

Remedies of the Purchaser in the Collapsing Deal

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Imagine, if you could:

1. sell a home that didn't exist;
2. on property you didn't own;
3. use the deposit to finance the construction of the building; and
4. back out of the deal any time within nine months if you change your mind.

In turn, all you had to do was:

1. not misrepresent what you were building;
2. make full disclosure in writing before the purchaser signs up;
3. advise the purchaser of all material changes;
4. finish the building on or before the date you put in the contract;
5. give the purchaser seven days to change her or his mind; and
6. not sell the development or go into bankruptcy before it is completed.

That, in a nutshell, is the *Real Estate Development Marketing Act*¹ (*REDMA*). The legislation provided developers with the “flexibility” the legislature felt the developers needed to encourage development. The second section provided what the legislature felt was the “appropriate consumer protection required by purchasers”.

Since *REDMA* came into force in 2004, it has been a license to print money for the development sector, i.e. developers/builders/lenders. When it was introduced in the legislature, the government downplayed the significant benefit conferred on developers by positioning *REDMA* as “the first comprehensive review of British Columbia’s real estate legislation in nearly 50 years”. It was all about reducing costs and the regulatory burden. The government freely acknowledged that it would “enable developers to pre-sell at an earlier stage” and would allow “developers to use purchasers’ deposit monies to construct the development”. When the legislation was debated in the legislature, the market for multiunit buildings was already booming. The Minister described the state of the industry as follows:

“We are in a bizarre period of time right now. I was just sort of joking here that people go out for a latte and on the way to Starbucks stop and buy a condominium. It is sort of like the Soviet Union. You walk down the street, and there’s a big line up, get in line, because you don’t know what they’re selling. You may want some. It’s sort of a weird time right now.”²

¹ REDMA citation.

² Hansard, Tuesday May 11, 2004 Afternoon Sitting - Volume 25, Number 9, pg. 11027.

Amazingly, the boom in real estate, that “weird time”, continued until mid-2008. During those four years little attention was paid to the enhanced consumer protection provided by *REDMA*. If purchasers wanted out of a contract - no problem, because the developer could invariably sell the unit for a higher price. Misrepresentations by the developer were of no moment, because there were no damages. Bankruptcy did not matter either, because purchasers who were given a new opportunity to rescind in most cases elected to complete even if there was a delay in closing.

That was then. The reality now is very different. The consumer protection aspects of *REDMA* are suddenly front and centre. If the developer has failed to comply with any of the six requirements set out above, the purchaser has a variety of options to seek redress, ranging from a claim for the return of the deposit to damages for misrepresentation. The purchaser’s position is also strengthened because *REDMA* requires that the deposit not be released (if the purchaser fails to close) without the purchaser’s consent or a Court Order.

REDMA is a “bright line” statute. If a developer has crossed the line and breached a section of the Act, the contract is either unenforceable or the purchaser has a further/ongoing right of rescission.

The decision of Smith J. in *Dwane V Bastion Coast Homes Ltd.* 2009 BCSC 726 released on June 1, 2009 has confirmed that purchasers who do not receive existing amendments to disclosure statements before entering into the contract of purchase and sale are entitled to rescind the contract. Arguably, this will also apply in cases where the amendment to the disclosure statement made after the time of contracting is not received at all.

In this case a purchaser of a \$3.5 million pre-sale condo received the original disclosure statement before entering into the contract but not the amendments which were in existence at that time. The purchaser gave written notice that it was rescinding the contract as was its right under the Act. This was refused by the developer and the purchaser sued the developer seeking a right of rescission and damages for misrepresentation.

On a summary application, the Court agreed that the purchaser had a right of rescission under the Act. The Court’s ruling affirms that the Real Estate Marketing Development Act (“*REDMA*”) is consumer protection legislation. Further, the ruling confirms that *REDMA* should be looked at as a whole and interpreted according to its plain language and in a purposive manner.

If one looks at what flows from a breach of each of the six main obligations set out above, the result is as follows:

1. a misrepresentation is deemed to be relied on by the purchaser, leaving only the issue of damages;
2. failure to provide a disclosure statement means the developer cannot enforce the contract and/or the purchaser has an ongoing right to rescind;
3. failure to provide amended disclosure is more complicated, but in many cases will mean that the contract is not enforceable;
4. if the developer misses the completion date, the normal rules of real property apply;
5. even the 7-day rescission clause may still have life if there was no opportunity to read the disclosure statement before signing the contract;

6. If the development was sold or if the developer went into bankruptcy or receivership, and the purchaser did not receive a new disclosure statement with a seven day right of rescission, the contract is unenforceable.

In the past when the real estate market collapsed, pre-sale purchasers were invariably left out in the cold. *REDMA* has dramatically improved the purchaser's legal position and bargaining power. The result is that the developers are going to have to give back some of the huge profits that they banked over the last four years.

The Top Ten Pre-Sale Breaches

10. **Alberta, eh? -
We had to file what - a Disclosure Statement?**

An Alberta developer chose a Richmond boardroom to market a condominium development to be built outside of Calgary. While the developer apparently understood the need to register as an extra provincial corporation, it failed to file a disclosure statement with the Superintendent or provide a disclosure statement to the purchaser. The contract stated that the agreement was to be governed pursuant to the Alberta *Condominium Property Act*.

This is directly contrary to Section 2 of *REDMA* which provides:

- (b) This Act applies to a developer who markets, in British Columbia, a development unit.
- (c) This Act applies regardless of whether the development unit being marketed is located in British Columbia or not,

Pursuant to Section 23, the Agreement was "not enforceable" by the developer because the developer breached "a provision of Part 2" [*Marketing and Holding Deposits*]. Faced with a clear breach of *REDMA* the developer promptly refunded the deposit with interest when the breach was brought to their attention.

9. **The Mirage -
The Ever Vanishing Completion Date(s)**

Setting the completion date for a presale development poses major problems for developers. Sooner is better, but when will the occupancy permit be issued for a building that hasn't even broken ground? Given this uncertainty, it is very much the exception for a contract to provide for closing on a specific date as is the case in a standard conveyance.

Because many months of marketing may take place before construction starts, it is understandable why the developers have avoided providing a specific closing date. By failing to do so, the agreement signed by the parties may be nothing more than an option which is only enforceable by the purchaser.

Amazingly, some contracts make no reference to a closing date at all.

Another form of contract, employed by some developers, provides that the completion date is to take place

“on a date to be specified by the vendor and not less than ten days after the Vendor or their solicitor notify the Purchaser or their solicitor of: a) permission from the city to occupy the unit or, b) full registration or expected registration of the strata plan in the land title office.”

On a plain reading of this clause, it is open for the developer to set a closing date eleven days after events a) and b) up to infinity!

More sophisticated developers typically employ a series of clauses which give the impression that the contract contains a specified completion date but, in reality, leaves the completion date at the absolute discretion of the developer. These contracts provide an estimated completion date (the Target Date) which the purchaser agrees (or, more accurately, has no choice but to accept) cannot be relied upon despite the sales pitch, brochures and assurances provided by the developer's agent moments earlier.

The agreement then typically provides that closing will take place at a time designated by the developer which will not be later than a given date (the Outside Completion Date). Typically, the Outside Completion Date is two to three years after the start of marketing but, in some cases, is several years down the road.

If that does not give the developer sufficient “wiggle room”, a further clause allows the developer to unilaterally extend the Outside Completion Date by 120 days.

Finally, the Outside Completion Date (plus 120 days) can be trumped by a *Force Majeure* clause which, on the face of it, gives the developer the power to indefinitely extend the closing date if substantial completion has been delayed because of an issue with a subcontractor, or “any other event beyond the reasonable control of the developer.”

It remains to be seen whether the response from developers and their counsel that “this is the standard clause used in the industry” will carry the day. Developers can expect to face stiff resistance from purchasers who will urge judges to find that contracts lacking a specific closing date are unenforceable.

8. Now you own it, now you don't - The developer scoops the Common Property

A hallmark of pre sale marketing is the common property that is typically owned and operated by the strata corporation and its members. Decisions as to its operation are at the discretion of members of the strata. The features of common property often induce purchasers to buy a unit in one development over an other.

In at least one staged development involving several strata corporations, the developer represented in the original disclosure statement that the strata corporation would own and operate an extensive common clubhouse area. In an amended disclosure statement the developer unilaterally reasserted ownership of the common property providing purchasers with only a lease to use the facilities. In effect, the developer marketed the clubhouse and the associated facilities as being for the sole use of the strata corporation and then unilaterally turned it into the local community centre!

Fundamental changes to the status of common property that “could reasonably be expected to affect the value, price, or use of the development unit or development property” are “material

facts” under *REDMA* which require the developer to disclose this change to all purchasers. Whether such disclosure requires the developer to provide a new seven day right of rescission is unclear and will have to be decided in an appropriate case. If a new disclosure statement is required in the face of such material facts, then the answer will be yes.

In that *REDMA* is consumer protection legislation, it supplants but does not abrogate the purchaser’s common law contractual rights. Rescission at common law remains available to a purchaser who, having been induced into signing a contract because of the common property associated with a development, may have a common law right of rescission as well.

7. **“The Sky is Falling” - Chicken Little - the Force Majeure Clause**

Force majeure clauses have their genesis in delay attributable to war and natural disasters; however, these clauses appear frequently in pre-sale agreements to address the uncertainty of the long term contracts. Fundamentally, *force majeure* clauses address circumstances that are unexpected and beyond the control of the parties. The breadth and purported application of these clauses will receive close scrutiny in the context of presale litigation.

In one instance, the vendor relied on the standard *force majeure* clause to extend the Outside Completion Date for an additional month because a subcontractor was not performing and had to be replaced.

The courts narrowly interpret the wording of such clauses. The underlying principles of *force majeure* and judicial treatment of its application rarely contemplate minor issues reasonably expected to arise within a particular industry. Depending on its construction, the clause will normally be construed *contra proferentum* as against the developer. Reliance upon this type of clause as a means to further delay an already overdue project, on the basis of issues foreseeable in a major, long term project, are unlikely to be accepted by the courts.

6. **Time is of the Essence - for the Purchaser!**

All pre-sale agreements are loaded in favour of the developer. The shorter and simpler pre-sale agreements typically specify that time is of the essence with respect to additional payments to be made by the purchaser and state emphatically that time is of the essence once the developer exercises its discretion and gives notice of the completion date. These clauses make it clear that any default by the purchaser permits the developer to retain the deposit and all accrued interest, and to sell the unit and recover any resulting short fall. In the alternative, the developer faced with any default, may elect to keep the contract alive and change monthly compound interest at astronomical rates until closing.

The more sophisticated agreements systematically strip the purchaser of any rights they might conceivably have under short, simply worded contracts. At the same time, such contracts specifically provide that the developer can extend the completion date indefinitely into the future. Time is of the essence is rendered meaningless in its application to the developer.

Interestingly, neither *REDMA* nor the policy statements issued pursuant to *REDMA* specify the form of contract to be used, nor do they require that such a contract contain a completion date.

Many contracts are so manifestly one-sided and unfair to the purchaser that, in the appropriate case, a court could easily conclude that such a contract is unconscionable and set aside the entire agreement on that basis.

**5. It was Bigger/Better in the Display Suite -
You can't rely on what you saw or were told!**

The hype surrounding pre-sales in recent years has been breathtaking. Beautiful models, flashy brochures, aggressive advertising and, of course, elaborate display suites are designed to create the impression that the purchaser is making an investment in a luxurious building that will only increase in value. Condominium units are commonly referred to as "homes" and penthouses have become "estates".

To the chagrin of many purchasers, the end product bears little resemblance to the "sizzle" sold in the display suite. When they raise the misrepresentation that induced them to sign the contract they are directed to the "non reliance clause" such as:

The purchaser acknowledges and agrees that there are no representations, warranties, conditions, etc., made by the Vendor, its agent or employees, other than those contained herein and in the disclosure statement, with respect to the strata lot.

What the purchaser is left with is a basic plan, the choice of a colour scheme and a finished product lacking the lustre of the model.

Other clauses typically allow the developer to increase or decrease the size of the unit by up to ten percent with an appropriate price adjustment up or down based on the square footage involved. Only if the unit is downsized greater than ten percent is the purchaser, typically, allowed to rescind the agreement.

REDMA provides some relief for misrepresentations made by the developer or its agents. "Misrepresentation" is defined as follows:

- (d) A false or misleading statement of a material fact, or
- (e) An omission to state a material fact.

Section 15 provides that a developer must provide a new disclosure or an amended disclosure statement to remedy misrepresentations. This provision on its face does not appear to deal with misrepresentations with respect to individual units.

Liability for misrepresentation is dealt with by Section 22 of *REDMA* which provides that a purchaser is "deemed to have relied upon the misrepresentation" and provides for a right of action for damages against the developer, a director, a person named in the disclosure statement, a person who authorized the filing of the disclosure statement and a person who signed the disclosure statement.

It would appear that a purchaser seeking to rescind the contract based on misrepresentations that pre-dated signing the contract will be required to rely on the common law rights of rescission arising from the misrepresentations. At some point, a unit will be found to be so much smaller or so different than what was represented to the purchaser so as to allow the

purchaser to rescind the contract and recover the down payment. Such a claim will be decided on a case by case basis as each set of facts and circumstances will be different.

The more the developer and its agents oversold the development, the more likely a judge will be inclined to find in favour of the purchaser.

4. **Evelyn Wood's Speed Reading Course - A prerequisite to signing a pre sale contract.**

Section 15 of *REDMA* places strict disclosure obligations on the developer. The obligation is mandatory in that it provides that "a developer must not enter into a purchase agreement...unless" the developer has complied with the three conditions set out below.

The first obligation imposed on a developer is the requirement that the disclosure statement be provided before the purchase agreement is entered into. Secondly, the purchaser has to be afforded "reasonable opportunity to read the disclosure statement". Finally, the developer has the obligation to obtain "a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement".

Some developers have attempted to comply with this provision by incorporating the "written acknowledgement" into the contract. A variation of this practice involves a separate signature line in the body of the contract specifically acknowledging receipt of the disclosure statement and, in some cases, acknowledging that the purchaser has had an opportunity to read the disclosure statement.

Other developers use a separate document which is typically signed in conjunction with the contract. In this document the purchaser acknowledges receipt of the disclosure statement and the fact that he/she has had an opportunity to read the disclosure statement. The latter practice would appear to be what was contemplated by Section 15 of *REDMA*.

The reality is that few, if any purchasers, were afforded a reasonable opportunity to read the disclosure statement. Even Evelyn Wood, at the peak of her speed reading career, would have required a considerable amount of time to read and absorb the dense language in the typical disclosure statement spanning more than 100 pages of legalese. In many cases, the disclosure was either not provided at all or only provided after the contract was signed. With line ups extending down the street, the pressure on the purchaser to enter into a contract immediately was immense, particularly given the knowledge that there were far more purchasers than units available in many developments.

This is the very type of pressure sales tactics that *REDMA* was designed to prevent. The fact that purchasers did nothing to protect themselves and failed to take the time to read the disclosure statement does not assist a developer who has breached Section 15 of *REDMA*.

Section 15 provides a bright line obligation on the developer. Failure to comply with any of the three provisions set out in Section 15 provides the purchaser with a right of rescission under Section 21 irrespective of the purchaser's underlying motivation to avoid completing the sale.

The most obvious right of rescission arises where the developer has failed to provide a disclosure statement at all. The next most egregious breach of Section 15 is the case where a developer has not provided a copy of the disclosure statement until after the contract has been

signed. The developer is prohibited from entering into the agreement in these circumstances because of the mandatory language of the section.

Even if a copy of the disclosure statement has been provided to the purchaser before the contract was entered into, the onus is still on the developer to positively establish, on the evidence, that the purchaser was “afforded reasonable opportunity to read the disclosure statement” and that the developer has obtained “a written statement” to that effect, which statement the developer is obligated to retain under subsection (2)(a) for a period of three years.

3. **The True Developers - Missing from the Action!**

The major developers in the Lower Mainland, and in particular downtown Vancouver, have become household names. The public has been bombarded with extensive advertising campaigns on TV, radio, and print media extolling the world class towers being developed by sophisticated and experienced development companies. The purchasers are told time and time again that they can trust and rely on these developers.

The provincial legislature, in passing *REDMA*, intended to hold such companies liable for any misrepresentations made in the course of marketing units in the developments they were building. This is clear from the broad definition of developer in Section 1 of the Act. The definition is as follows:

“developer” means a person who, directly or indirectly, owns, leases or has a right to acquire or dispose of development property.

The definition of a director in Section 1 of the Act, is also important. the definition is as follows:

“director” means:

(a) in the case of a corporation as defined in the *Business Corporations Act*, a director as defined in that Act, and

(b) in the case of a partnership or other entity

(i) a person who holds the title of director; and

(ii) a person who, by whatever name designated, performs the functions of a director of a corporation;

The obligations of the developer and a director of the developer are significant and are detailed in Section 22 of *REDMA*. The potential exposure of the developer and those individuals who might be considered to be a director obviously did not escape the notice of the major development companies.

To avoid claims pursuant to *REDMA* and, in particular, the remedies provided under Section 22, the major development companies that figure so prominently in the advertising are replaced in the pre sale contracts by numbered companies, partnerships, limited partnerships, or other similar entities that are presumably created for the purposes of the specific development.

Usually, only one individual signs the disclosure statement despite the fact that there might be several individuals that fit within the broad definition of director, as set out above.

It remains to be seen whether this slight of hand can succeed in sheltering major development companies from the statutory causes of action set out in *REDMA*. A plain reading of the definitions of “developer” and “director” suggest that this will not be the case. That said, the manner in which most disclosure statements have been drafted places very significant obstacles in the way of purchasers who attempt to enforce their *REDMA* rights against the major development company who they understood was promoting and developing the property.

2. **Amended Disclosure Statements - A trap for sloppy developers**

One of the fundamental underpinnings of *REDMA* is the continuing obligation on the developer to fully disclose to the purchaser all material facts relating to the development. Depending on the nature of the change in facts or circumstances giving rise to the need to make further disclosure, this obligation is discharged in one of two ways.

In many cases what is required is the filing of an amended disclosure statement. In other circumstances, the developer is required to file a new disclosure statement. In either case, the document has to first be filed with the Superintendent. Thereafter, “within a reasonable time”, the developer must “provide a copy of the disclosure statement or amendment to each purchaser”. Note the mandatory nature of this obligation.

Of particular importance is the obligation on the developer to file an amended disclosure statement once the developer has obtained a building permit. Policy Statement 5, section 6(c)(ii) states that:

If an amendment to the disclosure statement that sets out particulars of an issued building permit is not received by the purchaser within twelve months after the initial disclosure statement was filed the purchaser may at his or her option cancel the purchase agreement at any time after the end of that twelve month period...

Policy Statement 6 provides the same remedy if no amendment is filed concerning the availability of financing to complete the development.

If the developer fails to file an amended disclosure statement the developer is in breach of Sections 14 and 16 of *REDMA* and, as such, the contract “is not enforceable” because of Section 23 of *REDMA* which provides that “an agreement to purchase...a development unit is not enforceable against a purchaser by a developer who has breached any provision of Part 2 (*Marketing and Holding Deposits*).”

Similarly, even if the developer has filed an amended disclosure statement with the Superintendent, the contract is not enforceable unless the developer can provide proof that the amended disclosure statement was received by the purchaser.

The requirement to file an amended disclosure statement providing that a building permit has been issued is only the most obvious example of how a developer can run afoul of Section 16 of *REDMA*. The same analysis applies to any change in material facts or any misrepresentation in the original disclosure statement which, if it is not corrected, will provide the purchaser with the

unilateral right to cancel the contract by giving notice to the developer that it is in breach of *REDMA*.

**1. The New Disclosure Statement -
A second seven day period to rescind.**

One of the problems that has plagued the residential development industry over the years is the change in ownership of the development during the course of construction. The change may arise as a result of the sale of the development or, worse, by the developer finding itself in financial difficulties. This then leads to the creditor seizing control of the development by means of the appointment of a receiver or the company declaring bankruptcy.

REDMA provides protection for purchasers, primarily in two ways. First, Section 18 of *REDMA* provides that any deposit received from the purchaser is to be held in trust with a brokerage, lawyer, notary public or prescribed person who “holds the deposit for the developer and the purchase and not as agent for either of them”. Secondly, Section 16 places a positive obligation on the developer to file a new disclosure statement if the failure to comply with the Act is in respect of a change in the following material facts:

- (b) the identity of the developer;
- (c) the appointment, in respect of the developer, of a receiver, liquidator or trustee in bankruptcy, or other similar person acting under the authority of a court.

For the purposes of *REDMA*, a “new disclosure statement” is considered to be a “disclosure statement” as opposed to an amendment to a disclosure statement or an amended disclosure statement. The new disclosure statement must contain a right of rescission as provided for in Policy Statement 1 which gives all purchasers a further seven day right of rescission. This right runs from the date the developer obtains a written statement from the purchaser acknowledging that the purchaser had an opportunity to read “a new disclosure statement, if any, prescribed in Section 16(1)(a)(i).

The result is that if the developer transfers the property, each and every purchaser has a further right of rescission which the purchasers can exercise within seven days after they have received and had an opportunity to review the new disclosure statement.

Similarly, in the event of the appointment of a receiver or a trustee in bankruptcy, or arguably the appointment of a monitor under CCAA, the purchaser has an opportunity to rescind on receipt of the new disclosure statement.

In a falling market, developers and, more importantly, the secured creditors of a particular development will be wary of the appointment of a receiver or of putting a company in bankruptcy as to do so will trigger a new right of rescission for each and every purchaser. This may well explain why there are so few developments where the creditors have invoked the powers and rights available to them to apply to court to take over the development.

If the developer/receiver/trustee in bankruptcy, either intentionally or unintentionally, fails to comply with Section 16 and do not file a new disclosure statement, or fail to provide a copy of the new disclosure statement to each purchaser, the default provisions of Section 23 once again apply. The developer cannot enforce the contract because the developer is in breach of Part 2 (*Marketing and Holding Deposits*).

This is just another example of the strict liability provisions of *REDMA* which dictate that the developer, or its successors in interests, cannot enforce its rights under the contract and that any deposit held by the stakeholder must be returned to the purchaser.

Specific Performance in Future Pre-sale Litigation

While the economic climate and real estate market remain uncertain, the current situation will not last forever. When property values recover, purchasers may well seek to enforce contracts where the closing of the transaction is in their interest.

Specific Performance and Real Property

The leading case on specific performance with respect to real estate is *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415. In *Semelhago*, the Supreme Court of Canada considered the law surrounding specific performance for realty and at paras. 20 - 22 stated:

This approach may appear to be overly generous to the respondent in this case and other like cases and may be seen as a windfall. In my opinion, this criticism is valid if the property agreed to be purchased is not unique. While at one time the common law regarded every piece of real estate to be unique, with the progress of modern real estate development this is no longer the case.

The court established that with respect to realty specific performance should not be presumptively awarded, rather, at para. 22:

Specific performance should, therefore, not be granted as a matter of course absent evidence that the property is unique to the extent that its substitute would not be readily available.

In *Semelhago*, the purchaser elected damages in lieu of an available award for specific performance. The indication of the court that, "in future cases, under similar circumstances, a trial judge will not be constrained to find that specific performance is an appropriate remedy" suggests that damages will generally be a more appropriate remedy in such actions by purchasers.

Semelhago in British Columbia

Semelhago was recently referred to in *Kaler v. Scales* 2009 BCSC 457. Specific performance was held to be an appropriate remedy because the property in question had unique qualities of particular value to the purchaser, including an interest in adjacent property and an intent to jointly develop, the presence of gravel on the site, and a lack of similar, alternative development sites in the area. The unique qualities and the limited availability of substitutes are relatively common in commercial real estate claims. For purchasers of strata units, the issues of uniqueness and availability of substitutes are likely to form the crux of litigation in relation to specific performance.

A party seeking specific performance will bear the burden of adducing evidence to support the uniqueness of the property or the limited availability of an adequate substitute. In relation to the purchase of a condominium, this will be a difficult onus to discharge. While particular properties occupying a narrow segment of the market may possess unique qualities, this will not apply to generic strata units that are not unlike many other available properties. This reasoning was recently applied in the condo pre-sale context in *bcIMC Construction Fund Corp. v. Chandler Homer Street Ventures Ltd.*, 2008 BCSC 897, where Burnyeat J. stated:

There is nothing about these Strata Lots which would allow me to conclude that they are of a unique character and of particular value to Crestmark: *Behnke v. Beede Shipping Co. Ltd.*, [1927] 1 K.B. 649. It is clear that specific performance will only be generally available in the context of an agreement for the sale of land where the land is unique to the extent that a substitute would not be readily available: *Semelhago v. Paramadevan*, [1996] 2 S.C.R. 415...

Other Considerations

Where a plaintiff's claim for specific performance fails, damages may nonetheless be available. In a recovering market, purchasers may benefit from the finding of the court in *Semelhago* with respect to the date for assessment of damages. In the decision of *667975 B.C. Ltd. v. Purewal*, 2008 BCSC 828, the court held that specific performance should be ordered, but nonetheless discussed the assessment of damages in relation to the purchase and sale of land with reference to *Semelhago*:

In this case, if there were to be damages in lieu of specific performance, those damages would be assessed according to the value of the property at the time of trial, not at an earlier date. At paragraph 18 of the *Semelhago* case, the court concluded that in the circumstances of that case, the appropriate date for assessment of damages was the date of trial, or more precisely, the date of the judgment. That was the date upon which specific performance was ordered.

Should a plaintiff's claim against a vendor be successful, an assessment of damages at the date of the judgment, in a rising market, could result in a particularly favourable outcome. Common law damages assessed at the date of the breach may be much lower in comparison.

However, a claim for specific performance should not be approached without due consideration as to the merits. Counsel should bear in mind that a claim for specific performance that lacks a fair, real, and substantial justification may fail to insulate a plaintiff from obligations to mitigate losses and the consequences thereof. In *Trinden Enterprises Ltd. v. Ramsay*, 2008 BCSC 177, the court stated, at para. 13:

In this case, the issue is whether the plaintiff's claim for specific performance was a reasonable one. Was the claim based on "some fair, real and substantial justification", as required in *Semelhago v. Paramadevan* at para. 21-22? The concern is that by claiming specific performance, the plaintiff may be able to avoid the mitigation requirement. This is an improper purpose: *Ansdell v. Crowther* (1984), 55 B.C.L.R. 216 (C.A.) at para. 38, citing Estey J.'s judgment in *Asamera Oil Corp. Ltd. v. Sea Oil & General*

Corp., [1979] 1 S.C.R. 633, varied [1979] 1 S.C.R. 677 at para. 25:

[A] plaintiff may not merely by instituting proceedings in which a request is made for specific performance and/or damages thereby shield himself and block the court from taking into account the accumulation of losses which the plaintiff by acting with reasonable promptness in processing his claim could have avoided ... Before a plaintiff can rely on a claim to specific performance so as to insulate himself from the consequences of failing to procure alternate property in mitigation of his losses, some fair, real and substantial justification for his claim to performance must be found.

[emphasis added]

If a purchaser encounters difficulty at closing that is attributable to the reticence of a developer, a claim for specific performance may be considered. However, counsel should evaluate the reasonableness and justification of a claim before initiating proceedings seeking specific performance as a remedy. Jurisprudence in British Columbia with respect to strata units in particular, and real property generally, suggests that satisfying the requirements set out in *Semelhago* may be problematic.

Conclusion - Final Thoughts

The landscape in real estate litigation has changed. This is due in part to the new economic reality and in part due to the passage of *REDMA*. What is certain is that pre-sale purchasers are becoming better informed, challenges to contracts under the Act will take place and purchasers and developers will each have to take stock of their respective rights and obligations in this new reality.

This paper was originally written for the Continuing Legal Education Society of BC's "Real Estate Deals: Making Them and Breaking Them in Challenging Times" course held June 19, 2009. Mr. Baynham was the only lawyer to speak about the options that people who signed pre-sale contracts with developers have in a collapsing real estate market.

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