

DEVELOPER'S RIGHT TO DEPOSIT TRUMPS CONDO BUYER IN TRUMP TOWER RESIDENTIAL STRATA DISPUTE

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On July 25, 2017, the BC Supreme Court (the "**Court**") released a decision addressing the extent of a developer's disclosure obligations to prospective purchasers under the *Real Estate Development Marketing Act* [\[1\]](#) ("**REDMA**").

One of the key issues in *Chen v West Georgia Development Limited Partnership* [\[2\]](#) was whether a developer is required to ensure that prospective purchasers not only have an opportunity to review a disclosure statement, but also understand it.

Background

The plaintiff, a West Vancouver ophthalmologist (the "**Plaintiff**"), was interested in purchasing a residential strata unit in downtown Vancouver's Trump International Hotel and Tower development. In November 2013, an agreement was executed between the plaintiff and the defendant, West Georgia Development Limited Partnership (the "**Defendant**"), for the purchase and sale of a 3-bedroom suite in the Trump Tower (the "**Property**") for a purchase price of \$2.75 million (the "**Agreement**"). Pursuant to the terms of the Agreement, the Plaintiff paid an initial deposit of \$275,290 (the "**Initial Deposit**") the same day the Agreement was signed. At some point thereafter, the Plaintiff decided not to proceed with the purchase and failed to pay a second deposit of \$275,290, as required by the Agreement. According to the Defendant, by failing to pay the second deposit, the Plaintiff had terminated the Agreement and forfeited her right to the reclaim the Initial Deposit.

Analysis

Under REDMA, developers are required to provide prospective purchasers of a property with the disclosure statement that has been prepared in respect of such property prior to entering into an agreement for purchase and sale. The Plaintiff argued that, although she was provided with a disclosure statement for the Property (the "Disclosure Statement"), the Defendant did not satisfy its obligations pursuant to section 15(1)(b) of REDMA because the Defendant did not afford the Plaintiff an opportunity to understand the Disclosure Statement.

According to the Court, whether a prospective purchaser has been given an opportunity to read a disclosure statement comes down to a relatively simple question of fact.^[3] The Court found that the plaintiff's written acknowledgment that she had read the Disclosure Statement was evidence that section 15(1)(b) had been properly complied with. The Court reasoned that if the legislature had intended to impose the additional requirement that a developer must ensure that a prospective purchaser *understands* a disclosure statement, it could have explicitly said so.^[4] It further found that imposing such an obligation on developers would be inconsistent with the arm's length nature of the seller/buyer relationship.^[5]

The Court importantly noted that under REDMA,^[6] a prospective purchaser has seven (7) days to obtain advice on a disclosure statement and walk away from a purchase without forfeiting his or her deposit.^[7] Despite being advised of her statutory rescission rights, the Plaintiff failed to rescind the agreement within the seven (7) day timeframe and consequently lost the right to retain her deposit.

The Plaintiff also made two additional arguments alleging further failures to comply with REDMA. However, such arguments were easily dismissed by the Court.

Firstly, the Plaintiff argued that the Defendant failed to comply with section 11 of REDMA by marketing the strata lot without first making adequate arrangements to ensure she would have assurance of title.^[8] The Agreement stated that the Plaintiff did not have any interest in the Property until completion of the sale. The Plaintiff argued that paragraph 16 of Schedule A of the Agreement (the "Provision") did not allow for the Plaintiff to assert a purchaser's lien on the Property and as such, the Defendant did not make adequate arrangements to ensure the Plaintiff would have assurance of title. However, the Court stated that although the Provision may remove the Plaintiff's right to assert a purchaser's lien, it does not affect her ability to obtain an order for specific performance of the Agreement.^[9] As such, this argument was dismissed.

Secondly, the Plaintiff argued that the Defendant failed to comply with section 14 of REDMA by failing to make plain disclosure of all material facts in the Disclosure Statement.^[10] The Plaintiff alleged that the fact that the Defendant removed the Duplicate Certificate of Title that pertained to the Property from the Land Title Office should have been disclosed in the Disclosure Statement. However, Justice Sewell stated that such disclosure was not material.^[11] The Plaintiff also alleged that by failing to adequately explain in the Disclosure Statement the implications of the Provision, the Defendant failed to provide plain disclosure of a material fact. Justice Sewell dismissed this argument on the same rationale regarding the Provision mentioned above.

Takeaway

This decision creates clarity regarding the obligations under REDMA for developers who are marketing development units. It does so by stating that the obligations of section 15(1)(b) of REDMA are fact dependent and have not been elevated to a question of "understanding" which would effectively create a qualitative

threshold and place a significantly higher burden on developers. We recommend seeking legal advice if any questions or uncertainty arises regarding the extent of a developer's disclosure obligations under REDMA.

by Dharam Dhillon, Damon Chisholm and Emily Csiszar, Articled Student

[1] *Real Estate Development Marketing Act*, SBC 2004, c. 41.[ps2id id='1' target='']

[2] 2017 BCSC 1293 [*West Georgia Development*].[ps2id id='2' target='']

[3] *West Georgia Development*, *supra* note 2 at para 55.[ps2id id='3' target='']

[4] *Ibid.*[ps2id id='4' target='']

[5] *Ibid* at para 57.[ps2id id='5' target='']

[6] *Real Estate Development Marketing Act*, *supra* note 1, s. 21(2).[ps2id id='6' target='']

[7] *West Georgia Development*, *supra* note 2 at para 56.[ps2id id='7' target='']

[8] *Real Estate Development Marketing Act*, *supra* note 1, s. 11.[ps2id id='8' target='']

[9] *West Georgia Development*, *supra* note 2 at para 34.[ps2id id='9' target='']

[10] *Real Estate Development Marketing Act*, *supra* note 1, s. 11.[ps2id id='10' target='']

[11] *West Georgia Development*, *supra* note 2 at para 65.[ps2id id='11' target='']

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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