



No. S111747
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

EUN JUNG MOON, AYESHA ALL,
PRAKASH CHANDRA ARORA,
ROBERT DAVID BINDER and MASUMI BINDER,
VERONICA SARANNE BRYKAJLO and LESZEK BRAYKAJLO,
TARUN CHAUDHARY and MEENU CHAUDHARY,
SIANG HAI FOO, MELANIE CINDY MAH,
HYUN KYUNG PARK, SHINIL PARK,
MIRIAN ESTHER PHIBBS and PAUL WINSTON PHIBBS,
HELEN TALEBI,
HAROLD PETER THURINGER and BARBARA IRENE
THURINGER,
WEE MING WONG and LISA WONG,
HUI LIAN YE and WILLION SZETO,
KEVIN JASON YEUNG

PLAINTIFFS

AND:

SAILS AT THE VILLAGE ON FALSE CREEK
DEVELOPMENTS CORP. and CITY OF VANCOUVER

DEFENDANTS

RESPONSE TO CIVIL CLAIM

Filed by: the defendant City of Vancouver (the "City")

Part 1: RESPONSE TO NOTICE OF CIVIL CLAIM FACTS

Division 1 City's Response to Facts

1. The facts alleged in paragraphs 1 through 3 of Part 1 of the notice of civil claim are admitted.

2. The facts alleged in paragraphs 4 through 41 of Part 1 of the notice of civil claim are denied, with the exception of paragraphs 16 through 21, which purport to reproduce or paraphrase legislation, as to which the City says that the legislation speaks for itself.

Division 2 City's Version of Facts

1. The plaintiffs are the owners of strata lots in a development known as the Sails at the Village on False Creek ("Sails").
2. Sails is part of the Village on False Creek (the "Project"). The Project was developed on land (the "Land") – construed broadly to mean all legal parcels, whether two-dimensional land parcels, three-dimensional air space parcels or any combination of them – comprising or arising out of certain lots located on the south shore of False Creek and bounded by Columbia Street to the west, Ontario Street to the east, West 1st Avenue to the South and False Creek to the North.
3. On or about August 31, 2006, the City and Millennium Southeast False Creek Properties Ltd. which is now named SEFC Properties Ltd ("SEFC") entered into a lease agreement (the "Lease Agreement", or, as amended from time to time, the "Amended Lease Agreement") with respect to the Land and in furtherance of the creation of the Project. The Lease Agreement consisted of an agreement to lease the land (by itself, the "Ground Lease") and several related agreements between the parties which were attached to the Ground Lease as schedules.
4. At all material times prior to the execution of the Lease Agreement, the City was the registered and beneficial owner of all of the Land except for one lot, known as Lot 317, which was acquired by the City in or about May 2007. At all times that the City was the registered and beneficial owner of the Land, there were no improvements or structures of any material value on the Land.
5. In the Ground Lease the City and SEFC agreed to divide the Land into two sets of parcels, referred to as the City's Parcels and the Developer's Parcels.

6. The City's Parcels were those legal parcels of the Land upon which would ultimately be located the buildings (collectively, the "City's Buildings") designed to accommodate the following elements (as defined in the Ground Lease) of the Project:
 - (a) The Community Centre,
 - (b) The Child Care Facility,
 - (c) The Affordable Housing (including Family Day Care Centres); and
 - (d) Their respective parking, garbage/recycling and loading space facilities.

7. The Developer's Parcels were those legal parcels of the Land upon which would ultimately be located the buildings (collectively, the "Developer's Buildings") designed to accommodate the following elements (as defined in the Ground Lease) of the Project:
 - (a) The Market Housing;
 - (b) The Modest Market Housing;
 - (c) The Commercial Space;
 - (d) The Choice of Use space; and
 - (e) Their respective parking, garbage/recycling and loading space facilities.

8. The Ground Lease specifically provided that the Developer's Buildings would be owned legally and beneficially by SEFC. The City does not currently and has not at any time owned, directly or indirectly, legally or beneficially, the Developer's Buildings or any interest in the Developer's Buildings (with the sole exception of the security interest described below). The City does not currently and has not at any time had any right to acquire or to dispose of the Developer's Buildings or any interest in the Developer's Buildings.

9. As part of the Lease Agreement, the City and SEFC agreed (the "Purchase and Sale Agreement") that, following the due performance of SEFC's obligations under the Lease Agreement (and in particular under the Ground Lease, the Development Agreement, and the Exclusive Use Period Sublease/Agreement, as those terms are defined in the Ground Lease), the City would sell to SEFC the Developer's Parcel's (excluding the Developer's Buildings, which would already belong to SEFC).
10. The strata lots which are the subject of this and certain related lawsuits are a sub-set of the strata lots (the "Strata Lots") created as part of the Project and which represent individual units in the Developer's Buildings, the titles to which were formed by subdivision from the titles of the Land comprising the Developer's Parcels.
11. Since SEFC always owned the Developer's Buildings, the purchase by SEFC of the Developer's Parcels would result in the consolidated legal and beneficial ownership by SEFC of the Developer's Buildings and the Developer's Parcels, which would include, inter alia, all of the Strata Lots.
12. Pursuant to the Ground Lease, SEFC granted the City a security interest (the "City Security") in respect of all of SEFC's property, including its interest in the Developer's Parcels and the Developer's Buildings. The City Security created a general and continuing security for all of the obligations of SEFC under the Lease Agreement to pay money to the City, including without limitation, SEFC's obligation to pay to the City the purchase price for the Developer's Parcels (excluding the Developer's Buildings) pursuant to the Purchase and Sale Agreement.
13. A significant part of the ultimate aim of SEFC in connection with the Project was to sell the Strata Lots to arms' length purchasers ("Third Party Purchasers") at a profit.
14. In furtherance of the Project, on or about September 28, 2007, SEFC entered into a loan agreement (the "Fortress Loan") with Fortress Credit Co. L.L.C. ("Fortress") the proceeds of which were to fund the construction of the Developer's Buildings.

15. It was a requirement of the Fortress Loan that SEFC create one or more single purpose legal entities (the "Salescos" or individually a "Salesco") to market the Project and effect the sale of the Strata Lots to Third Party Purchasers. The Fortress Loan contemplated that SEFC would enter into one or more bulk sale agreements, pursuant to which it would agree to sell the Strata Lots to one or more Salescos for further sale to Third Party Purchasers (the "Bulk Sale Agreements").
16. The Fortress Loan provided that the proceeds of the sales by any Salesco would be paid to Fortress in reduction of the Fortress Loan until such time as the Fortress Loan was completely repaid.
17. The Fortress Loan also stipulated a certain minimum price for the sale of each Strata Lot by a Salesco to a Third Party Purchaser (the "Condominium Minimum Release Price").
18. One of the amendments to the Lease Agreement was executed on or about September 28, 2007 (the "Third Amendment"). The Third Amendment acknowledged that the marketing and sale of the Strata Lots would be conducted through the use of one or more Salescos and provided that:
 - (a) SEFC would not do or cause to be done any activity that would permit it to be included as a "developer" for the purposes of the Real Estate Development Marketing Act, S.B.C. 2004, c. 41 ("REDMA").
 - (b) SEFC would require that disclosure statements or pre-sale agreements prepared by or on behalf of any Salesco would state that there be no occupancy, alteration or modification of any unit until after the VANOC Exclusive Use Period (as that term was defined in the Ground Lease);
 - (c) SEFC would cause each Salesco to permit the City to review and comment on any disclosure statement and would cause such Salesco to consider any comments the City might have;

- (d) SEFC would not agree with Fortress to amend the Condominium Minimum Release Price without the prior consent of the City;
 - (e) Subject to certain conditions, the City would facilitate the sales of individual Strata Lots (each a "Unit Sale") by a Salesco to a Third Party Purchaser by:
 - (i) Executing a transfer of the relevant Strata Lot;
 - (ii) Executing a release of the Ground Lease with respect to the relevant Strata Lot; and
 - (iii) Executing a release of the City Security with respect to the relevant Strata Lot.
 - (f) The net proceeds generated by any Unit Sale would be paid:
 - (i) First, to Fortress until the Fortress Loan was completely repaid;
 - (ii) Next, to the City until the balance of the purchase price for the Developer's Parcels (excluding the Developer's Buildings) pursuant to the Purchase and Sale Agreement was paid; and
 - (iii) Last, to SEFC.
19. SEFC did enter into Bulk Sale Agreements with a number of Salescos. In the case of Sails, SEFC entered into a Bulk Sales Agreement with the defendant Sails at the Village on False Creek Developments Corp. ("Sails Salesco").
20. On or about February 18, 2009, the City purchased the Fortress Loan from Fortress together with an assignment of all of Fortress's related security. As part of that purchase the City acquired all of the outstanding shares in each of the Salescos.
21. In or about September 2009, the City and SEFC entered into an amended and restated loan agreement (the "Amended Fortress Loan") in respect of the Fortress Loan.

22. The City did not engage in any activities, communications or other interactions of any kind with any person intended to or capable of leading to a sale or lease of any of the Strata Lots. The City did not engage in any activities, communications or other interactions of any kind with any person from which such a person could possibly gain the impression that they had acquired, were invited to acquire, or had an opportunity to acquire a Strata Lot or any indirect or derivative right or option to acquire a Strata Lot.
23. Any and all activities undertaken to offer the Strata Lots for sale to the public were undertaken by or on behalf of a Salesco. In the case of Sails, all such activities were undertaken by Sails Salesco.
24. All sales of the Strata Lots have been conducted in accordance with the Amended Lease Agreement, the Fortress Loan and the Amended Fortress Loan. The City's participation in such sales as described in paragraph 18 (e) above was undertaken only to facilitate sales by Salescos to Third Party Purchasers. The City's only other involvement in such sales was the execution of partial releases of the security granted pursuant to the Fortress Loan and the Amended Fortress Loan.
25. The Purchase and Sale Agreement has not been terminated and SEFC continues to be entitled to purchase the Developer's Parcels.
26. The City has taken steps to enforce its rights pursuant to the Amended Fortress Loan. Specifically, the City commenced a proceeding and on or about November 17, 2010, obtained an order for the appointment of a receiver (the "SEFC Receiver") to realize on the assets of SEFC for the purpose of recovering amounts due under the Amended Fortress Loan.
27. Prior to the appointment of the SEFC Receiver, all net sales proceeds were paid in reduction of the Amended Fortress Loan. Subsequent to the appointment of the SEFC Receiver, the net sales proceeds go to the Receiver, who from time to time, makes distributions to the City in reduction of the Amended Fortress Loan. Some of the net proceeds have been applied to operation expenses and to certain capital expenditures designed to enhance the marketability of the remaining Strata Lots

(collectively, the "Receiver's Expenditures"). Subject only to Receiver's Expenditures incurred to date and the retention by the Receiver of a provision for current and future Receiver's Expenditures, all net sales proceeds have been paid in reduction of the Amended Fortress Loan.

28. To date, the indebtedness pursuant to the Amended Fortress Loan has not been fully repaid. The City has not, to date, received any proceeds of sale of any of the Strata Lots in payment of the balance of the purchase price pursuant to the Purchase and Sale Agreement.
29. The City specifically denies having made any of the alleged misrepresentations set out in paragraph 36 of Part 1 of the notice of civil claim (the "Alleged Misrepresentations"). The City did not make any representations to any of the plaintiffs or to any actual or potential Third Party Purchaser about Sails or the Project generally. In the alternative, any representation which the City did make were in the nature of subjective statements regarding the Project and were all in fact substantially correct and represent reasonable expressions of opinions or views about the characteristics and qualities of the Project.
30. The disclosure statement delivered by a Salesco to each purchaser of a Strata Lot, including the plaintiffs, contained an accurate and detailed description of the Strata Lots.
31. The Strata Lots as built, including the plaintiffs' Strata Lots, conformed in all material regards to the descriptions in the relevant disclosure statement which was delivered to the plaintiffs.
32. The disclosure statement delivered to the plaintiffs also contained a complete and accurate description of the ownership structure of the Project and of the Strata Lots, including the way in which title would be conveyed to purchasers.
33. Each of the plaintiffs had an opportunity to inspect the Strata Lot to be purchased and in fact conducted such an inspection either in person or by authorized representative. The plaintiffs did not make any complaint with respect to their

respective Strata Lots as a result of the inspection. In the alternative, any complaints that the plaintiffs made were in the nature of identifying remediable deficiencies and such deficiencies have been, or alternatively are in the process of being, addressed and corrected.

34. The plaintiffs have occupied their Strata Lots or have permitted tenants to occupy their Strata Lots and in either case:
 - (a) Have received value for the period of ownership of their Strata Lots; and
 - (b) Have effected wear and tear on their Strata Lots such that they are no longer in the condition or substantially the condition that they were in when they were conveyed to them.
35. In connection with the purchase of their Strata Lots, each of the plaintiffs executed and delivered to the City an Acknowledgement and Release in which the plaintiffs acknowledged that the City had executed a title transfer only to facilitate the sale by the relevant Salesco and further unconditionally, absolutely and irrevocably released the City from any and all claims related to the transfer or the Strata Lots.
36. The plaintiffs did not at any time leave or file a notice in writing with the City Clerk with respect to their alleged claims and losses.

Division 3 Additional Facts

1. The City does not wish to raise any additional facts beyond those identified in Division 2 above.

Part 2: RESPONSE TO RELIEF SOUGHT

1. The City does not consent to the granting of any of the relief sought in Part 2 of the notice of civil claim.
2. The City opposes the granting of the relief sought in paragraphs 42 to 49 of Part 2 of the notice of civil claim.
3. The City asks that the plaintiffs' claims be dismissed with costs.

Part 3: LEGAL BASIS

1. The Salescos were the developers, as that term is defined in REDMA, with respect to the Strata Lots. Sails Salesco was the developer, as that term is defined in REDMA, with respect to the plaintiffs' Strata Lots.
2. The Salescos, including Sails Salesco, were the only entities who marketed, as that concept is defined in REDMA, the Strata Lots.
3. The Salescos, including Sails Salesco, complied with all obligations of REDMA and the regulations promulgated thereunder.
4. Specifically, the Salescos prepared, filed and delivered to all purchasers, including the plaintiffs, full, complete and properly compliant disclosure statements.
5. Any and all activities which amounted to marketing of the Strata Lots either as that concept is defined in REDMA or otherwise were carried out by Salescos.
6. The City is not and has never been a developer, as that term is defined in REDMA, with respect to the Project or the Strata Lots because the City did not, at any material time, directly or indirectly:
 - (a) Own
 - (b) Lease;
 - (c) Have a right to acquire; or
 - (d) Have a right to dispose ofany of the Strata Lots.
7. The Strata Lots represent a subdivision of the combined interest in the Developer's Buildings and the Developer's Parcels.
8. Properly construed, the concept of ownership in the definition of "developer" in REDMA, means beneficial ownership and not the holding of bare legal title.

9. At no material time did the City have any beneficial interest in any of the Strata Lots:
 - (a) The City never obtained any interest of any kind in the Developer's Buildings, which make up a substantial and key part of the Strata Lots;
 - (b) The City historically owned the Land from which the Developer's Parcels were derived but that ownership interest was alienated by the City when it entered into, and as to Lot 317 when it amended, the Lease Agreement.
10. As a matter of law, when the owner of real property enters into a conditional agreement to sell the property, the owner immediately alienates all beneficial interest in the property, subject only to its reversionary rights which arise in the event that the agreement to sell is terminated before completion.
11. The Purchase and Sale Agreement between the City and SEFC was such a conditional agreement to sell. As a result of the Lease Agreement, the City held only bare legal title to the Developer's Parcels.
12. The Purchase and Sale Agreement has not been terminated and as such SEFC continues to be the beneficial owner of the Developer's Parcels, subject to the Bulk Sale Agreements.
13. When the Developer's Parcels were subdivided into the Strata Lots, the City continued to hold the bare legal title to the Strata Lots.
14. Every transfer of legal title to real property, including a Strata Lot, attracts an obligation to pay property transfer tax pursuant to the Property Transfer Tax Act, R.S.B.C. 1996, c. 378
15. As a matter of administrative convenience and tax efficiency, the City agreed to facilitate sales by Salescos to Third Party Purchasers by executing transfers and releases as described herein.
16. Further, or in the alternative, the City at no time:
 - (a) Sold;

- (b) Leased;
- (c) Offered to sell or lease; or
- (d) Engaged in any transaction or activity likely to lead to a sale or lease of

any of the Strata Lots and as such, the City did not engage in any activities which amounted to marketing of the Strata Lots either as that concept is defined in REDMA or otherwise.

17. Because the City was not a developer and/or did not market any of the Strata Lots, REDMA did not and does not apply to the City and the City had no requirement to file, sign or be identified in any disclosure statement with respect to the Project or the Strata Lots.

18. SEFC is not and has never been a developer, as that term is defined in REDMA, because it alienated the right to acquire and dispose of the Strata Lots to the Salescos pursuant to the Bulk Sale Agreements.

19. Further, or in the alternative, SEFC at no time:

- (a) Sold;
- (b) Leased;
- (c) Offered to sell or lease; or
- (d) Engaged in any transaction or activity likely to lead to a sale or lease of

any of the Strata Lots and as such SEFC did not engage in any activities which amounted to marketing of the Strata Lots either as that concept is defined in REDMA or otherwise.

20. Because SEFC was not a developer and/or did not market any of the Strata Lots, REDMA did not and does not apply to SEFC and SEFC had no requirement to file,

sign or be identified in any disclosure statement with respect to the Project or the Strata Lots.

21. There has been no failure to comply with the provisions of REDMA and the plaintiffs are not entitled to rescission under s. 21 (3) of REDMA.
22. Further and in the alternative, the right to rescission provided in s. 21 (3) of REDMA is subject to all of the principles, limitations and qualifications that apply to the remedy of rescission in equity or at common law and:
 - (a) The plaintiffs are not entitled to rescission because they cannot *give restitutio in integrum* as a result of the use of, and wear and tear to, their Strata Lots; or in the alternative
 - (b) If the plaintiffs are entitled to rescission, they must account to the defendants for the value that they have received during the period of their respective ownership.
23. The purchase agreements signed by the plaintiffs specifically provide that there are no representations other than as made in the relevant disclosure statement and that the agreements contain all material terms between the parties.
24. The Alleged Misrepresentations, even if they were made, which is denied, are all subjective statements regarding the Project and are all in fact substantially correct and represent reasonable expressions of opinions or views about the characteristics and quality of the Project.
25. If the Alleged Misrepresentations were made and if they were untrue, all of which is denied, then, the plaintiffs did not rely, and alternatively did not reasonably rely, on any of them in deciding to purchase a Strata Lot.
26. The Alleged Misrepresentations, even if they were made, and even if they were untrue, all of which is denied, were not such as to amount to or result in an *error in substantialibus* and they would not entitle the plaintiffs to equitable rescission.

27. The Alleged Misrepresentations are such that, even if they were made, and even if they were untrue, all of which is denied, the plaintiffs would have received substantially what they had contracted to receive, would have suffered no loss or damage and would have no right or entitlement to any compensation or damages for misrepresentation.
28. The plaintiffs have not alleged facts which would justify the granting of a tracing order and no tracing order should be granted. Specifically, the plaintiffs have not alleged that they had any continuing proprietary interest in the purchase money paid to Sails Salesco.
29. The plaintiffs have each executed a binding Acknowledgment and Release which forecloses and extinguishes all of the claims which are asserted as against the City in the notice of civil claim.
30. In the further alternative, the City pleads and relies on section 294 of the Vancouver Charter, S.B.C. 1953, c. 55 (the "Charter"):
 - (a) The plaintiffs' claims for rescission pursuant to REDMA depend on and amount to an allegation that the City purported to act in compliance with REDMA but in fact failed to do so;
 - (b) It is implicit in the plaintiffs' claims for rescission that the City's actions would not permit any legal complaint or claim, if the City had complied with the requirements of REDMA;
 - (c) As such, section 294 (1) applies to the plaintiffs' claims for rescission and those claims are time-barred as they were not commenced within 6 months of the date upon which the asserted cause of action allegedly arose;
 - (d) Further, the plaintiffs' claims, to the extent that they seek the payment of money from the City, amount to a claim for damages as that term is used in section 294 (2) of the Charter;

- (e) The plaintiffs failed, without reasonable excuse, to leave or file notice with the City Clerk and their claims are therefore time-barred by operation of section 294 (2) of the Charter.

Defendant's address for service: Stikeman Elliott LLP
 Barristers and Solicitors
 1700 - 666 Burrard Street
 Vancouver, BC V6C 2X8
 (604) 631-1300
 Attention: David R. Brown

Fax number address for service (if any): 604-681-1825

E-mail address for service (if any): drbrown@stikeman.com

Place of trial: Vancouver

The address of the registry is: 800 Smithe Street
 Vancouver, BC V6Z 2E1

Dated: April 7, 2011

Signature of

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|--------------------------|
| <input type="checkbox"/> |
| X |

Defendant
 Lawyer for Defendant, City of
 Vancouver
 David R. Brown

Rule 7-1 (1) of the Supreme Court Civil Rules states:

- (1) Unless all parties of record consent or the court otherwise orders, each party of record to an action must, within 35 days after the end of the pleading period,
 - (a) prepare a list of documents in Form 22 that lists
 - (i) all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact, and
 - (ii) all other documents to which the party intends to refer at trial, and
 - (b) serve the list on all parties of record.