In an article published in July, 2011 – *The Tide May Be Turning on Pre-Sale Litigation* – we discussed several important decisions by the Supreme Court of Canada, B.C. Court of Appeal, and B.C. Supreme Court, which indicated that courts were starting to apply less technical and more common sense approach to *REDMA*. Recognizing that *REDMA* should not be used to allow buyers to escape from pre-sale contracts by seizing "*on any trivial or unimportant fact that was not disclosed*", courts found that only omissions or misrepresentations of *material* facts – facts that, objectively, would likely be considered important by a reasonable buyer in making a decision to buy – should render a contract unenforceable. More generally, it appeared that courts were less willing to accept "excuses" and more likely to hold buyers to the contracts they made irrespective of the state of the economy.

Ten months later, it appears that B.C. courts have, with one notable exception, stayed the new course. We discuss four recent *REDMA* cases below.

Deposits and Opportunity to Review a Disclosure Statement

In ***Drake v. North Ellis Developments Ltd.***, a buyer refused to complete a pre-sale contract and sued to get the deposit back, while the developer countersued for damages. The buyer argued that the contract was invalid because of breaches of *REDMA*, specifically: (i) that the deposit he had paid was contrary to *REDMA*; and (ii) despite confirming in the purchase contract that he had received and was given a reasonable opportunity to review the disclosure statement, that he in fact was not given this opportunity.

The purchase contract provided that the buyer would pay a deposit of 7.5%, and would secure a further 7.5% by way of a deposit bond payable to the vendor on completion. Because the purchase contract was entered into before a building permit was in place, a Policy Statement restricted deposits to a maximum of 10%. The buyer argued that the deposit was in fact 15% and thus rendered the contract unenforceable. The court rejected this argument, finding that a "deposit" under *REDMA* is money actually paid by a buyer to the vendor, and does not include giving security for a future payment of a deposit, such as posting the 7.5% bond in this case.

With respect to the "reasonable opportunity" to review the disclosure statement, the purchase contract contained a confirmation by the buyer that he had "*received and [had] sufficient opportunity to read the Disclosure Statement*". Nevertheless, he testified that he simply signed documents that were given to him and, in the 45 minutes that he spent at the sales office, was neither given an opportunity to review the disclosure statement, nor were any of its provisions explained to him. The vendor's realtor, on the other hand, testified that:

- she went through the purchase contract in detail with the buyer;
- she explained to the buyer the section where he acknowledged receiving the disclosure statement and provided him with a copy of the disclosure statement;

- she explained to the buyer that he should read the disclosure statement and call if he had any questions; and
- she had explained that he had seven days to cancel the contract.

The court found that, on affidavit evidence alone, it could not determine what exactly happened at the sales office, and further evidence would be required at a full trial. However, the court specifically refused to find that the mere fact that documents were provided and signed over a course of 45 minutes was determinative. What mattered was what transpired during that time: "*It may be that in the context, if [the agent] described various portions of the agreement and explained the rights of rescission and invited Mr. Drake to take the documents home, that would be a reasonable opportunity*."

The decision in ***0741340 B.C. Ltd. v. Johnston*** provides a useful contrast with ***Drake***. In this case, the buyer also acknowledged in the contract receiving and reviewing a disclosure statement and specifically initialled that clause. However, the sales person admitted that she did not in fact provide one of the amendments and the consolidated disclosure statement to the buyer. In light of this, the court had little choice but to order rescission and return of the deposit under s. 21(3) of *REDMA*.

Different Approaches to Materiality: Only Negative Impacts Are Material

Two cases rendered by the B.C. Supreme Court this year illustrate two starkly different approaches to materiality.

In ***Bosa Properties (Edgemont) Inc. v. Ban***, buyers purchased a unit in the Altemont project in Coquitlam (Westwood Village), which completed earlier than expected. The buyers obtained several extensions, bringing them within the expected completion timeframe, but ultimately refused to complete. The buyers claimed that the refusal had nothing to do with the market downturn (the unit was appraised at $115,000 less than the original purchase price), but alleged the following three breaches of *REDMA* that they said entitled them to rescind the contract:

1) a breach of s. 15(1), by failing to provide a disclosure statement and/or a reasonable opportunity to review it (although they initialled the section in the contract confirming otherwise);
2) a breach of s. 14(2)(a), by failing to comply with Policy Statement 1 ("**PS1**") and "state [in the disclosure statement] the actual or estimated dates of commencement and completion of construction". The disclosure statement in this case provided a range of dates: "*The developer intends to commence construction of the development by May 2007. The estimated date for substantial completion of construction is 29 months after commencement of construction*"; and
3) even if the range was compliant with PS1, a breach of sections 14(1)(b) & 16(1), by failing to amend the disclosure statement when construction commenced on February 12, 2007, at which time "*the retention of the original estimate of commencement and completion became materially misleading*".

On the first issue, the court refused to accept the evidence of the buyers and their realtor, finding that it was internally inconsistent and in some aspects implausible. The court preferred the evidence of the

vendor's agent, a realtor with 25 years of experience, who testified as to her usual practice and the steps she took for this particular transaction. Taking into account her "*evidence, anchored by her routine practice and the logic inherent in ensuring that such transactions would not be imperiled by failing to provide a disclosure statement before execution*", the court found that the "*logic of the evidence that there was an existing file [for each unit] with a disclosure statement, a contract and a floor plan to aid in the proper processing of multiple transactions is compelling and is uncontradicted*."

Notably, although the agent acknowledged that the buyers signed the contract without fully reviewing the disclosure statement, the court refused to find that they were not given a reasonable opportunity to review it, finding that she did review key parts of the disclosure statement with them. All in all, the court found that the buyers' evidence was not sufficient to disprove "their own explicit acknowledgement of receipt" in the purchase contract.

On the second issue, the buyers argued that although PS1 "*allows some measure of elasticity of delays*" because "*some delays in the construction of condominiums may be expected*", a "reasonably accurate" date must still be provided. They argued that "*a range is not a date for the purpose of [PS1]*" because it "*is indefinite and at best implied a range of possible dates for commencement and completion*."

The court did not specifically address this alleged breach. However, given that it ultimately found against the buyers, it appears to have accepted the developer's argument that a range of dates does not, by itself, breach PS5. In particular, in ***Chameleon Talent***, at trial and on appeal, the courts appear to have accepted that a reference to a month – a 30 day range – was not improper.

On the third issue, the buyers advanced bold propositions that "*construction dates as prescribed content are always material facts which must be plainly disclosed without misrepresentation*" or that they are always material because "*they could reasonably be expected to affect the value, price or use of* [the unit]." Thus, as soon as an actual commencement date and revised estimated completion date crystallized, the developer was obligated to amend the disclosure statement. The buyers argued that, in essence, all that mattered was that there was some change in the construction dates, irrespective of the nature of the change (other than most trivial), and without reference to the particular facts of the case.

The court rejected these propositions, explaining that construction dates are only material if, "*in context, the uncertainty of the estimated completion date in the disclosure statement is sufficiently at odds with the actual completion date so as to 'generally be material to purchasers and prospective purchasers in respect of the price to be paid for, the value there may be in and the use of the condominium unit that is to be purchased'"*. The court found that section 14(2)(b) will not be infringed "*[i]f from an objective person's standpoint, the difference in what is represented as likely to occur from what actually occurs has little or no impact on"* the value, price or use of the unit.

In this context, the court explained that "*acceleration is qualitatively different than delay and would not similarly influence the mind of a reasonable person*":

> *The essential distinction between an accelerated completion date and a delayed one … is that an accelerated completion date does not have an inevitable or irremediable affect on "the price to be paid for, the value that may be in, and the use of a condominium that is to be purchased." If*

completion is delayed, there is a period of time which is unrecoverable and that has an inevitable impact on the criteria in paragraph (a) of the definition of material fact in REDMA.

The longer a purchaser has to live in, or rent out a unit, the more value it has, the more integral the price of it is, and the greater its use is. The less time a purchaser has to live on or rent out a unit, the less value it has, the less integral the price is and the less opportunity there is to use it.

In essence, the court implicitly held that material facts that require amendments are those that negatively affect the price, value or use of the unit.

Different Approaches to Materiality: Everything is Material

A stark contrast to the materiality approach in ***Bosa*** is the decision of the B.C. Supreme Court ***Woo v. ONNI Ioco Road Five Development Limited Partnership***, released on May 23, 2012. In this case, the developer filed an amendment (the "**Amendment**") that, it acknowledged, was not provided to the buyers until after they completed the sale. The Amendment disclosed that everything was on track with the development (including construction commencement and estimated completion dates), and advised that the developer was planning to enter into a revenue sharing agreement for ad space in the retail portion of the strata, with revenue to be kept by the developer. The buyers took possession of the units in February, 2009. In April and October, 2010, they demanded rescission of their contracts under s. 21(3) of *REDMA* because they did not receive the Amendment that they were "entitled to".

Section 16(1) provides that a developer must file and deliver an amendment if "*the developer becomes aware that a disclosure statement does not comply with the Act or regulations, or contains a misrepresentation …*". The court set out two grounds upon which it was concluded that the developer was required to file the Amendment and, consequently, required to deliver it to the buyers.

Firstly, the judge relied on the following declaration in the Amendment:

The foregoing statements disclose, without misrepresentation, all material facts relating to the Development referred to above, as required by the Real Estate Development Marketing Act of British Columbia, as of March 23, 2007.

From this, the court "*infer[red] that the developer filed the first amendment in order to ensure compliance with its obligation to disclose all material facts relating to the development*." No substantive analysis was provided for this conclusion, although we do not know what submissions were made by counsel.

Secondly, the court considered whether the contents of the Amendment were material facts, such that "*a reasonable person [would] conclude that the fact in issue would affect "the value, price, or use of the development unit?*" The court concluded that the "everything on track" content of the Amendment were material facts because they reduced the risk of the developer failing to complete the project:

In my view, a reasonable person would conclude that the facts that subdivision approval had been obtained, that a building permit had been issued and that construction had commenced and was proceeding on schedule would affect the "value, price, or use" of the development units

> *by reducing the risk of the developer failing to complete the project. The absence of these facts from the original disclosure statement was an "omission to state a material fact" and therefore a "misrepresentation" within the meaning of s. 16 of the Act.*

Accordingly, the court concluded that the developer had to file an amendment to correct this misrepresentation and, therefore, the buyers were entitled to the amendment.

Similarly, the court found that the contents of the Amendment were facts that had to be disclosed in the original disclosure statement under PS1 if they were then available, and, since they became available later, in the Amendment:

> *The first amendment contains facts and proposals which under [PS1] should have been disclosed if they had existed at the time of filing the original disclosure statement. Those facts and proposals include the developer's intention to enter into a revenue agreement with an advertising company that would possibly include the rental of advertising space in common property areas of the development, with the revenues to be retained by the developer, as well as the notifications in paragraph 1.3 that subdivision approval had been granted, and in paragraph 1.6 that a building permit had been obtained and construction had commenced in October 2006.*

An apparent problem with this analysis is that the court did not really consider how the facts in the Amendment would affect a reasonable person. The court considered neither ***Bosa***, where it was effectively explained that an effect needs to be negative to be material, nor ***Sharbern***, where the Supreme Court of Canada explained that "*an omitted fact is material if there is a substantial likelihood that its disclosure would have been viewed by the reasonable [buyer] as having significantly altered the total mix of information made available.*" Indeed, it is difficult to imagine how the reduction in risk would have significantly altered the mix of information for buyers who already entered into contracts.

No Occupational Rent or Other Compensation for Rescission After Closure

In ***Woo***, the court ultimately found for the buyers and ordered rescission of the contracts. However, for developers, what may be more important than the court's analysis of the materiality, is the fact it refused the developer's plea for occupational rent or compensation for diminution in value of the units.

The developer argued that because the buyers "*had the use and enjoyment of the strata lots from the time that their purchase agreements completed*", the court had to order compensation to return parties to the positions they were in before they entered into these contracts. The buyers argued, on the other hand, that compensation is not available for the statutory right of rescission under *REDMA*.

The court considered statutory rescission schemes in Ontario, Alberta and Saskatchewan (not related to real estate) and found that, because *REDMA* did not specifically provide for compensation or occupational rent, this remedy was not available to the developer: "*Had the Legislature intended that there be an accounting, or payment of occupational rent, it would have said so …*". Notably, the court relied on the notion that *REDMA* is consumer protection legislation in concluding that policy considerations precluded the relief sought by the developer:

> *In the absence of a statutory provision for an accounting, there are policy considerations that weigh against the Court ordering occupational rent and an accounting. The purpose of the statutory right of rescission provided by s. 21(3) is to protect consumers by ensuring that developers disclose all material facts. That section is aimed at providing a remedy to purchasers where a developer fails to perform its obligations, rather than at achieving equity between both parties to a commercial transaction.*
>
> *The prospect of recovering occupational rent might create for some developers an incentive to litigate claims for statutory rescission and to prolong that litigation, knowing that occupational rent would continue to accrue.*

We have no word yet on whether the developer will pursue an appeal.