COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Pinto v. Revelstoke Mountain Resort Limited Partnership,* 2011 BCCA 210

Date: 20110426
Dockets: CA038082, CA038086

Docket: CA038082

Between:

Marc Pinto

Respondent
(Plaintiff)

And

Revelstoke Mountain Resort Limited Partnership

Appellant
(Defendant)

Docket: CA038086

Between:

Yohai Borenstein

Respondent
(Plaintiff)

And

Revelstoke Mountain Resort Limited Partnership

Appellant
(Defendant)

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel
The Honourable Madam Justice Bennett

On appeal from: Supreme Court of British Columbia, March 30, 2010
(*Pinto v. Revelstoke Mountain Resort Limited Partnership*, 2010 BCSC 422, S094287 and S094288)

Counsel for the Appellant: M.A. Clemens, Q.C.

Counsel for the Respondent: A.P. Morrison

Place and Date of Hearing:	Vancouver, British Columbia November 16, 2010
Place and Date of Judgment:	Vancouver, British Columbia April 26, 2011

Written Reasons by:
The Honourable Madam Justice Bennett

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Madam Justice Bennett:

Overview

[1] This is an appeal from a summary trial where the central issue was whether a developer breached s. 16 of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*], thereby rendering two contracts of purchase and sale unenforceable, by failing to deliver copies of four amendments to the initial disclosure statement to two purchasers.

[2] The appellant, Revelstoke Mountain Partnership ("Revelstoke"), submits that the court below erred in failing to consider whether the amendments in question were required to be made pursuant to s. 16, deciding in effect that the failure to deliver any amendment to a disclosure statement, no matter how inconsequential, within the specified time, constitutes a breach of s. 16. Revelstoke also argues, in the alternative, that any breaches of s. 16 were remedied by its eventual delivery of a "Consolidated Disclosure Statement" which contained the text of all amendments to the original disclosure statement.

[3] The respondents, Marc Pinto and Yohai Borenstein, submit that Revelstoke should be precluded from arguing that it was not required to deliver a copy of the amendments at issue as Revelstoke did not plead this defence or argue it at trial. Alternatively, the respondents argue that Revelstoke was required to deliver the amendments at issue to them in a timely fashion, and submit that Revelstoke's delivery of the unfiled "Consolidated Disclosure Statement" did not remedy its contraventions of the *REDMA.*

[4] I have concluded that the appeal should be dismissed.

Factual Background

[5] The respondents are individual purchasers of two strata property units in a real estate development known as Nelsen Lodge located in Revelstoke, British

Columbia. They purchased their units pursuant to separate but very similar contracts of purchase and sale dated March 31, 2007 (the "Contracts of Purchase and Sale"). Revelstoke was the vendor in each of the Contracts of Purchase and Sale.

[6] Mr. Pinto paid a deposit of $122,800 to secure the purchase of Unit 514. Mr. Borenstein paid a deposit of $87,800 to secure the purchase of Unit 506.

[7] On or about March 12, 2007, Revelstoke filed a disclosure statement (the "Disclosure Statement") with the Superintendant of Real Estate. The respondents received copies of the Disclosure Statement for their review prior to entering into the Contracts of Purchase and Sale.

[8] Between April 2, 2007, and February 5, 2009, Revelstoke filed seven amendments to the Disclosure Statement. Both of the respondents received the first two amendments, but not the next four, which were filed on various dates in 2008. A summary of the content of the four amendments that were not provided to the respondents is set out below:

(a) Amendment 3 advised that the developer had obtained a building permit for Phase 3 and completed the subdivision for the development site. It also advised of a covenant in favour of the City.

(b) Amendment 4 advised of and made ancillary amendments consequent on the developer's decision to offer residential lots for sale in Phase 2. It advised that the estimated date of commencement of construction of Phase 2 was April 1, 2008, and that the estimated date of completion of construction of Phase 2 was November 30, 2009.

(c) Amendment 5 advised that the developer had decided to increase the number of strata units it intended to build and amended the Disclosure Statement to renumber the strata lots in the development. Amendment 5 also changed the construction phases of the development. Originally, Phase 1 was to consist of Buildings 1, 4, and 5; Phase 2

was to consist of Building 2; and Phase 3 was to consist of Building 3. Following Amendment 5, Phase 1 consisted of Building 1; Phase 2 consisted of Building 3; and Phase 3 consisted of Buildings 2, 4, and 5. It should be noted that almost all of the development's recreation facilities were to be housed in Building 2, the construction of which was moved from Phase 2 to Phase 3. Despite these changes, the estimated dates for commencement and completion of construction of Phases 1 and 2 remained the same. Amendment 5 advised that the estimated date of commencement of construction of Phase 3 was May 1, 2008, and the estimated date of completion of construction of Phase 3 was December 31, 2009. The amendment also advised of changes in the constitution of the board of directors of the general partner.

(d) Amendment 6 amended the Disclosure Statement to provide for five phases of construction instead of three: Phase 1 consisted of Building 1, Phase 2 consisted of Building 3, Phase 3 consisted of Building 2, Phase 4 consisted of Building 4, and Phase 5 consisted of Building 5. It also amended the estimated dates for the commencement and the completion of construction. The estimated date for completion of construction of Phase 1 changed from December 31, 2008 to February 28, 2009. The estimated date for completion of construction of Phase 2 changed from November 30, 2009 to October 31, 2009. The estimated date for the completion of construction of Phase 3 remained the same. Amendment 6 further updated the identity of certain directors and officers of the general partner.

[9] The respondents say they became aware that they had not received Amendments 3 to 6 on receiving the seventh amendment in early February 2009. Around the same time, Revelstoke provided the respondents with a "Consolidated Disclosure Statement" which included the text of all amendments effected by the seven amendments to the original Disclosure Statement without highlighting the changes. The respondents became aware of three of the amendments about a year

after they were filed and another about three months after it was filed. The respondents never received the amendments, except as contained in the "Consolidated Disclosure Statement".

[10] In a letter to Revelstoke dated February 13, 2009, Mr. Pinto provided notice of rescission and demanded the return of his deposit. Mr. Borenstein sent a similar letter on February 15, 2009.

[11] On March 3, 2009, each of the respondents received a letter from Revelstoke stating that they had previously been notified of a February 26, 2009 completion date, and that, as a result of their failure to complete their purchases on that date, Revelstoke was terminating the Contracts of Purchase and Sale and keeping the their deposits.

[12] On June 5, 2009 and June 17, 2009, Mr. Pinto and Mr. Borenstein commenced separate actions in the Supreme Court of British Columbia, each seeking, *inter alia*:

(a) Orders rescinding their respective Contracts of Purchase and Sale;

(b) Declarations that Revelstoke had contravened the provisions of the *REDMA*;

(c) A declaration that their respective Contracts of Purchase and Sale were unenforceable; and

(d) Orders requiring Revelstoke to return their deposits, together with interest and costs.

[13] Mr. Pinto and Mr. Borenstein's claims were heard together by summary trial. At the summary trial, they argued that the Contracts of Purchase and Sale were unenforceable as Revelstoke had breached the *REDMA* by marketing units before filing a disclosure statement, and by failing to provide copies of amendments to the Disclosure Statement to them within the time required by s. 16 of the *REDMA.* The respondents did not pursue their alternative claims alleging statutory and common

law rights of rescission, breach of contract, and misrepresentation at the summary trial.

The Summary Trial Judge's Findings

[14] The learned summary trial judge held that it was unnecessary for him to decide whether the units were marketed before the filing of the disclosure statement and dealt only with the allegation that Revelstoke had failed to deliver copies of certain amendments in a timely way, as there were no facts in dispute with respect to that issue. He allowed the respondents' actions, holding that the Contracts of Purchase and Sale were unenforceable due to Revelstoke's breach of s. 16(1) of the *REDMA*, and ordering the return of the respondents' deposits. In his conclusion, he said this:

> [37] The *Act* does not set a specific time within which a developer who files an amendment must provide it to the purchaser. Section 16(1)(b) merely says it must be provided "within a reasonable time" after filing. Although the importance, or lack of importance, of a particular amendment to a purchaser is not relevant to the existence of the purchaser's statutory right, it may be relevant to defining a reasonable time for delivery of the document in the circumstances of a particular case. In some cases, a specific amendment might be of so little consequence to a reasonable purchaser that receipt of the amendment at any time prior to completion might be sufficient even if the amendment had been filed many months earlier.

[15] He also concluded that the provision of the "Consolidated Disclosure Statement", which included the amendments, to the respondents was insufficient. He said this at para. 38:

> [38] But even if that is correct, it is of no assistance to the defendant in this case because the evidence is that the plaintiffs did not receive the amendments. It is not sufficient that the amendments may have been incorporated into a "consolidated disclosure statement" that the plaintiffs received. There is no provision in the *Act* for such a consolidated document and s. 16 says that an amendment must clearly identify and correct the defect. Neither the clear language nor the general purpose of the *Act* is complied with if the existence and nature of an amendment is not clearly drawn to the purchaser's attention. The purchaser should not be expected to make a line-by-line comparison of two lengthy documents in order to identify any amendments that might have been made.

[16] There were no arguments before the summary trial judge as to whether Amendments 3 to 6 were required to be delivered under s. 16 of the *REDMA*.

The Legislation

[17] The *REDMA* is consumer protection legislation. One of its central objectives is to ensure that material facts are provided to purchasers when developments are being marketed to them: *Dwane v. Bastion Coast Homes*, 2009 BCSC 726 at para. 69. Consumer protection legislation is to be interpreted generously in favour of the consumer: *Seidel v. TELUS Communications Inc.,* 2011 SCC 15 at para. 37.

[18] Section 14 of the *REDMA* requires a developer to provide a prospective purchaser with a disclosure statement:

> 14 (1) A developer must not market a development unit unless the developer has
>
> (a) prepared a disclosure statement respecting the development property in which the development unit is located, and
>
> (b) filed with the superintendent
>
> (i) the disclosure statement described under paragraph (a), and
>
> (ii) any records required by the superintendent under subsection (3).
>
> (2) A disclosure statement must
>
> (a) be in the form and include the content required by the superintendent,
>
> (b) without misrepresentation, plainly disclose all material facts,
>
> (c) set out the substance of a purchaser's rights to rescission as provided under section 21 [*rights of rescission*], and
>
> (d) be signed as required by the regulations.

[19] The Superintendent of Real Estate has issued a policy statement addressing the form and content of disclosure statements required under s. 14(2)(a) of the *REDMA* ("Policy Statement 1"). Paragraph 3 of Policy Statement 1 states:

> Form 1 sets out the form and content required under section 14 of the Act for disclosure statements filed in relation to strata lots contained in a stratified building. **The information contained in each disclosure statement must be set out in the order contained in Form 1. If a section does not apply to a particular development property, the section must state "not**

> **applicable".** Sections and subsections may be added by a developer, as required, to meet the developer's obligation to disclose plainly all material facts.
>
> *NOTE: If a change occurs that would have the effect of rendering a statement false or misleading or that brings into being a fact or proposal which should have been disclosed if the fact or proposal had existed at the time of filing, section 16 of the Act requires developers to file an amendment to the disclosure statement. If the change is in respect of the identity of the developer or the appointment of a receiver, liquidator, trustee in bankruptcy or other person, in respect of the original developer, then the new developer, who has the right to acquire or dispose of the development property, must file its own new disclosure statement.*
>
> [Emphasis in original.]

Revelstoke and the respondents disagree as to whether Policy Statement 1 has statutory effect. Given my conclusions, it is not necessary to decide this question.

[20] The definition of “disclosure statement” includes “any amendment made to a disclosure statement”. A developer who becomes aware that a disclosure statement contains a misrepresentation or does not comply with the *Act* or regulations is required to file an amendment. In some circumstances, an amendment is insufficient and the developer must file a new disclosure statement. Those circumstances are set out in ss. 16(2) and (3):

> (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.

[21] “Misrepresentation” is defined as “a false or misleading statement of a material fact” or “an omission to state a material fact”. The definition of “material fact” referred to in s. 16(2) reads:

> "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[.]

[22] Section 16(1)(b) requires developers to provide copies of new disclosure statements or amendments to purchasers who have not yet received title. Delivery must be completed "within a reasonable time after filing a new disclosure statement or an amendment under [s. 16(1)(a)]".

[23] An issue arose during the course of submissions regarding whether an Exhibit appended to the Disclosure Statement or Amendment formed part of the Statement or Amendment. The important changes found in the Amendments appear in the Amended Statement itself; therefore it is not necessary to refer to the Exhibits when deciding the issues in this case.

[24] Section 23 provides that a purchase agreement is not enforceable against a purchaser by a developer who has breached certain provisions of the *Act*, including those relating to disclosure statements.

Analysis

I. Raising new issues on appeal

[25] I will begin my analysis by considering whether Revelstoke should be precluded from raising the issue of whether Amendments 3 to 6 were required to be made pursuant to s. 16 of the *REDMA* in the present appeal. As noted above, Revelstoke did not raise this issue in its pleadings or its arguments at trial.

[26] It is well-established that an issue not raised at trial and presented for the first time on appeal ought to be "most jealously scrutinized": *Hodgkinson v. Hodgkinson*,

2006 BCCA 158 at para. 21; *Baker v. British Columbia Insurance Company* (1993), 76 B.C.L.R. (2d) 367 at para. 15 (C.A.). An appellate court will only permit a new issue to be entertained "where the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to do so": *Wasauksing First Nation v. Wasausink Lands Inc.* (2004), 43 B.L.R. (3d) 244 at para. 102 (O.C.A.); cited with approval by the Supreme Court of Canada in *Quan v. Cusson*, 2009 SCC 62.

[27] As noted by Prowse J.A. in *O'Bryan v. O'Bryan* (1997), 97 B.C.A.C. 62 at para. 24 (C.A.), "the prohibition against permitting one party to raise a new issue on appeal for which the evidentiary groundwork was not fully laid in the trial court is primarily to prevent prejudice to the party against whom the issue is raised." A new ground is more likely to be entertained "where it raises an issue of law alone than where it requires leading evidence either in the appeal court or at a new trial": *Emmett v. Arbutus Bay Estates Ltd.* (1994), 48 B.C.A.C. 26 at para. 9 (C.A.).

[28] The authorities suggest that an appellate court should be particularly wary when considering whether to permit a new issue to be raised on an appeal from a summary trial. See, for example, *Orange Julius Canada Ltd. v. Surrey (City of)*, 2000 BCCA 467, where this Court (*per* Mr. Justice Finch, as he then was) declined to hear the appellants' argument with respect to an implied contract of indemnity on an appeal from a summary trial procedure:

> [70] In my respectful view, the Court should decline to hear or adjudicate upon this issue. The appellants did not plead an implied contract of indemnity in the third party notices issued against Laing or its employees, and no evidence of such an implied contract was adduced before the learned summary trial judge. Further, no submissions respecting this issue were made to the learned summary trial judge. Consequently, the respondents on this appeal are not able to make a full answer and defence to the allegation. The Court is asked to decide the issue on the hypothesis that the appellants' allegations of fact are well founded and cannot be contradicted.
>
> [71] To allow the appellants to advance this argument now would undermine the efficacy of the summary trial procedure. In *Baker v. B.C. Insurance Co.* (1993), 76 B.C.L.R. (2d) 367 (C.A.) Madam Justice Rowles said at 373:
>
> > [22] The trial proceeded under Rule 18A. The issues were defined by the pleadings. Had the point the defendant now wishes to argue been pleaded, it is impossible to say what additional evidence would have

> been put before the court, or what conclusions the trial judge would have reached on that evidence or where the trial judge would have placed this case within the law. See *Gaines v. Patio Pools Ltd.* (1984), 51 B.C.L.R. 121 (C.A.), at 124. To allow the defendant's argument to be made for the first time in this Court would, in my view, invite an injustice and, as well, undermine the efficacy of Rule 18A.

[29] In my respectful view, Revelstoke should not be permitted to argue that Amendments 3 to 6 were not required to be made under s. 16 of the *REDMA* for the first time on appeal. I reach that conclusion for the reasons stated in the case law noted above.

[30] However, since the factual record is complete, the merits were fully argued, and an aspect of Revelstoke's argument that may be important to the practice can be dealt with expeditiously, I would add the following. Even if Revelstoke is correct that it was only required to deliver amendments that were required to be made pursuant to s. 16, I am of the view that Revelstoke was required to deliver, at a minimum, Amendment 5, which related to building additional strata units and changing the completion dates for the recreational facilities. Both of these changes fall within the definition of a "material fact" as defined in s. 16(2)(a) in that both changes may affect the "value, price or use of the development unit or development property". In *Chameleon Talent Inc. v. Sandcastle Holdings Ltd.*, 2010 BCCA 300 at para. 10, this Court held that substantial delays of many months in the construction of a condominium project will generally be "material to purchasers and prospective purchasers in respect of the price to be paid for, the value there may be in, and the use of a condominium unit that is being purchased."

[31] Revelstoke submits that this Court should permit it to argue that the amendments were not "required to be made" in this appeal as to do otherwise would leave a precedent which is wrong in law. While I am of the view that the interests of justice do not require that Revelstoke be permitted to raise this issue for the first time on appeal, my conclusions in this case should not preclude this issue from being raised in another case before the Supreme Court.

II. The "Consolidated Disclosure Statement"

[32] Revelstoke submits that its delivery of the "Consolidated Disclosure Statement" remedied any breach that it may have committed with respect to the *REDMA.* I respectfully disagree. In my view, the "Consolidated Disclosure Statement" fails on a number of bases to be sufficient service or to "cure" Revelstoke's failure to provide the amendments.

[33] First, as the trial judge noted at para. 38, above, amendments must clearly identify and correct the defect (s. 16(1)(a)(ii)). In my view, the *REDMA*'s clear language and general purpose (i.e., to ensure that material facts are provided to purchasers when developments are being marketed to them) support the conclusion that the "Consolidated Disclosure Statement", which requires purchasers to make a line-by-line comparison of two lengthy documents in order to locate any amendments, is not sufficient.

[34] Furthermore, the "Consolidated Disclosure Statement" was not filed with the Superintendant of Real Estate as required by s. 16(1)(a).

[35] Finally, the "Consolidated Disclosure Statement" was not provided within a "reasonable time" as required by s. 16(1)(b). Amendment 5 (which, as noted above, clearly dealt with material facts) was filed a year before the respondents received the "Consolidated Disclosure Statement".

[36] Disclosure of material facts within a reasonable time is fundamental to the consumer protection scheme developed by the Legislature. This did not occur and the respondents are entitled to rescind their contracts pursuant to the *REDMA.*

Disposition

[37] I would dismiss the appeal.

"The Honourable Madam Justice Bennett"

I **agree:**

"The Honourable Madam Justice Saunders"

I agree:

"The Honourable Mr. Justice Frankel"