IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bigleaf Ventures Ltd. v. Marine Drive Properties Ltd.*, 2009 BCSC 633

Date: 20090511
Docket: S071201
Registry: Vancouver

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Between:

**Bigleaf Ventures Ltd., Samel Holdings Ltd.,
Adrian Karasz, Andriana Karasz,
Cy McCullough, Caralyn Patricia Bennett,
Dennis Robert Ohman, Leanne Clair Ohman,
Keith Charles Shearer and Shelley Rose Price-Shearer**

Plaintiffs

And

**Marine Drive Properties Ltd. and
Elke Loof-Koehler**

Defendants

Before: The Honourable Madam Justice Russell

Reasons for Judgment

Counsel for the Plaintiffs: P. Hildebrand

Counsel for the Defendants: M. Lawless

Date and Place of Hearing: March 31, 2009
Vancouver, B.C.

Introduction

[1] The plaintiffs individually purchased units in a townhouse development (the "Primera") in Ucluelet, British Columbia. They seek damages from the defendants for breach of the ***Real Estate Development Act***, S.B.C. 2004, c. 41 (the "***Act***"), based on misrepresentations made in a disclosure statement, and for breach of contract.

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[2] The defendants include Marine Drive Properties Ltd. ("MDP"), a real estate company which developed the Primera, and Ms. Elke Loof-Koehler, the principal of MDP.

[3] The six plaintiffs all purchased units in the Primera with the belief that they could rent out the units as short-term vacation rentals. They argue the disclosure statement produced by MDP, as well as representations of officials with MDP, indicated such rentals were permitted.

[4] They argue the statement at issue is a statement of opinion and not a statement of fact, and further that the presence of an entire agreement clause in the standard form agreements for purchase and sale (the "Agreements"), signed by all of the plaintiffs, precludes recovery.

[5] MDP began marketing the Primera in the summer of 2003, prior to the commencement of construction. The plaintiffs purchased their units at different times, starting in late 2003 to late 2005 and signed the Agreements.

[6] MDP filed a disclosure statement, as required under the now repealed ***Real Estate Act***, R.S.B.C. 1996, c. 397, which, *inter alia*, stated that purchasers would be able to rent their units on a weekly basis to members of the public.

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[7] Construction of the Primera was completed in December 2005. At the first strata meeting, a representative of MDP advised the owners that the Primera's zoning did not permit short-term rentals. This was subsequently confirmed in writing by the District of Ucluelet's (the "District") solicitor.

[8] Both the plaintiffs and MDP subsequently attempted to have the Primera re-zoned to permit short-term rentals however both applications were rejected.

[9] The plaintiffs then initiated the present action to recover damages based on two grounds: breach of statute and breach of contract.

[10] The defendants advance two main defences: first, the District is incorrect in its interpretation of the applicable zoning by-law, and second that the statement at issue is not a statement of fact, but rather a statement of opinion.

Issues

[11] There are two issues in this action:

1. Is the statement at issue a material fact, as defined under the ***Act***, and if so, was it false or misleading? Further, are any of the defences under the ***Act*** applicable to the defendants?
2. Was the disclosure statement incorporated into the Agreements, and if so, is the defendant MDP liable for breach of contract?

Facts

[12] MDP acquired land and subdivided it into two parcels: the parent parcel and the parcel which the Primera was developed on. The parent parcel was zoned as "Rural District". At the request of MDP and Ms. Loof-Koehler, it was re-zoned to CD-2(A), ("Comprehensive Development") as was the land which the Primera was built on.

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[13] MDP had previously developed another project in the area, the Tauca Lea, that was zoned CS-5 ("Tourist Commercial Zone"), which permitted short-term vacation rentals. Some of the plaintiffs had previously purchased units in the Tauca Lea and rented them out as short-term vacation units.

[14] In marketing the Primera, the defendants filed a disclosure statement in July 2003, which was signed by Ms. Loof-Koehler. The statement included the following at 4.2(g):

> The purchasers of strata lots will not be under any obligation to utilize the services of any specific rental management company and will be under no obligation to make his strata lot available for rental to the public. The zoning with respect to the Development will permit the purchasers of the strata lots to rent the strata lot on a weekly basis to the general public, subject to the restrictions as contained in the applicable zoning bylaw of the District of Ucluelet.
>
> [Emphasis added]

[15] The disclosure statement was amended twice, in September 2003 and February 2004, but neither amendment related to the above statement.

[16] The disclosure statement outlined that MDP was represented by two real estate agents: Sandy Rantz and Judy Gray. The disclosure statement also included a standard form agreement of purchase and sale for purchasers to complete.

[17] In December 2004, the defendants applied to the District to re-zone the Primera to permit vacation rentals (VR-2). The District rejected this application at first reading.

[18] The plaintiffs purchased their units at different times, commencing in September 2003 to October 2005. Three of the plaintiffs had previously purchased units in the nearby MDP development, the Tauca Lea.

[19] The purchasers were advised, through the disclosure statement and conversations with MDP sales representatives and the two real estate agents representing MDP, that short-term vacation rentals were permitted.

[20] Building of the Primera was completed in December 2005. At the first strata meeting, in April 2006, a representative of MDP informed the owners the Primera's zoning did not permit short-term rentals.

[21] The District's solicitor subsequently confirmed this in writing and noted that while property zoned as "Resort Condominium" permitted short-term rentals, this was not one of the "permitted uses" for the Primera's zoning.

[22] Following the initial strata meeting, a group of owners applied to re-zone the Primera. They sought MDP's consent to the application, which it granted, as it

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owned a unit in the Primera. The application was submitted and subsequently denied.

[23] In February 2007, the defendants sought to re-zone the Primera by converting its present zoning, multi-family residential use, to resort condominium use, which would have permitted short-term rentals. The District rejected this application at first reading.

[24] The defendants argued the District was incorrect in its interpretation of its zoning by-laws and short-term vacation rentals were permitted at the Primera. One of the owners filed a petition to this court seeking clarification on this point, naming the defendants and the District as respondents. The petition was dismissed and the District's position was upheld by Rice J. in ***Bigleaf Ventures Ltd. v. District of Ucluelet, Marine Drive Properties Ltd., and Elke Loof-Koehler***, (8 January 2008), Vancouver SO75168 (S.C.).

Relevant Legislation

[25] The defendants were obligated to issue a disclosure statement under the then ***Real Estate Act***. When that act was repealed in 2005, the transitional provisions in the ***Act*** deemed the disclosure statement to be filed under the ***Act***: see s. 47(1).

[26] Sections 14-17 outline requirements with respect to disclosure statements. Developers are required to file a disclosure statement prior to marketing a development and must not enter into a purchase agreement until a copy has been provided to the purchaser. Developers are required to file a new or amended

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disclosure statement if it does not comply with the ***Act*** or Regulations or contains a misrepresentation.

[27] The **Act** defines misrepresentation in s. 1, as follows:

> **"misrepresentation"** means
>
> (a) a false or misleading statement of a material fact, or
>
> (b) an omission to state a material fact.

[28] Material fact is also defined in s. 1, as follows:

> **"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.

[29] Section 22 deals with liability for misrepresentations by developers or directors (of the developer) in disclosure statements. Section 22(3)(a) states that if a disclosure statement contains a misrepresentation the purchaser is deemed to have relied upon the misrepresentation and s. 22(3)(b) provides a right of action for damages against the developer and the director. Further, s. 22(4) states that even if the misrepresentation is removed or corrected after the purchaser and developer have entered into an agreement, s. 22(3) continues to apply.

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[30] There are certain defences outlined in s. 22. Section 22(5) holds that a person is not liable under s. 22(3) if they prove the purchaser was aware of the misrepresentation at the time the purchaser received the disclosure statement. Sections 22(7) and (8) provide a due diligence defence and hold an individual is not liable under s. 22(3) if the requirements outlined are met.

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[31] Sections 39-42 address offences under the ***Act***. Section 39(1)(a) states that a person commits an offence if they contravene ss. 14-16. Section 39(1)(c) states that a person commits an offence if they make a statement in a disclosure statement which contains a misrepresentation, subject to s. 39(2). Section 39(2) provides a defence if the person did not know the statement contained a misrepresentation or was false or misleading, and in exercising reasonable diligence could not have known that the statement contained a misrepresentation or was misleading. Section 39(3) states that if a developer commits an offence under the ***Act***, an officer, director or controlling shareholder who "authorizes, permits or acquiesces" in the offence commits the same offence whether or not the developer is convicted.

[32] If the person is liable under s. 39, s. 40 outlines penalties: corporations are liable, upon first conviction, of a fine up to $100,000, and individuals are liable, upon first conviction of a fine of up to $100,000 and or up to two years in jail.

Discussion

I. Breach of Statute

[33] Three issues must be addressed in order for the plaintiffs to be successful in this claim:

a) Was the statement at issue related to a material fact?;

b) If so, was it a false or misleading statement of a material fact?; and

c) Are any of the defences outlined in the ***Act*** available to the defendants?

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[34] The defendants submit that the disclosure statement is qualified by referencing the local by-laws, which, in effect, means it is the District's decision that governs. Further, they submit article 4.2(g) in the disclosure statement is not determinative with respect to rentals and state article 4.4 overrides any statements made in 4.2(g). For ease of reference 4.2(g) and 4.4 read as follows:

> 4.2(g) The purchasers of strata lots will not be under any obligation to utilize the services of any specific rental management company and will be under no obligation to make his strata lot available for rental to the public. The zoning with respect to the Development will permit the purchasers of the strata lots to rent the strata lot on a weekly basis to the general public, subject to the restrictions as contained in the applicable zoning bylaw of the District of Ucluelet.
>
> 4.4 The Strata Lots are intended for the personal use of the owners or their immediate family members and/or rental to the public in compliance with the applicable zoning bylaws as relates to the Strata Lots. Copies of the applicable bylaws are available for review at the office of the District of Ucluelet located at PO Box 999 Ucluelet, B.C. V0R 3A0.

[35] Provision 4.6 is also instructive:

> The Developer has rezoned Lots 1 and 2, District Lot 281, Clayoquot District, Plan VIP62019 to CD-2 (Comprehensive Development 2A and 2B). The Lands fall within the CD-2 zone and the zoning permits the construction of residential multi-family units at a medium density of 31 residential units per hectare on the Lands...

Was the statement a material fact?

[36] The plaintiffs submit the statement at issue was material given the manner in which the project was marketed by both MDP and its real estate agents.

[37] The affidavits of the six plaintiff purchasers indicate that all purchased units in the Primera on the basis that they could rent out their units on a short-term basis. Those affidavits indicate that the purchasers were informed by Ms. Loof-Koehler, Ms. Gray or other sales agents of MDP that the units could be rented out. The three purchasers who had previously purchased units in the Tauca Lea were informed that the units in the Primera would be rentable on the same basis as the Tauca Lea, except that participation in a rental pool would not be mandatory and owners could privately rent their units. The plaintiffs depose that they purchased their units to generate income from rentals and did not intend to use the units for personal use. A number of the plaintiffs took steps to facilitate rentals, including purchasing furniture (designed for rental units) as well as developing rental websites.

[38] Prowse J. (as she then was) considered the meaning of "material" in ***Dureau v. Kempe-West Enterprises Ltd. et al.***, [1989] B.C.J. No. 2123 (S.C.), under the then ***Real Estate Act***. She stated, at p. 11 (QL):

> Section 1 of the ***Securities Act*** defines a "material fact" as follows:
>
> > 22. "material fact" means, where used in relation to securities issued or proposed to be issued, a fact that significantly affects, or could reasonably be expected to significantly affect, the market price or value of those securities; . . .

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> I adopt the meaning given to the words "material fact" in the ***Securities Act*** as appropriate to the meaning of the word "material" in section 59 of the [***Real Estate***] ***Act***. There are differences in the legislation, but the definition is one which, in my view, accords with common sense. In other words, the word "material" is not specifically directed toward the loss that would be suffered if the material fact were found to be false, but rather to the effect which the material fact has, or is deemed to have, on the purchaser's willingness to buy, and for what price. In other words, you look at the effect which the material fact would have on the purchaser's willingness to buy for the price offered, and if the statement is such that it could reasonably affect his judgment as to whether to buy, and for what price, then it is material for the purpose of this section.

[39] This definition was adopted by Neilson J. (as she then was) in ***Pacific International Development Corp. v. Gourmet Gallery Inc.***, 2000 BCSC 823 at para. 93, 33 R.P.R. (3d) 89 and cited in ***Inmet Mining Corp. v. Homestake Canada Inc.***, 2002 BCSC 681 at para. 100, 23 C.P.C. (5th) 348, var'd by 2003 BCCA 610, 24 B.C.L.R. (4th) 1.

[40] There has been no judicial consideration of "material fact" under the ***Act***.

[41] In their pleadings, the defendants submit the plaintiffs were made aware that MDP was undertaking efforts to "secure and confirm the weekly rental zoning provisions from the District of Ucluelet". Thus, the plaintiffs made an informed decision to proceed with the purchase of the units in any event, and thus, s. 22(5) is applicable.

[42] The statement at issue in the disclosure statement (provision 4.4) makes clear that purchasers would be entitled to rent their units, on a weekly basis, subject to zoning restrictions. The plaintiffs relied upon this statement in purchasing their units. Further, s. 22(3)(b) states that whether the purchaser received the disclosure statement or not, they are deemed to have relied upon it.

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[43] Based on the evidence of the plaintiffs, it is evident that the primary purpose for purchasing the units was to obtain rental income. In taking a common sense approach, as outlined in ***Dureau***, it is obvious that a statement which indicates rentals are permitted would surely affect the value a purchaser would ascribe to the unit and the resulting decision to purchase. Therefore, I conclude the statement falls under the definition of "material fact" as outlined in s. 1 of the ***Act***.

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[44] It follows that the statement was clearly misleading and false based on my assessment of the above evidence. Further, the defendants were aware that the application for re-zoning, which would have permitted short-term rentals, was rejected by December 2004 and that the Primera's current zoning would not have permitted short-term rentals based on their experience with the Tauca Lea.

Do any of the statutory defences assist the defendants?

[45] There are a number of defences that are available to the defendants. First, s. 22(5) provides that a person is not liable under s. 22(3)(b) if it can be shown that the purchaser had knowledge of the misrepresentation at the time of receiving the disclosure statement. Second, ss. 22(7) and (8) provide due diligence defences. Third, s. 39(2) provides a defence if it can be demonstrated that the developer did not know the statement contained a misrepresentation, or that the statement was false or misleading, and that due diligence would not have revealed the misrepresentation.

[46] None of the defences assists the defendants. First, there is no evidence indicating that any of the purchasers had knowledge of the misrepresentation at the

time of purchase. The plaintiffs' primary, if not exclusive, purpose for purchasing units in the Primera goes to the heart of the alleged misrepresentation. The evidence of the plaintiffs is unequivocal that the units were purchased for rental purposes.

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[47] Second, the evidence demonstrates that ss. 22(7) and (8) are of no assistance to the defendants in this case.

[48] Third, the defendants knew by December 2004, at the latest, that the Primera was not zoned to permit short-term vacation rentals. In addition, they would have been aware of the different zoning designations and the permissible uses under those designations given their development of the Tauca Lea, which permitted short-term vacation rentals.

[49] Additionally, the plaintiffs submit there are additional grounds of liability to two plaintiffs (Samel Holdings Ltd. and Mr. and Mrs. Karasz), who purchased their units in April 2005 and October 2005. The plaintiffs submit that the defendants are liable under s. 39(1)(a) for contravening s. 16(1).

[50] The plaintiffs argue that by April 2005 the defendants were aware the re-zoning application had been rejected by the District and they did not amend the misrepresentation contained in the disclosure statement by filing an amendment, as required under s. 16(1).

[51] The requirements of s. 16(1) are clear: if the developer becomes aware of a misrepresentation in a disclosure statement they must file an amendment or a new

disclosure statement. The amendments filed by the defendants did not amend the statement in the disclosure statement with respect to short-term rentals.

[52] In conclusion, I find the defendants breached ss. 22(3) and 16(1) and are liable under ss. 39(1)(a) and (c).

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II. Breach of Contract

[53] The plaintiffs submit MDP is liable for breach of contract based on the fact that the representations made regarding rentals were terms of the contract. They argue the terms of the disclosure statement were incorporated into the purchase contract and rely on the decision of ***Intrawest Corporation v. No. 2002 Taurus Ventures Ltd. et al.***, 2006 BCSC 293, 54 B.CL.R. (4th) 173 (In Chambers) var'd by 2007 BCCA 228, 64 B.C.L.R. (4th) 8.

[54] In order for a representation to form part of the contract it must be incorporated as a term of the contract: see G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Scarborough: Carswell, 2006) at pp. 437-438. In the context of agreements for sale of land the issue centres around whether statements made prior to the completion of the contract were incorporated into the agreement itself.

Was the disclosure statement incorporated into the contract?

[55] The case law is clear that in order for representations made in a disclosure statement to have contractual status "the Disclosure Statement must be expressly incorporated": ***413255 B.C. Ltd. v. Jesson***, 2006 BCSC 1070, 57 B.C.L.R. (4th) 184

at para. 30. That decision relied upon the reasoning in ***Malenfant v. Janzen***, [1994] B.C.J. No. 2373 (S.C.), where Harvey J. stated, at para. 28:

> [28] I was not referred nor am I aware of authority holding that answers given to questions set out in a Property Condition Disclosure Statement are to constitute representations in the form of warranties as to the condition of the property in question. The questions and answers in the form itself are stated to form part of the contract of purchase and sale "if so agreed in writing by the vendors and purchasers" and, in this manner, may support a breach of contract if the answers provided are untrue based upon current actual knowledge. In this regard there may be afforded a basis for claiming breach of contract.

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[56] In ***413255 B.C. Ltd.***, Gerow J. concluded the disclosure statement was not incorporated into the purchase and sale agreement based on the following clause of the agreement, at para. 31:

> [31] There are no representations, warranties, guarantees, promises or agreements other than those set out in this contract and the representations contained in the property disclosure statement if attached, all of which will survive the completion of the sale.

[57] There was no evidence that the parties had expressly incorporated the representations in the disclosure statement into the agreement, nor was there evidence that the representations constituted an enforceable collateral contract: see para. 32. The breach of contract claim, based on the defendant's alleged failure to disclose defects in the building, was dismissed.

[58] In ***Intrawest***, the petitioner filed for foreclosure after the respondent purchaser defaulted on his mortgage payments. The respondent purchased a lot in Whistler from the petitioner and alleged the petitioner made various representations to the effect that the petitioner would construct ski trails connecting the development,

which the lot was situated in, to ski runs on Whistler Mountain. The ski trails were not constructed by the time the petitioner demanded full payment of the mortgage; the respondent sought to rescind the contract or obtain damages for the alleged misrepresentations.

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[59] One of the issues in that case was whether the disclosure statement was incorporated into the purchase and sale agreement. Prior to entering into the agreement, the respondent was given a disclosure statement. That statement did not contain express terms with respect to potential completion dates for the ski trails or who would build and pay for them, but rather outlined only the location of the trails.

[60] The purchase contract contained the following clause:

> [13] Miscellaneous - This Contract is the entire agreement between the parties and there are no other terms, conditions, representations, warranties or collateral agreements, express or implied, whether made by the Vendor, any agent, employee or representative of the Vendor or any other person. All of the terms, conditions, representations, and warranties contained in this Contract will survive closing and the transfer of the Property to the Purchaser.

[61] The trial judge held certain parts of the disclosure statement were part of the purchase contract, which holding was not disturbed by the Court of Appeal, and stated at paras. 44, 47 and 48:

> [44] The contract in this case referred to the property being sold as a lot situated in the Kadenwood development "as more particularly defined in the disclosure statement." It contained an acknowledgment that the purchaser had received and had an opportunity to read the disclosure statement. The disclosure statement outlined the subdivision plan, the location of the various lots, road access, the structure of the strata corporation and other matters relating to the form and character of the development.

> ...
>
> [47] In this case, the fact that the disclosure statement is referred to in the agreement of purchase and sale as part of the description of the property being sold must be given some meaning. Intrawest was not intending to sell, and Mr. Houghton was not intending to buy, an isolated lot in the woods. The intention of the parties was that the lot would be part of a larger development that Intrawest was promising to create, as described in the disclosure statement.
>
> [48] When the entire contract clause is read in combination with the property description, the only fair reading is that the parties intended that representations as to the form and character of the Kadenwood development would only be part of the contract to the extent to which those matters were expressly dealt with in the disclosure statement. The parties clearly intended that the contract and disclosure statement would be the whole of the agreement.

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[62] The trial judge held that the representations alleged by the respondent, regarding the ski trails, were not contractual, as neither the disclosure statement nor the purchase contract outlined any specific representations about the trails. The trial judge held the only way such representations could have contractual force was through a collateral contract. The trial judge's finding, that there was no evidence of such a contract, was remitted to trial by the Court of Appeal.

[63] In the instant case, the sale and purchase agreement contains the following clauses which refer to the disclosure statement:

> 6. On the Completion Date, the Vendor will transfer title to the Lot to the Purchaser free and clear of all registered liens, mortgages, charges and encumbrances of any nature whatsoever save and except:
>
> a) the legal notations set out in the Disclosure Statement;
>
> b) the encumbrances and the proposed non-financial encumbrances set out in the Disclosure Statement;
>
> c) any other easements, rights-of-way, and any development covenants or agreements in favour of utilities, public authorities and other parties as required by them;

> ...
>
> 9. The purchaser acknowledges that the Purchaser is purchasing the Lot as shown on the proposed subdivision plan attached as Schedule "A" to the Disclosure Statement.

[64] The contract also contains the following clause:

> 16. This Agreement shall constitute the entire agreement between the Vendor and the Purchaser and no representations, warranties and previous statements made by any person or agent other than those contained in this Agreement shall be binding upon the Vendor. This Agreement may not be altered or amended except by an amendment in writing signed by both parties.

[65] The plaintiffs argue the factual situation in this case is similar to the ***Intrawest*** decision as the contracts of the plaintiffs "identified what they were purchasing by express reference to the Disclosure Statement". They submit based on the reasoning of ***Intrawest*** the representations made in the disclosure statement have contractual force.

[66] With respect, I am unable to agree with that submission for two reasons. First, the sale and purchase agreements do not expressly incorporate the disclosure statement, save and except for the descriptions contained therein regarding liens, mortgages, charges and encumbrances, and the location of the lot on a subdivision plan. While the agreements refer to the disclosure statement, there is no express incorporation of the disclosure statement as a whole, or with respect to the rental status of the units, as stated in ***413255 B.C. Ltd.*** and ***Malenfant***.

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[67] Second, in ***Intrawest*** it does not appear that the trial judge incorporated the whole of the disclosure statement into the contract. Rather, only the representations as to the "form and character" of the development were incorporated as the contract described the property as being that defined in the disclosure statement: see para. 48. The reasoning in ***Intrawest*** indicates that the incorporation of representations contained in the disclosure statement was expressly limited to the extent outlined in the contract. In this case, while the agreement does refer to, and thus incorporate, certain aspects of the disclosure statement, it does not expressly incorporate the representation regarding rentals.

[68] Accordingly, the breach of contract claim must be dismissed.

Damages

[69] The defendants are liable for damages resulting from breach of the ***Act***. I invite the parties to present written submissions with respect to quantum of damages within 10 days of the release of this decision.

'L.D. Russell J."

The Honourable Madam Justice Loryl D. Russell

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