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Real Estate Agents – Duties and Liability

A recent case in the British Columbia Supreme Court has shown that a fiduciary relationship can arise between a seller and a real estate agent who is either the prospective purchaser or the agent of the prospective purchaser.

In *Westrheim v. Gao* (J 2007 BCSC 274), the plaintiffs made an offer to purchase a house, subject to the sale of a condominium that they owned and were living in. Shortly after making the offer, the plaintiffs listed their condominium for sale at \$529,900. Days later, realtor G presented an offer on behalf of a client. A price of \$517,500 was eventually agreed upon, subject to financing; however, the client backed out of the purchase on the date when financing was to be secured.

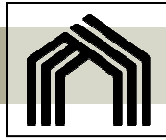
G and her husband C (also a realtor) then decided to make an offer of their own to purchase the same condominium on the same terms, except not subject to financing. G was named purchaser, and C was named as G's real estate agent. The plaintiffs accepted the offer and ultimately finalized the sale. During negotiations, the plaintiffs made it clear to G that it was important to them that she buy the condo for her own use, not for investment or resale. G assured them this would be the case.

Shortly after the sale was completed, G painted the condominium, installed hard-wood flooring, and hired a decorator to "stage" the unit for sale. The condominium was then listed for sale at \$639,000, and subsequently sold for 613,000. G's net profit after expenditures on improvements was \$61,500.

The plaintiffs successfully sued G for breach of fiduciary duty. Because G was a real estate agent as well as the purchaser, the court was satisfied that a fiduciary relationship existed. The *Real Estate Services Act* provides that a real estate agent acting as purchaser must complete a "Disclosure of Interest in Trade" document which requires that he/she disclose what purpose the property is to be used for: personal, rental, or other use *or* resale *or* both. Although the court was satisfied that G checked both of the boxes (rental and resale) in the disclosure document, a technical error in G's fax machine prevented the transmission of such information to the seller plaintiffs. The court was also convinced by the plaintiffs' evidence that G represented not to resell, and further took advantage of the flaw in the faxed copy of the disclosure statement to support such an assurance.

The court noted that a fiduciary relationship will arise if the real estate agent provides or omits information that he/she knows will influence a seller's decision and the seller relies on that information. Here, the court held that G was aware the condominium was worth more than the selling price because of her experience in the market; that she presented an offer immediately upon collapse of her client's offer; and that the property had only been listed for a short time. Furthermore, G represented that she was not going to resell the condominium, which the plaintiffs relied on.

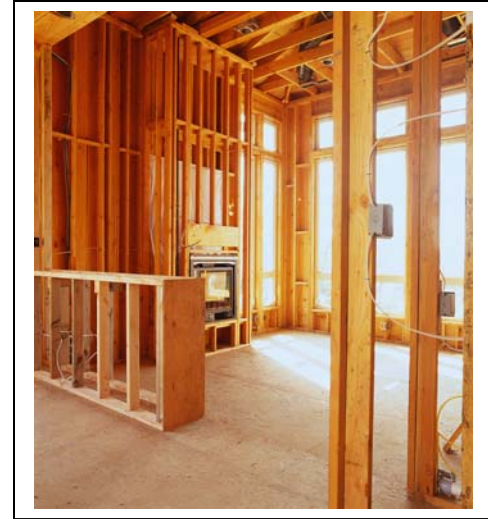
The court awarded damages to the plaintiffs in the amount of \$69,608 (\$61,500 for the profit made by G's resale and \$8,108 for C's commission in the transaction).



New Disclosure Rules for Pre-Sale Contracts

Purchasers of properties not yet built at the time of contract now have more information available to them at the time they enter into those contracts, thanks to recent amendments to the Real Estate Development and Marketing Act and related policy statements. Special emphasis is placed upon provisions for cancelling purchase agreements, following well publicized facts from a recent case in Coquitlam where the developer, CB Development 2000 Ltd., terminated 32 pre-sale contracts due to financial difficulties.

The B.C. Financial Institutions Commission now requires additional information to be included in Disclosure Statements submitted to the Superintendent for filing on or after November 1, 2007. Amendments to existing Disclosure Statements that are made after November 1, 2007 will also require the additional information.



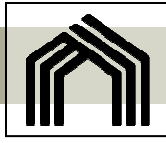
Policy Statement 14 requires that the section of the Disclosure Statement regarding the purchase agreement must:

- Provide notice that a copy of the developer's form of the purchase agreement is attached as an Exhibit to the Disclosure Statement, and attach that Exhibit;
- Describe any provisions in the purchase agreement for terminating that purchase agreement;
- Describe any provisions in the purchase agreement that allow for an extension of time for completing that purchase agreement, including whether the developer or purchaser may require or refuse an extension, and whether the developer may seek a fee or increased purchase price in order to agree to an extension. Any other extension provisions must also be disclosed;
- Describe any provisions of the purchase agreement for assigning that purchase agreement to a new purchaser. Additionally, state whether the developer may refuse to allow an assignment or seek a fee in order to agree to an assignment;
- Describe any provisions of the purchase agreement for the purchaser or the developer to receive interest on the deposit monies.

Policy statement 15 will require further disclosure on the developer's background, experience, and any conflicts of interests that may affect a buyer's decision. This rule will not only apply to pre-sale units, but to all types of development properties.

Buyers are to acknowledge receipt of additional disclosure information and notice of relevant provisions in contracts of purchase and sale by placing their initials on the front page of a Disclosure Statement. This is a common protection measure which should increase buyer awareness of some of the risks associated with these types of transactions. More information on disclosure requirements can be located in the *Real Estate Development Marketing Act* at www.flc.gov.bc.ca.

INCREASED DISCLOSURE = INCREASED AWARENESS = INCREASED PROTECTION



Changes to Homeowner Protection Legislation place Burden of Disclosure on Owner-Builders and Sellers for Extended Period

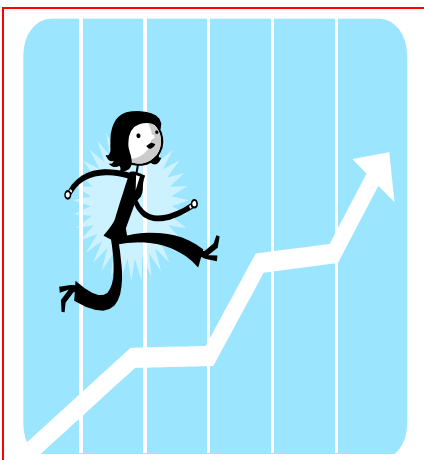
Amendments to the Homeowner Protection Act came into force in November 2007. These amendments will make it easier for prospective purchasers to locate relevant information regarding newly or recently constructed homes by establishing various databases, both electronically on the Online New Homes Registry at hpo.bc.ca, and at the municipal level where information will be available regarding proof of warranty coverage or owner-builder exemption.



The amendments also place a greater obligation of disclosure on sellers of owner built homes, for up to ten years after the owner built home was originally occupied. Owner builders, whether or not they have voluntarily purchased the standard 2-5-10 warranty from a warranty provider, will be required to provide a disclosure notice to prospective purchasers, in a format prescribed by the HPO, within the first ten years after the home was originally occupied by the owner-builder. Owner-builders remain obligated, by virtue of the statutory warranty, to subsequent purchasers for any defects in the home within that first ten year period. The amendments to the legislation clarify that this obligation parallels the obligations of a Licensed Residential builder under the warranty insurance plan. Subsequent purchasers who sell within that first ten year period will also be obligated to provide the same disclosure notice.

Further information regarding these amendments can be found at the link below:

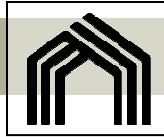
<http://www.hpo.bc.ca/Publications/BuildingBC/2007-Special/index.html>



Did You Know?

The Victoria Real Estate Board (www.vreb.org) reports housing sales that continue to indicate a strong market and to break local records for total value of properties sold. . In September 2007, the average price of single family homes in Greater Victoria hit a record high \$584,193; the average for the last six-months was \$572,007. While MLS listings were down slightly from the same time in 2006 (3,381 v. 3,449), sales in September '07 totaled 632, up from 593 sales in September '06, but down from 846 sales in August '07.

Sales in Greater Victoria soared in October, up 20% from the same month last year (708 v. 590). Sales have not been this numerous in the month of October since 2003. End of year statistics were consistent with these increases. There were 408 MLS® sales last month, as compared to 385 such sales in December 2006. Volume of listings on the MLS also continues to increase over last year - 2,799 properties were listed at the end of December 2007, as compared to 2,650 properties in December 2006.



Vendor Obligations and Assignments of Contract

A recent Supreme Court of British Columbia decision (*Mann v. Sarai*, 2007 BCSC) involved an important issue respecting assignments of contract.

In this case, a Seller entered into a contract of purchase and sale with a Buyer. Prior to the completion date, the Buyer added his father as a party to the contract. The Buyer's lawyer delivered the transfer documents and statement of adjustments prior to completion and the Seller refused to execute the documents. The Seller's evidence was that after he entered into the contract, he changed his mind. The Seller also maintained that he was not required to execute documents to both the original Buyer and his father.

The Court confirmed that in the absence of any provision in a contract of purchase and sale of land precluding assignment, the Buyer was at liberty to assign his contractual rights as an equitable interest in the land. The Court also ordered specific performance (the sale was ordered to be completed) as the Buyer's remedy for the Seller's default. The property in question was not being purchased to be "flipped" for profit, and its location, size, and proximity to services made its characteristics special to the Buyer, which justified the order for specific performance rather than damages.



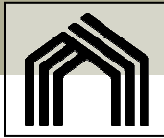
Clients must be prepared to fulfill their contractual obligations. An assignment of contract will not negate a seller's obligations under a valid agreement, unless specified in the contract.

MDM Profile: Dawson Mullin

Recent law school graduate Dawson Mullin joined Mullin DeMeo in September 2007. Dawson received his undergraduate degree from the University of Victoria, before moving to Australia to complete his law degree at Bond University.

Dawson is currently having his foreign law degree accredited, and upon completion will begin his articles here in Victoria. Dawson is interested in practicing real estate law, and hopes to be a long term member of both Victoria's legal and real estate community.

In his leisure time, Dawson enjoys traveling, running, working out, playing soccer, and spending time with his family and friends.



GST Payable on New Residential Real Property Transactions after Tax Rate Change to 5% (Effective January 1st, 2008)

For the second time in less than two years, the Federal government has proposed amendments to the *Excise Tax Act* that have lowered the rate of GST from 6% to 5% effective January 1, 2008. With regard to the sale and purchase of real estate, the government will adhere to certain transitional provisions, some of which are summarized below in simplified form. For a complete overview of the proposed tax reduction and its potential effects on your client's real estate transaction, please consult the Canada Revenue Agency Notice available in pdf format at www.cra-arc.gc.ca/E/pub/gi/notice226/notice226-e.pdf.

	Completion/Possession On or Before June 30, 2006	Completion/Possession On or After July 1, 2006 but before January 1, 2008	Completion/Possession On or After January 1, 2008
Contract of Purchase and Sale Signed On or Before May 2 2006	Rate of Tax = 7%	Rate of Tax = 7% Apply for 2006 Transitional Rebate	Rate of Tax = 7% Apply for both 2006 and 2008 Transitional Rebates
Contract of Purchase and Sale Signed On or After May 2, 2006 but before October 30, 2007	Rate of Tax = 7%	Rate of Tax = 6%	Rate of Tax = 6% Apply for 2008 Transitional Rebate
Contract of Purchase and Sale Signed On or After October 31, 2007	N/A	Rate of Tax = 6%	Rate of Tax = 5%

Please note that this chart is for informational purposes only and does not constitute a legal or tax opinion. All information and specific circumstances should be reviewed by and discussed with a qualified tax advisor.

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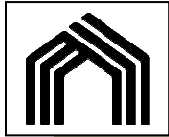
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About Us

Mullin DeMeo maintains one of the busiest real estate law practices in British Columbia and certainly on Vancouver Island. Each year, Mullin DeMeo processes more real estate transactions than any other firm in the Victoria area.

We have a staff of five lawyers, eighteen legal assistants, a land title agent, electronic filing capability and advanced technology, all dedicated to providing excellent legal services regarding real estate matters.

All major financial institutions in Victoria have approved us to prepare mortgage documentation and we are counsel for several local branches. Our lawyers maintain a good working relationship with Victoria Real Estate Board members, and we are called upon on a weekly basis to speak to Realtors on legal issues.

We are proud to have been the first law firm in British Columbia to submit Land Title Documents by electronic filing. In fact, Peter DeMeo was the first lawyer in the province to obtain and use a digital signature molded exclusively by the Law Society of B.C. Mr. DeMeo has since been regularly invited to speak to various legal groups and both the legal and real estate community respects his expertise with electronic filing of real estate documents.

The goal of our firm is to provide a level of service that will ensure that our clients are fully satisfied and will wish to remain long-term clients of the firm. If you would like further information please contact us.

We're on the Web!

Visit us at:

www.realestatelawvictoria.com

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