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disclosure exposure? only where condo developers misstate or omit material details in disclosure statements

Ontario law requires that condominium developers disclose specific information to purchasers of condominium units, including certain details of the condominium's first year budget and other financial data. Failure to comply with these statutory disclosure requirements can have serious consequences for a developer. A material misstatement or omission may entitle a purchaser to damages or to walk away from an agreement of purchase and sale altogether. However, it can be difficult for a developer to know what level of disclosure is required in particular circumstances.

In *Essex Condominium Corporation No. 89 et al. v Glengarda Residences Ltd.*[1] (*"Essex"*), the Ontario Court of Appeal shed some light on the level of disclosure that developers must provide regarding certain equipment leases and other agreements for which condominium corporations will be responsible. The *Condominium Act*,[2] which has since been repealed and replaced by the *Condominium Act, 1998*,[3] was at issue in *Essex*. Accordingly, the Court's analysis in relation to disclosure directly applies only to condominiums where at least one unit was sold before May, 2001. The expanded disclosure obligations as prescribed in the New Act apply to condominiums sold after May, 2001.

the facts in *Essex*

Glengarda Residences Ltd. (the "**Developer**") developed two high-rise condominium buildings, each with its own condominium corporation. The two buildings were connected by a rotunda that housed facilities which were shared by the owners in both condominiums. The rotunda included a dedicated heating, ventilation and air-conditioning system (the "**HVAC System**"). Prior to turning the buildings over to the condominium corporations, the Developer sold the HVAC System to the Royal Bank

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1 2010 ONCA 167.

2 RSO 1990, c 26 (the "**Old Act**").

3 RSO 1998, c 19 (the "**New Act**").

(the "**Bank**"). In turn, the Bank leased the HVAC System back to the condominium corporations through an eight-year lease with an annual cost of approximately $31,200 and a $32,400 purchase option on termination (the "**Lease**").

A dispute arose over alleged deficiencies in the Developer's disclosure in relation to the Lease. The disclosure statement, which the Developer prepared before the construction of the actual buildings and the negotiation of the Lease, listed the Lease within the projected first year's budget for the condominiums' shared facilities. The description of the Lease was minimal: "HVAC lease $34,900," accompanied by a note reading, "cost of the lease for air make-up and other air handling equipment in this area."

The condominium corporations claimed that they did not realize that they were leasing the HVAC System until six years later, during a building audit. The corporations accordingly brought a lawsuit against the Developer, claiming that the disclosure statement lacked necessary information regarding the Lease and seeking damages for the full amount of the Lease, less the costs for the first year.

was the developer's disclosure statement inadequate?

The trial judge ruled in favour of the condominium corporations, but the Court of Appeal overturned the decision, finding that the Developer's level of disclosure respecting the Lease met its statutory obligations.

The Court of Appeal recognized that the prescribed disclosure obligations are intended to protect consumers. The Court found that, although the condominium corporations might have found it useful to have more detailed estimates regarding the Lease, the information disclosed was not so minimal that it made the disclosure statement "false, deceptive or misleading" or otherwise "incomplete in a material respect". The disclosure statement's shortcomings did not sink to the level of material misstatement or omission, which are the faults that the statute was designed to protect against. A reasonable purchaser would have known that the HVAC System was leased and would have known the annual cost of that lease from the disclosure provided.

The Court did, however, suggest that the result could have been different if the terms of the Lease were shown to be outside of those normally found in equipment leases, or if the annual total due under the Lease shot up after the condominiums' first year budget.

The Court also explicitly rejected the condominium corporations' attempt to secure a remedy against the Developer at common law. The Court found that "a condominium corporation cannot bring a claim for misstatement in a disclosure statement" outside of the powers granted by the statutory regime because there

is no contractual relationship between a condominium corporation and the condominium's developer. This ruling is in keeping with the fundamental principle that actions for negligent misrepresentation must be limited to avoid imposing "liability in an indeterminate amount for an indeterminate time to an indeterminate class".[4]

the new act

Essex is a recent case that sheds light on how the Old Act's provisions respecting disclosure statements apply. However, sales of new condominiums have been subject to the more detailed disclosure requirements set out in the New Act since May, 2001. While disclosure disputes may from time to time continue under the Old Act, clearly an increasing number of decisions will be rendered under the expanded statutory disclosure requirements of the New Act. Those in the condominium industry will be required to consider the wording of the New Act cautiously as very few of the new disclosure requirements have thus far been interpreted by the courts.

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[4] *Hercules Managements Ltd v Ernst & Young,* [1997] 2 SCR 165 at para 31.

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