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DELAYING DISCLOSURE HAS CONSEQUENCES FOR STRATA DEVELOPERS

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Pre-selling strata units before starting project construction is an accepted part of the development process and is usually required by lenders. The courts, however, will protect the rights of pre-sale purchasers by requiring timely and thorough disclosure by developers. Developers who fail to strictly comply with the law as articulated in the *Real Estate Development Marketing Act* (REDMA) risk having their contracts of purchase and sale found to be voidable at the option of the purchaser.

The risks of non-disclosure

REDMA is consumer protection legislation which, as the British Columbia Court of Appeal recently noted, is traditionally “interpreted generously in favour of the consumer.” One of REDMA’s central objectives is to ensure that notice of all material facts, as well as disclosure of the inevitable alterations occurring in the course of development, are provided promptly to pre-sale purchasers.

To this end, Section 23 of REDMA provides that a purchase agreement is not enforceable against a purchaser by a developer who has breached certain provisions of the Act, including those relating to disclosure statements.

What facts must be disclosed

Section 14 of REDMA requires a developer to provide a prospective purchaser with a disclosure statement that must, among other considerations, “without misrepresentation, plainly disclose all material facts” respecting the development and the purchaser’s interest.

The question of what is or is not a material fact has been canvassed to some degree in court decisions. In a 2010 decision, *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, the Court of Appeal held that material facts were those facts “in respect of the price to be paid for, the value there may be in, and the use of a condominium unit that is being purchased.” In that case, substantial delays in the construction of a condominium project were held to be material.

Timing of the disclosure

The Act requires developers to create and file a new disclosure or an amendment immediately with the Superintendent of Real Estate upon becoming aware that the disclosure statement is inaccurate or non-compliant. In *Jameson House Properties Ltd. (Re)*, the Court of Appeal noted that the word “immediately” in Section 16(1) of REDMA is to be construed to allow for “a reasonable time” for compliance in “a commercial context”.

A developer must also deliver copies of disclosure statements and all amendments to purchasers who have not yet received title. In this context REDMA states that delivery must be completed “within a reasonable time after filing a new disclosure statement or an amendment.” While the Act does not set a specific time for a developer to provide a new disclosure or amendment to a purchaser, there is authority suggesting that the importance (or lack of importance) of a particular amendment is relevant to defining “a reasonable time” for delivery of the document.

In a recent judgment, *Pinto v. Revelstoke Mountain Resort Limited Partnership*, the Court of Appeal found that two contracts of purchase and sale were unenforceable against the purchasers by a developer because they were not delivered as expeditiously as they should have been. An

amendment regarding a change in the construction timetable, filed a year before the purchasers received it, was not delivered within a “reasonable time” as required by REDMA.

The Court alluded to two other relevant elements. REDMA does not provide for a “consolidated” disclosure statement that could avoid the requirement to file and deliver separate amendments in each instance of material change. In addition, any amendment or new disclosure must identify clearly the changes made to the previous disclosure statements and not leave it up to the purchaser to discern them.

Conclusion

REDMA appears to place a heavy onus on developers but it is only compliance with that burden that enables pre-sales by meeting the need of consumers to get what they bargained for in the uncertain and ever-changing development process. Strict compliance with REDMA disclosure requirements can be time-consuming and costly.

However, not doing so puts developers at risk of having their pre-sale contracts found voidable at a purchaser’s option and it is trite to point out that this usually will occur when the developer is most desirous of maintaining pre-sale contracts. A developer that views diligence in such matters as a proactive investment rather than a cost and detriment is likely to conclude developments successfully.