IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Dwane v. Bastion Coast Homes Ltd.,***
2009 BCSC 726

Date: 20090601
Docket: S088736
Registry: Vancouver

Between:

Timothy Francis Dwane

Plaintiff

And

Bastion Coast Homes Ltd. and
Coast Development Partnership, A Partnership of
Bastion Coast Homes Ltd. and
Bastion Development Corporation

Defendants

And

MAC Real Estate Corp.

Third Party

Before: The Honourable Madam Justice Lynn Smith

Reasons for Judgment

Counsel for Plaintiff:	M.A.Clemens, Q.C. K.D. Loo
Counsel for Defendants:	F.R. Eadie
Counsel for Third Party:	W.E. Knutson, Q.C.
Place and Date of Hearing:	Vancouver, B.C. February 26 and March 4, 2009

INTRODUCTION

[1] The plaintiff applies for judgment on an issue pursuant to Rule 18A of the *Rules of Court*. The issue is whether the plaintiff had a statutory right of rescission under the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 (the "*REDM Act*") in respect of a contract to purchase strata property.

[2] The defendants seek an order staying the plaintiff's application for 90 days to enable them to complete examinations for discovery and discovery of documents with respect to the plaintiff's action and their action against a third party.

[3] The application raises two issues: (1) Is this an appropriate case in which to decide a single issue under Rule 18A, leaving others in abeyance? (2) If so, did the *REDM Act* give the plaintiff the statutory right of rescission that he purported to exercise?

FACTS

[4] The plaintiff, Timothy Dwane, and his wife, Teresa Dwane, became interested in the fall of 2007 in moving from their Richmond home to a condominium unit in a new development at the University of British Columbia called "Coast".

[5] The defendant Coast Development Partnership, the developer of the property, is a general partnership between Bastion Development Corporation and Bastion Coast Homes Ltd.

[6] Between October 2007 and April 2008, the plaintiff and his wife visited the presentation centre for the Coast development on numerous occasions, speaking on each occasion with a real estate agent, Ivy Wu, of MAC Real Estate Corp. ("MAC"), the third party.

[7] The plaintiff and Ms. Dwane were interested in a unit called E602, sometimes called the "Terrace Penthouse 07", which is approximately 2,000 square feet in size,

with another 2,000 square feet of terrace. It was listed for purchase at a price of $3.5 million.

[8] The plaintiff alleges that certain false representations were made, prior to his purchase of that unit, about the view available from the unit and privacy issues. Those alleged representations are not the subject of this summary judgment application.

[9] The plaintiff, in October 2007, was given an electronic copy of a disclosure statement with respect to the development (the “Original Disclosure Statement”), dated September 27, 2005.

[10] There had been three amendments to the Original Disclosure Statement, dated October 16, 2006, February 23, 2007 and June 7, 2007.

[11] The first amendment, dated October 16, 2006, provided the development plan and building plan numbers, and made some changes to the common costs schedule. The second amendment, on February 23, 2007, changed the general description of the development, stating that it would include 45 condominiums, rather than the previous 35, deleted the “wine storage room” from the features, and changed the interim budget for costs with respect to the common areas. Thus, in the February 23, 2007 amendment, the density of the development was increased and the budgeted costs for the common areas per unit were increased from $3,636.00 per unit to $4,082.00 per unit. Finally, the third amendment on June 7, 2007 set out a reconfiguration of the units.

[12] The defendants formally admitted through their counsel at the hearing that the amendments of February 23 and June 7, 2007 were never delivered to the plaintiff, and they tendered no evidence to contradict the plaintiff’s evidence that he never received any of the amendments.

[13] On or about May 9, 2008, the plaintiff signed an offer to purchase the unit, and that offer was accepted on or about May 10, 2008 by a representative of the defendants, resulting in a contract of purchase and sale (the “Contract”). The

plaintiff provided a cheque to the developer's solicitor, in trust, representing a deposit in the amount of $350,000. At that time, the plaintiff was provided with a further paper copy of the Original Disclosure Statement without the amendments.

[14] On or about October 27, 2008, the plaintiff and Ms. Dwane, for the first time, had access to the partially completed unit, and could see the actual view from the unit and its terrace. The plaintiff's evidence is that during that visit, he discovered that the representations that had been made to him about the view from the unit and about the privacy of the unit were false.

[15] The plaintiff retained legal counsel, who made inquiries of the Financial Institutions Commission and learned about the three amendments to the Original Disclosure Statement which had been filed but not delivered to the plaintiff.

[16] On October 31, 2008, counsel for the plaintiff wrote to Bastion Coast Homes Ltd. and to the developer, enclosing a notice of rescission of the Contract based on s. 21(3) of the *REDM Act*, and demanding the return of the $350,000 in deposit monies which the plaintiff had paid.

[17] The writ and statement of claim were filed December 15, 2008, and amended on January 29, 2009. The plaintiff seeks a declaration that he is entitled to rescind the Contract on the basis of the defendant's breach of s. 15 of the *REDM Act*, or alternatively on the basis of the alleged misrepresentations by the defendants, and that the plaintiff is entitled to the return of his deposit together with interest. The plaintiff also seeks damages for negligent misrepresentation.

[18] In their statement of defence and counterclaim filed December 19, 2008, the defendants dispute that the plaintiff is entitled to rescind the Contract pursuant to the provisions of the *REDM Act*, or at all, say that the defendants are entitled to retain the deposit, and deny that any representations were made to the plaintiff as alleged, or at all. The defendants also say that if there were misrepresentations, the plaintiff is barred from relying on them by the terms of the Contract. The defendants counterclaim, alleging that the plaintiff has repudiated the Contract, and stating that

the defendants do not accept such repudiation. The defendants say that they are entitled to the deposit monies paid by the plaintiff. In addition they claim specific performance and, in the alternative, common law damages.

[19] The defendants issued a third party notice on December 19, 2008, against MAC. The third party notice alleges that MAC was retained by the defendants to provide real estate marketing services, that MAC owed the defendants a duty of care, and that if the plaintiff's allegations provide the plaintiff with a legal basis for rescission of the contract, then MAC breached its duty of care and breached the retainer contract by failing to provide real estate marketing services in a careful and professional manner consistent with the standards in the industry. The defendant pleads that all amendments were delivered to MAC, and MAC was instructed to provide all interested parties with copies of the amendments prior to prospective purchasers entering into contracts with the defendants. The third party notice alleges that MAC was negligent and in breach of contract in a number of respects, including in failing to ensure that all statements or representations made to the plaintiff were factually correct, and in failing to provide the plaintiff with all amendments.

[20] MAC, in its statement of defence to the third party notice, denies all allegations made by the defendants, and specifically denies that it breached any duty of care or the terms of its contract. It denies that it received any instruction from the defendant Bastion Coast Homes with respect to providing purchasers with copies of the amendments to the disclosure statements, and alleges that it was specifically instructed by Bastion Coast Homes not to provide purchasers with certain amendments to the disclosure statement.

[21] The third party also says that if the plaintiff does have a right of rescission under the *REDM Act*, or at all, or if the plaintiff is entitled to a return of the deposit with interest, the loss suffered by the plaintiff was caused or contributed to by the fault of the defendants.

[22] The plaintiff seeks judgment on the sole issue of the statutory right of rescission.

ISSUES

[23] There are two issues: (1) whether I should exercise my discretion to proceed under Rule 18A to decide the single issue of the plaintiff's alleged right of statutory rescission; and (2) whether the plaintiff has a right of rescission under the *REDM Act*.

PROCEEDING ON THE SINGLE ISSUE UNDER RULE 18A

[24] Rule 18A provides as follows:

> (1) A party may apply to the court for judgment, either on an issue or generally, in any of the following:
>
> (a) an action in which a defence has been filed;
>
> (b) an originating application in respect of which a trial has been ordered under Rule 52(11)(d);
>
> (c) a contested family law proceeding;
>
> (d) a third party proceeding in which a statement of defence to third party notice has been filed;
>
> (e) a proceeding by way of counterclaim in which a statement of defence to counterclaim has been filed.
>
> …
>
> (8) On an application heard before or at the same time as the hearing of an application under subrule (1), the court may
>
> (a) adjourn the application under subrule (1), or
>
> (b) dismiss the application under subrule (1) on the ground that
>
> (i) the issues raised by the application under subrule (1) are not suitable for disposition under this rule, or
>
> (ii) the application under subrule (1) will not assist the efficient resolution of the proceeding.

[25] The defendants' position is that this case is at an early stage and the plaintiff's application should be adjourned. Although the plaintiff and defendants have exchanged lists of documents, the third party has not provided a list of documents, and there have been no examinations for discovery. The defendants

say that the application should not proceed until they have had an opportunity to conduct examinations for discovery, and it should then proceed on all of the issues in the pleadings, including the plaintiff's claims based on alleged misrepresentations.

[26] The main point urged by Mr. Eadie for the defendants is that the plaintiff should not be allowed to split his case, to "litigate in slices". Counsel refers to the leading authorities on the subject, many of which are discussed in Greg. J. Tucker, "Use of Rule 18A to decide some, but not all, issues in an action: 'Slicing and Dicing in Complex Litigation'" in Gregory S. Pun et al., *Rule 18A Applications – 2005 Update. Proceedings of a Conference Held in February 2005* (Vancouver, BC: Continuing Legal Education Society of British Columbia, 2005).

[27] In *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138, the trial judge had determined an issue under Rule 18A in a context where the facts were still indeterminate. Madam Justice Southin stated, at paras. 28 and 29:

> In the case at bar, I infer that both parties were entranced by these questions of law and thus the learned chambers judge considered he ought to address them, but, with respect, the judge before whom a proceeding of this kind comes must not think of himself or herself as a puppet in the hands of the litigants. Under subrule (8), the court may dismiss an application when it will not assist the efficient resolution of the proceeding or when the issues are not suitable for disposition under the rule.
>
> Both these considerations applied here. A trial judge should bear in mind, as must we, that the loser in this Court has a right to seek leave to appeal to the Supreme Court of Canada. That court ought not to be faced, in deciding whether to grant or refuse leave, with a court of appeal having made pronouncements, allegedly erroneous, on important questions of law in an action which may ultimately fail on its facts.

[28] There is a number of reasons for exercising caution before proceeding to decide "an issue" on an application for summary trial under Rule 18A.

[29] One, as illustrated by *Bacchus*, is that pronouncements on the law should not be made in a factual vacuum.

[30] A second reason is illustrated by *Prevost (Committee of) v. Vetter*, 2002 BCCA 202, 100 B.C.L.R. (3d) 44. There, the Court of Appeal held at para. 8 that it

was not possible for the summary trial judge to determine the existence of a duty of care or the appropriate standard of care, and whether it had been breached, without also determining the facts flowing to causation. In other words, where facts determined for the purposes of a Rule 18A application overlap the facts relevant to an issue that must be left to trial, it may be inappropriate to proceed.

[31] A third reason is that a summary trial decision on an issue may have an impact on other parties who will be litigating the remaining issues: *Strata Plan VIS3815 v. Polo Pacific Development Ltd.*, 2003 BCSC 1811 and *Infowest Services Inc. v. British Columbia*, 2004 BCSC 1165. However, it is important to note that both of those cases involved an application for summary trial against only one of several defendants. No case was brought to my attention in which the impact on a third party non-defendant has been considered as an impediment to the determination of an issue under Rule 18A as between the plaintiff and the defendant.

[32] Practical matters, such as the prospect that the Rule 18A judgment will not be final, because a successful appeal will require re-litigating the matter in some respect, must be considered. Rule 18A(8)(b)(ii) specifically directs the court to consider whether the application will assist the efficient resolution of the proceeding. In particular, in *North Vancouver (District) v. Fawcett* (1998), 162 D.L.R. (4th) 402, 60 B.C.L.R. (3d) 201 (C.A.) at para. 33 the Court stated:

> With respect, it seems to me that if the answer to an issue sought to be tried under Rule 18A will only resolve the whole proceeding if one answer is given, but not if a different answer is given, then the applicant should be required to demonstrate, and the judge should be expected to decide, that the administration of justice, as it affects not just the parties to the motion, but also the orderly use of court time, will be enhanced by dealing with the issue as a separate issue. It can not be enough simply that the parties have agreed to a summary trial of one or more issues, but not all of the issues, raised in the proceeding, without any consideration for the effective use of court time, or the efficient resolution of the proceeding.

[33] Mr. Eadie argues that determination of the statutory rescission issue in favour of the plaintiff would only possibly resolve the action between the plaintiff and the defendants, not between the defendants and the third party. He submits that the

third party could take the position that the effective cause of the plaintiff's loss was not the third party's failure to provide the amendments, but the defendants' misrepresentations as to view and privacy. Thus, the defendants would be at a disadvantage in proceeding with the third party action if the plaintiff did not participate in the trial on the misrepresentation issues.

[34] Further, Mr. Eadie submits that determination of the statutory rescission issue in favour of the defendants would leave open the plaintiff's claim for misrepresentations, and a possible claim for common law rescission on the basis that he did not receive the amendments; thus, an adjournment to permit completion of discovery might permit resolution of all issues at a summary trial to follow. Urging that there is no evidence that the plaintiff would be prejudiced if required to delay to permit a brief examination for discovery, permitting an 18A hearing on all issues, he argues that if the plaintiff wants to keep the misrepresentation "arrow in his quiver", he must put up with the whole litigation process.

[35] Mr. Clemens, on behalf of the plaintiff, submits that the sole fact relevant to the statutory rescission issue is not in dispute, since the defendants admit that the plaintiff did not receive the second and third amendments to the disclosure statement. On the basis of that fact, he says, the statutory rescission issue can be determined, and if it is determined in favour of the plaintiff, the plaintiff will abandon his claims with respect to misrepresentation. Mr. Clemens further suggests that if there is an appeal, it would be a very straightforward matter that would not require a lengthy hearing, and could be dealt with fairly briskly.

[36] The plaintiff's position is that that there is no *lis* between the plaintiff and the third party, and the third party claim has no relation to the plaintiff's claim in evidence or in law. Mr. Clemens refers to Rule 22(18), which states:

> 22 (18) The court may impose terms on any third party procedure to limit or avoid any prejudice or unnecessary delay that might otherwise be suffered by the plaintiff as a result of that third party procedure.

He characterizes the plaintiff as a bystander to the litigation between the defendant and the third party, and observes that the plaintiff lives in the Lower Mainland, and would be compellable as a witness.

[37] Mr. Clemens submits that an adjournment to permit examination for discovery must serve a useful purpose, referring to *Lopez v. Villalobos*, 2004 BCSC 1817, and urges that such an adjournment would serve no useful purpose in the litigation between the plaintiff and the defendants.

[38] As to prejudice, he points out that the plaintiff is out his deposit of $350,000, submits that prejudgment interest is not at market rates, and submits that involvement in litigation is *per se* expensive in money and time.

[39] The plaintiff's position is that sometimes proceeding on an issue is the correct course, as illustrated by *Pro Star Mechanical Contractors Ltd. v. Sandbar Construction Ltd.*, (1992), 1 C.L.R. (2d) 310; *Remington Energy Ltd. v. British Columbia Hydro and Power Authority*, 2004 BCSC 1352; *British Columbia (Attorney General) v. Perry Ridge Water Users Assn.*, 2003 BCCA 275, 13 B.C.L.R. (4th) 274; and *Coal Harbour Properties Partnership v. Liu*, 2004 BCSC 15, 16 R.P.R. (4th) 227. Mr. Clemens submits that these cases show that there is not an absolute bar to proceeding to determine an issue under Rule 18A(1) where the issue is suitable for disposition and will assist in the efficient resolution of the whole of the action. This is particularly so, he argues, where there is no dispute about the facts necessary to decide the issue, and where those facts are not interrelated with other facts underlying the remainder of the dispute.

[40] The plaintiff's position is that the efficient way to proceed in this case, and to give effect to Rule 1(5) (to secure the just, speedy and inexpensive determination of every proceeding on its merits), is to determine the statutory rescission issue under Rule 18A.

[41] The position of the third party, represented by Mr. Knutson, is that the adjournment should be granted. Mr. Knutson argues that his client would lose its

rights to conduct an examination for discovery against the plaintiff if the plaintiff succeeds, and submits that the third party might argue that there were two good claims, only one of which affects the third party, and accordingly, there is an interrelationship between the issues.

[42] I am persuaded that this is one of the unusual cases in which it is appropriate to determine a single issue under Rule 18A, leaving other issues in abeyance. There is no dispute as to the facts necessary to decide the statutory rescission issue, and the issue can be decided on those facts (in other words, it will not be decided in a factual vacuum.) The facts necessary to decide the statutory rescission issue are not intertwined with other facts pertinent to the remaining issues.

[43] The third party is not a defendant in this litigation, and the issues between the defendants and the third party can continue whether or not the statutory rescission issue is determined, and regardless of the way in which it is determined. Although there may be some disadvantage to the defendants and the third party if they have to proceed without the plaintiff as a party in their litigation, that disadvantage can be alleviated. In the litigation between the defendants and the third party, the plaintiff will be compellable as a witness, and could be examined before trial under Rule 28.

[44] The disadvantage to the plaintiff in delaying a resolution of this matter, and requiring him to proceed on all of the issues, including the alleged misrepresentations, must be weighed in the balance. As reflected in Rule 22(18), third party proceedings should be conducted in a manner that minimizes prejudice and delay to the plaintiff. There is the potential that determination of the statutory rescission issue will have the effect of deciding the matter overall as between the plaintiff and the defendants.

[45] Taking all of those factors into account, I am of the view that proceeding with the plaintiff's application for judgment on the statutory rescission issue will assist the efficient resolution of this litigation and is consistent with the object of the *Rules*.

THE STATUTORY RESCISSION ISSUE

[46] Was the plaintiff entitled to rescind the Contract? The answer depends upon whether the *REDM Act* gives a purchaser a right of rescission where the purchaser does not receive existing amendments to the disclosure statement, along with the disclosure statement, before entering into the purchase agreement.

Relevant Provisions of the REDM Act

[47] The legislation contains the following provisions:

> 1 In this Act:
>
> <u>"disclosure statement" means a statement that discloses material facts about a development property, prepared in accordance with section 14(2) [filing disclosure statements], and includes any amendment made to a disclosure statement;</u>
>
> …
>
> "material fact" means, in relation to a development unit or development property, any of the following:
>
> (a) a fact, or a proposal to do something, that affects, or could reasonably be expected to affect, the value, price, or use of the development unit or development property;
>
> (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;
>
> (d) any other prescribed matter;
>
> …
>
> 3 (1) A developer who markets or intends to market a development unit must
>
> (a) meet the applicable requirements of Division 2 [Preliminary Requirements or Approvals],
>
> (b) ensure that arrangements have been made in accordance with Division 3 [Title Assurance and Utility Payments]
>
> (i) to assure the purchaser’s title or other interest for which the purchaser has contracted, and
>
> (ii) to pay the cost of utilities and other services, and
>
> (c) file and provide a disclosure statement in accordance with Division 4 [Disclosure Statements].
>
> (2) A developer who receives a deposit must deal with the deposit in accordance with Division 5 [Deposits].

…

15 (1) A developer must not enter into a purchase agreement with a purchaser for the sale or lease of a development unit unless

(a) a copy of the disclosure statement prepared in respect of the development property in which the development unit is located has been provided to the purchaser,

(b) the purchaser has been afforded reasonable opportunity to read the disclosure statement, and

(c) the developer has obtained a written statement from the purchaser acknowledging that the purchaser had an opportunity to read the disclosure statement.

(2) A developer must

(a) retain a written statement obtained under subsection (1)(c) for a period of 3 years or a longer period prescribed by regulation, and

(b) produce the written statement for inspection by the superintendent on the superintendent's request.

16 (1) If a developer becomes aware that a disclosure statement does not comply with the Act or regulations, or contains a misrepresentation, the developer must immediately

(a) file with the superintendent, as applicable under subsection (2) or (3),

(i) a new disclosure statement, or

(ii) an amendment to the disclosure statement that clearly identifies and corrects the failure to comply or the misrepresentation, and

(b) within a reasonable time after filing a new disclosure statement or an amendment under paragraph (a), provide a copy of the disclosure statement or amendment to each purchaser

(i) who is entitled, at any time, under section 15 [providing disclosure statements to purchasers] to receive the disclosure statement, and

(ii) who has not yet received title, or the other interest for which the purchaser has contracted, to the development unit in the development property that is the subject of the disclosure statement.

(2) A developer must file a new disclosure statement under subsection (1)(a)(i) if the failure to comply or misrepresentation referred to in that subsection

(a) is respecting a matter set out in paragraph (b) or (c) of the definition of "material fact" in section 1 [definitions],

(b) is respecting a matter set out in paragraph (d) of the definition of "material fact" in section 1, and the regulation prescribing the matter specifies that a new disclosure statement must be filed if subsection (1) of this section applies, or

(c) is of such a substantial nature that the superintendent gives notice to the developer that a new disclosure statement must be filed.

(3) A developer must file an amendment to the disclosure statement under subsection (1)(a)(ii) in any case to which subsection (2) does not apply.

(4) A developer who is required to file a new disclosure statement or an amendment under subsection (1) must not market a development unit in the development property that is the subject of the new disclosure statement or amendment

(a) until the developer has complied with subsection (1)(a), or

(b) unless permitted by the superintendent.

…

21 (1) A purchaser does not have a right of rescission under this section

(a) if the purchaser is not entitled to receive a disclosure statement under this Act, or

(b) as a result of receiving an amendment to a disclosure statement in respect of a development property, including an amendment described in section 16(1)(a)(ii) [non-compliant disclosure statements], unless the purchaser has not previously received any disclosure statement in respect of that development property.

(2) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, a purchaser of the development unit may rescind the purchase agreement by serving written notice of the rescission on the developer within 7 days after the later of

(a) the date that the purchase agreement was made, and

(b) the date that the developer obtained, under section 15(1)(c) [providing disclosure statements to purchasers], a written statement from the purchaser acknowledging that the purchaser had an opportunity to read

(i) the disclosure statement provided under that section, or

(ii) a new disclosure statement, if any, described in section 16(1)(a)(i) [non-compliant disclosure statements].

(3) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission on the developer.

(4) A notice of rescission under subsection (2) or (3) must be served according to the regulations.

(5) If a developer is served with a notice of rescission that complies with the requirements of subsections (2) to (4), the developer must immediately inform the person who is holding the purchaser's deposit under section 18 [handling deposits].

(6) If a person who is holding a purchaser's deposit under section 18 is informed, under subsection (5), of the purchaser's rescission, the person must promptly return the deposit to the purchaser.

22 (1) In this section:

"developer" means a developer that is required by the Act or regulations to

(a) file a disclosure statement with the superintendent, or

(b) provide a disclosure statement to a purchaser

in respect of a development property;

"director" means a director of a developer at the time that the developer

(a) filed a disclosure statement with the superintendent, or

(b) provided a disclosure statement to any purchaser

in respect of a development property.

(2) This section does not apply to a purchaser who is not entitled to receive a disclosure statement under this Act.

(3) If a developer files a disclosure statement respecting a development property and the disclosure statement contains a misrepresentation, a purchaser of a development unit in the development property, whether the purchaser received the disclosure statement or not,

(a) is deemed to have relied on the misrepresentation, and

(b) has a right of action for damages against

(i) the developer,

(ii) a director,

(iii) a person who consented to be named, and was named, in the disclosure statement as a developer or director,

(iv) a person who authorized the filing of the disclosure statement, and

(v) a person who signed the disclosure statement.

(4) If

(a) a disclosure statement contains a misrepresentation at the time at which a purchaser and a developer enter into a purchase agreement, and

(b) the misrepresentation is removed or otherwise corrected after the purchaser and developer have entered into the purchase agreement,

subsection (3) continues to apply as if the misrepresentation had not been removed or corrected.

(5) A person is not liable to a purchaser under subsection (3) if the person proves that the purchaser had knowledge of the misrepresentation at the time at which the purchaser received the disclosure statement.

...

[emphasis added]

Legislative History

[48] The *REDM Act* provides different rights of rescission in comparison with its predecessor, Part 2 of the *Real Estate Act*, R.S.B.C. 1996, c. 397. The provisions in Part 2 (substantially the same as had existed in the *Real Estate Act*, R.S.B.C. 1979, c. 356) created express statutory rights of rescission in limited circumstances as follows, in s. 78:

> 78 (1) If a person has entered into a contract in British Columbia to purchase or lease subdivided land located outside British Columbia, a time share interest located outside British Columbia or to purchase a shared interest in land located outside British Columbia, and
>
> (a) any of the provisions of this Part have not been complied with, and
>
> (b) the person is a purchaser, owner or lessee named in the contract to purchase the subdivided land or time share interest or is a purchaser or owner named in the contract to purchase a shared interest in land,
>
> the person may rescind the contract, at any time up to one year after the date that the contract was entered into and while the person remains the beneficial owner, by serving written notice of rescission on the developer or the agent for the developer.
>
> 78 (2) A person who has entered into a contract in British Columbia
>
> (a) to purchase or lease a time share interest, located in or outside British Columbia,
>
> (b) to purchase or lease subdivided land located in British Columbia, or
>
> (c) to purchase a shared interest in land located in or outside British Columbia
>
> and who continues to be beneficially entitled to an interest in the subdivided land, the shared interest in land or the time share interest, may rescind the contract by serving written notice of rescission on the developer or the developer's agent, in the case of a contract relating to a shared interest in land or a time share interest within 7 days after, and in the case of a contract relating to subdivided land within 3 days after, whichever date is the later,
>
> (d) the date the contract was entered into, or
>
> (e) the date the person received a copy of the prospectus required under this Part in respect of that subdivided land, shared interest in land or time share interest.

[49] The legislation also provided, in s. 77, that an agreement would be unenforceable against the purchaser if the vendor had breached any provisions in Part 2 of the *Real Estate Act*, though only in the case of executory contracts

(*Chambers v. Pennyfarthing Development Corp.* (1985), 64 B.C.L.R. 145, which considered the equivalent provisions in the 1979 *Real Estate Act*).

[50] The *REDM Act* now provides, in s. 21(3), as follows:

> 21 (3) Regardless of whether title, or the other interest for which a purchaser has contracted, to a development unit has been transferred, if a purchaser is entitled to a disclosure statement in respect of a development property under this Act and does not receive the disclosure statement, the purchaser may rescind, at any time, a purchase agreement of a development unit in that development property by serving a written notice of rescission on the developer.

[51] When the *REDM Act* was introduced for First Reading in the Legislature on May 6, 2004, the Honourable G. Abbott commented as follows:

> As well, the new act will maintain and enhance consumer protection. Purchasers will continue to have the benefit of full and plain disclosure, as well as enhanced rescission rights.
>
> (British Columbia, Legislative Assembly, *Report of Debates (Hansard)* 10914, 6 May 2004 at 1410).

[52] As Ruth Sullivan explains in *Sullivan on Construction of Statutes*, 5th ed. (Markham, ON: LexisNexis Canada Inc., 2008) at 577, the legislative evolution of a statute – examination of the changes to a provision over time – has long been relied upon by courts to aid in statutory interpretation. Further, evidence of legislative history may be considered as relevant to the external context in which it was made and as direct evidence of its purpose: *Sullivan* at 609.

Positions of the Parties

[53] Counsel for the plaintiff submits that the question before me is one of statutory interpretation, and that the interpretation urged by the plaintiff is not only clear from the wording of the statute, but is the interpretation that is most consistent with the statute's purpose.

[54] The plaintiff's position is that s. 15 of the *REDM Act*, read with the definition of "disclosure statement" in s. 1, means that both the disclosure statement and copies of any amendments that then exist must be provided to a purchaser before he or she

enters into an agreement to purchase a development unit. Mr. Clemens urges that the contrary proposition makes no sense since the purpose of the disclosure statement and amendments is to provide the purchaser with complete and truthful information about the property.

[55] In Mr. Clemens's submission, similar provisions were interpreted in *Strata Plan LMS 3851 and Homer Street Development Limited Partnership*, 2008 BCSC 1160, ("*Homer Street Development*"). In that case, the plaintiffs had purchased strata lots through sale agreements following the receipt of a disclosure statement issued under the 1996 *Real Estate Act* and *the Securities Act*, R.S.B.C. 1996, c. 418. Mr. Justice Truscott held that an amendment to a disclosure statement becomes part of the disclosure statement, and an existing amendment must be delivered along with the disclosure statement.

[56] The plaintiff's position is that under s. 1 of the *REDM Act*, "disclosure statement" includes all amendments, that the plaintiff was entitled to receive the amendments but did not, and that the consequences are clear. He says that s. 21(3) of the *REDM Act* gives him the right to rescind at any time.

[57] The position of the defendants is that although the *REDM Act* is admittedly consumer protection legislation, and its objective is to ensure disclosure to purchasers, there is a distinction between disclosure requirements and a right of rescission. They point out that not all amendments relate to material facts or serve to correct misrepresentations, and argue that not all amendments give rise to the right to rescind.

[58] Mr. Eadie submits that the previous legislation did not provide a right of rescission in comparable circumstances to those at issue here. He refers to two cases.

[59] The first is *Pirog v. Carnarvon* (1990), 56 B.C.L.R. (2d) 11, 17 R.P.R. (2d) 124 (S.C.). In that case, when the plaintiffs entered into a contract to purchase property in March 1989, they saw the disclosure statement. Subsequently, the disclosure

statement was amended but those amendments were not provided to the plaintiffs. The plaintiffs argued that, taken together, ss. 50, 56 and 63(1.1) of the 1979 *Real Estate Act* gave them a statutory right to rescind the contract within three days of receiving a copy of any amended disclosure statements. Madam Justice Boyd held that s. 63(1.1) referred to a “prospectus required under this part”, and did not refer to an amended disclosure statement. She stated at para. 18:

> The section does not address the issue of those rights of rescission, if any, which arise on the receipt of an Amended disclosure statement. I agree with Carnarvon’s counsel that had the legislature intended that such a statutory right of rescission was to have arisen, it would have specifically provided for such a right.

[60] The second case referred to by the defendants was *Beaton v. Pyfrom* (1991), 56 B.C.L.R. (2d) 18, 16 R.P.R. (2d) 216 (S.C.). In that case, Spencer J. followed *Pirog* and said the following, at para. 9:

> QUESTION No. 1 – IS THERE A STATUTORY RIGHT OF RESCISSION:
>
> This question has been answered by a recent decision of this court. The case is *Pirog and Szogi v. Carnarvon and Fourth Development Limited Partnership*, [1990] [unreported], December 20th, 1990 Vancouver No. C903650. In it Boyd J. had to deal with this express point and ruled that Section 63(1.1) applies only to an original prospectus filed under part two of the Act and not to any amendment. The plaintiff’s counsel urged that I should not follow it but gave no basis for distinguishing it nor any reason consistent with *Re Hansard Spruce Mills Ltd.* (1954), 13 W.W.R. (N.S.) 285 (B.C.S.C.) why I am not bound by it. Although it appears to have been a decision rendered *nisi prius*, a reading of it reveals that it is supported by careful reasoning based upon a strict construction of the statutory language in a way that interferes as little as possible with the contract between the parties, and to rely upon the rule of construction that where a statute expressly includes one matter but makes no mention of another, that other was deliberately excluded. In my view the case is binding upon me and this part of the plaintiff’s case must therefore fail.

[61] In *Homer Street Development* in 2008, the Court distinguished those two cases (at para. 678) on the basis that they only stand for the proposition “that an investor who received a Disclosure statement and then entered into a binding contract of purchase and sale does not obtain any new right of rescission upon filing of a subsequent amendment to the Disclosure statement”.

[62] The defendants submit that there is nothing in the new legislation explicitly changing the previous position or providing a statutory right of rescission to a party who has not received an amendment, and argue that if such a right is to be provided, it must be stated in clear language. Mr. Eadie also submits that the *REDM Act* in some contexts evidently cannot intend to refer to amendments when it refers to a “disclosure statement”, and therefore it should not be read as doing so in s. 21(3).

[63] In Mr. Eadie’s submission, the purpose of the legislation is fulfilled by the interpretation urged by the defendants because a purchaser should not be able to rescind unless there has been a significant change in the developer’s promise or information. He points to the distinction in the *REDM Act* between a new disclosure statement (required where there has been a material change or where the superintendant so requires) and an amendment (required in other cases, where the change has not been material).

[64] Mr. Eadie argues that distinguishing between amendments filed prior to the date of sale and those filed after the date of sale would be inconsistent with the purpose of the *REDM Act*, which is not to provide additional rights of rescission to purchasers, but rather to require disclosure, prior to closing, of all material facts. He says it does not further the objectives of the *REDM Act* to give a right of rescission when amendments that are about mere clerical errors or mundane matters have not been delivered at the time of purchase. He suggests that the Court should have flexibility to permit rescission where there has been failure to provide amendments that prejudice the purchaser, but not where they have not. He says that where a purchaser is getting what he bargained for, he should not be permitted to avoid his contractual obligations. He also argues that the plaintiff always has common law rights of rescission, as well as a statutory claim in damages with deemed reliance (referring to s. 22 of the *REDM Act*).

[65] Mr. Eadie also submits that s. 21(1)(b), which states that a purchaser has no right of rescission as a result of receiving an amendment unless the purchaser has

not previously received any disclosure statement in respect of the development property, applies in this case. Thus, he suggests, because the plaintiff had already received the Original Disclosure Statement when he received the amendments, he has no right of rescission.

[66] Contrary to the defendants' submission, I do not think that s. 21(1)(b) has any bearing on the issue before me. The plaintiff is not claiming a right to rescind because he received an amendment. He claims, instead, a right to rescind because he did not receive an amendment that already existed when he received the Original Disclosure Statement, before he entered into the Contract.

Analysis

[67] The precise question to be determined, as I have stated, is whether s. 21(3) of the *REDM Act* provides a right of rescission to a purchaser if existing amendments were not delivered to him, along with the disclosure statement, when he entered into the agreement.

[68] The general approach to statutory interpretation is described by the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd.*, [1998] 1 S.C.R. 27, 154 D.L.R. (4th) 193. It is necessary look at the statute as a whole to understand the overall purpose of the legislation and give effect to its provisions. The Court in *Rizzo* adopted the following statement from Elmer A. Driedger, *Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983), at 87:

> Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

[69] It is common ground that the *REDM Act* is a piece of consumer protection legislation and that one of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them. The statements of the Minister, providing some evidence of the legislative history of the

REDM Act, and the legislative evolution support the conclusion that the statute has that purpose.

[70] Looking at the scheme of the legislation as a whole, the disclosure statement is the most significant element in its disclosure requirements. Developers are prohibited from entering into purchase and sale agreements unless a copy of the disclosure statement is provided in the form and with the content prescribed by the superintendent, and unless the purchaser has a reasonable opportunity to read the disclosure statement.

[71] Section 16 provides that when subsequent corrections to the disclosure statement are made, if the correction relates to a “material fact” as defined in the legislation, or if it relates to a matter that is prescribed or otherwise required by the superintendent, there must be a new disclosure statement. In other cases, corrections must be made through amendments to the disclosure statement. In both cases (new disclosure statements or amendments), copies must be provided to each new or existing purchaser.

[72] The right of rescission under s. 21(3) is provided to any purchaser who was entitled to a disclosure statement, but did not receive it. Section 1 defines “disclosure statement” to include “any amendment to a disclosure statement”. There is nothing in the wording of the legislation, or in the overall scheme of the *REDM Act*, that is inconsistent with a reading of the words “disclosure statement” in s. 21(3) as including amendments.

[73] The *Homer Street Development* case held, under the previous legislation, that amendments in existence when the contract is made form part of the disclosure statement and must be delivered.

[74] If a disclosure statement has already been amended by the time a purchaser signs a contract, the purchaser should know that fact and know what the amendments are, for the simple reason that the purchaser is entitled to know what it is that he or she is purchasing. To require developers to provide copies of existing

amendments along with the disclosure statement is not to impose an onerous burden on them, and is consistent with the legislative objective of consumer protection. It is also consistent with that objective to provide a remedy for purchasers, in the form of a right of rescission, where developers have failed to meet their disclosure obligations. I conclude that as a result of s. 1 and s. 21(3) of the *REDM Act*, a purchaser who did not receive amendments with the disclosure statement at the time of purchase has a right to rescind the agreement.

CONCLUSION

[75] I find that the plaintiff did have a right of rescission pursuant to s. 21(3) of the *REDM Act*. The plaintiff will have judgment on that issue pursuant to Rule 18A.

[76] It is unnecessary to address the supplementary submissions made by counsel for the plaintiff with respect to the possible impact of s. 23 of the *REDM Act*.

[77] The plaintiff will have his costs of this application.

"The Honourable Madam Justice Lynn Smith"