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Seller beware

Real Estate

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It's an uncomfortable fact of life that anyone buying into a new condominium development must sign a contract and put down a deposit, sight unseen, years before they can move into a completed building. That's because pre-sales are routinely required by banks and other lenders that don't want to advance funds without the security of knowing units will be sold. But the uncertainties involved in this practice are a frequent source of frustration for purchasers and developers alike all over Canada, often leading to disputes and lawsuits.

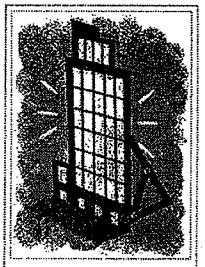
Illustration: Matt Deley

The old adage of "buyer beware" goes out the window, says Mark Thompson, a partner with Singleton Urquhart LLP in Vancouver. "The property is simply an idea, a business plan, a concept, a set of architectural drawings, which could be changed in the actual building. And it's only possible to say to a purchaser 'Do your own due diligence on this,' if you have a completed property."

Nowhere is this issue as hot as it is in British Columbia, where a boom and bust in the property market, together with concerns about leaky condos and other construction defects, has ratcheted up the risks for all concerned. These risks were recently highlighted by a B.C. Supreme Court decision that will make developers evermore cautious of the stringent disclosure rules imposed by the province's Real Estate Development Marketing Act (REDMA). This legislation, introduced in 2004 to protect consumers buying pre-sale condo units, places strict requirements on developers to provide purchasers with full disclosure statements and allows purchasers seven days to rescind after signing an agreement. It also gives them the right to get out of the contract at any time if the developer has not met all obligations imposed under the act. "The act is clearly designed to make sure that the buyer who is pre-buying is given the full goods and the onus is definitely on the developer here to be very stringent with disclosures," says Thompson.

Christopher Johnston, assistant chairman of the pre-sale condo litigation group at Harper Grey LLP in Vancouver, has been tracking case law on the legislation and observes that there were very few cases before 2009, while there has been a series of court rulings since then "all dealing with different issues but all finding in favour of the retail purchaser and their rights to disclosure."

The reason for the renewed interest in REDMA litigation is obvious. Before the market slumped in 2008, condo prices were soaring and purchasers were happy to hang onto or profit from a great investment. Now, it's the opposite. Condo prices have dropped dramatically and purchasers are finding their units are no longer worth what they agreed to buy them for in the pre-sale contracts. So many people "are looking for whatever means they can to get out," says Thompson.

The decision in *Ulansky v. Waterscape Homes Ltd. Partnership* will make it easier for purchasers to get out of their deals, according to Damon Chisholm, an associate specializing in commercial real estate at McMillan LLP's Vancouver office. The case involved a dispute over whether the developer of an 18-storey building, part of a nine-phase condo development in Kelowna, B.C., provided full disclosure regarding the risk that owners may decide to rent out their units on a short-term basis. The developer had provided assurances in the pre-sale disclosure statements that the building was not designed for, or intended to be used for, hotel-style short-term rentals. In the municipal development permit it was described as a multiple-unit residential dwelling tower. But the court found the disclosure statement failed to point out that a secondary permitted use under the municipal zoning was "hotel/motel accommodation within a multiple residential unit." This would make it possible for owners to rent out their units and for the strata board to allow this practice.

The court accepted the evidence of the 12 plaintiffs in the case showing that short-term rentals were occurring and were permitted in the building — and that building permits were being issued for that purpose. The pre-sale contracts were ruled unenforceable and the developer ordered to return all deposits to the plaintiffs.

Chisholm does not question the plaintiffs' motives. He says he understands owners of condo units may feel that vacant landlords or transient occupants of a rental unit will not take good care of the building. However, he says, the ruling will "open the floodgates" to other people who don't necessarily care about short-term rentals but want to walk away from their contracts for other reasons.

What the ruling does, according to Chisholm, is clarify the position of the B.C. courts on how much detail must be provided in a disclosure statement. Until now, he says, many developers have presented details that they considered relevant and not necessarily followed all of the formal requirements set out for disclosure statements under the act. In this case, the developers apparently overlooked the possibility that secondary uses permitted under the municipal bylaw could be a material fact that should be included.

The risk to developers of missing some relevant detail is particularly serious because REDMA does not require that purchasers prove they were relying on the misrepresentation contained in the disclosure statement. "None of these purchasers who got out of this contract need to argue, 'Had I known short-term rentals would be allowed I never would have bought.' That's irrelevant. The fact that the developers missed doing something required by them under the act allows a purchaser to get out," says Chisholm. As a consequence of this ruling, Chisholm says he is advising developer clients to "list everything" in their disclosure statements. For example, he says they would be better off "actually copying and pasting the zoning, as opposed to paraphrasing and running the risk that you get it wrong."

Developers are beginning to get the message, says Johnston: "They're disclosing everything because they're so nervous of being offside of the act."

Meanwhile, in Ontario, where pre-sale disclosure rules are embedded in the province's Condominium Act, purchasers are having much less success when they take developers to court, according to Gerald Miller, managing partner and head of the real estate practice at Toronto-based Gardiner Miller Arnold LLP. "There's lots of litigation over this type of thing and the consumer generally loses," he says. But Harry Herskowitz, senior real estate counsel at DelZotto Zorzi LLP in Toronto, says this is probably because purchasers didn't review their documents carefully enough or failed to retain a solicitor when they originally signed the pre-sale agreement. When they get to court, he says, they are likely to find that the matters they are complaining about were adequately addressed in the disclosure documents. "Requiring even more disclosure will not necessarily add to the ultimate level of the purchaser's true understanding or comprehension of the condominium issues involved," he says.

Johnston, in Vancouver, agrees that longer, more detailed disclosure documents could be harder for purchasers to understand — if they bothered to read them. He says only two out of 200 clients he has seen on pre-sale matters actually brought him the pre-sale documents before locking themselves into a deal. "People are, unfortunately, putting more thought into buying rain gear to go hiking than they are to a half-million-dollar condo," he says.

That may not matter so much in B.C., however, because REDMA's consumer protection provisions are strong enough that it is the seller, rather than the buyer, who has the greatest reason to beware.

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