Citation: Halcyon Point Development ULC (Re),
2024 BCSRE 24
Date: 2024-04-16
File # INV18.019.43064

IN THE MATTER OF THE *REAL ESTATE DEVELOPMENT MARKETING ACT*
SBC 2004, c 41 as amended

AND

IN THE MATTER OF

HALCYON POINT DEVELOPMENT ULC

AND

DALE TORTORELLI

REASONS FOR DECISION REGARDING LIABILITY

[These Reasons have been redacted before publication.]

Date of Hearing:	February 5 - 7, 2024
Counsel for BCFSA:	Menka Sull and Jon Peters
Counsel for the Respondents:	Jesse Gelber
Hearing Officer:	Andrew Pendray

Introduction

1. Pursuant to section 27 of the *Real Estate Development Marketing Act* ("REDMA"), the Superintendent of Real Estate issued a notice of hearing in respect Halcyon Point Development ULC and Dale Tortorelli (the "respondents").

2. The allegations set out in the notice of hearing are that the respondents, in 2017, marketed a development property without preparing a disclosure statement, contrary to section 14(1) of REDMA; and that the respondents received a deposit in relation to a development unit in a development property without placing that deposit in a trust account, contrary to section 18(1) of REDMA.

3. The respondents take the position that REDMA was not applicable to the property in question, but that they were in fact engaged in a private partnership to develop a portion of the property, and that the allegations in the notice of hearing ought to be dismissed. The respondents further argue

that the delay in bringing this regulatory action had created procedural unfairness and a significant unfairness to the respondents, such that the proceeding ought to be dismissed.

4. This hearing proceeded by way of an oral hearing. Both BCFSA and the respondents were represented by legal counsel.

Notice of Hearing

5. The allegations against the respondents are set out in a Second Further Amended Notice of Discipline Hearing:

> …the allegations against one or both of Halcyon Point Development ULC ("Halcyon") and Dale Tortorelli ("Mr. Tortorelli") are as follows with respect to a development property legally described as [Property 1] (the "Development Property"):
>
> 1. Halcyon and Mr. Tortorelli marketed a development unit in the Development Property without preparing a disclosure statement, contrary to section 14(1) of the REDMA; and
>
> 2. Halcyon and Mr. Tortorelli received a deposit from a purchaser in relation to a development unit in the Development Property without placing that deposit in the trust account of a brokerage, lawyer, notary public or trustee, contrary to section 18(1) of the REDMA.

Issues

6. The issues are:

- Did the respondents breach section 14 of REDMA by marketing a development unit in the property, as described at item 1 of the Notice of Hearing?
- Did the respondents breach section 18 of REDMA by receiving a deposit from a purchaser in relation to a development unit at the property without placing that deposit in a trust account, as described at item 1 of the Notice of Hearing?
- Should the proceeding against the respondents be stayed due to delay?

Jurisdiction and Procedure

7. Pursuant to section 44 of REDMA, the Superintendent of Real Estate (the "Superintendent") may delegate any of its powers. The Chief Hearing Officer and Hearing Officers of the Hearings Department of BCFSA have been delegated the statutory powers and duties of the Superintendent with respect to sections 29 through 32 of REDMA.

8. BCFSA must prove its case on the balance of probabilities, that is, BCFSA must prove that it is more likely than not that the facts as alleged occurred. In order to make a finding against the respondents, I must find that the evidence is "sufficiently clear, convincing and cogent" to satisfy that test: *FH v McDougall,* 2008 SCC 53, [2008] 3 S.C.R. 41.

9. Evidence is generally considered as a matter of procedure.[1] As an administrative tribunal the Superintendent is not bound by court rules of evidence, and in the absence of any statutory provision to the contrary, may consider any evidence it considers relevant, including hearsay evidence: *Adams v. British Columbia (Superintendent of Motor Vehicles,* 2019 BCCA 225 (CanLII).

10. Further, the fact that the legislation may provide for a formal structure for enforcement proceedings does not preclude hearsay evidence from being admitted at a hearing.[2] There is no provision in REDMA which imports civil or criminal rules of evidence into the administrative proceedings held by the Superintendent. The Superintendent may, however, draw upon principles underlying court rules of evidence to exclude or assess evidence.

11. The Superintendent must also afford procedural fairness to a respondent where a decision may affect his or her rights, privileges or interests. This right includes a right to be heard. The Superintendent affords every respondent an opportunity to respond to the case against him or her by ensuring that advance notice is provided to the respondent regarding the issues and the evidence, and providing an opportunity for the respondent to present evidence and argument. The Superintendent must determine facts, and decide issues set out in the notice of hearing, based on evidence. The Superintendent may, however, apply its individual expertise and judgment to how it evaluates or assesses evidence.

Applicable Law

12. Section 1 of REDMA sets out a number of definitions which are applicable to this matter. Specifically, section 1 provides that:

> "**deposit"** means money paid by a purchaser to a developer in relation to a development unit before the purchaser acquires title or any other interest in the development unit;
>
> "**developer**" means a person who, directly or indirectly, owns, leases or has a right to acquire or dispose of development property, unless the person is, or is in a class of persons which is, excluded by regulation;
>
> "**development property**" means any of the following:
>
> …
>
> (f) 2 or more shared interests in land in the same parcel or parcels of land;
>
> …
>
> "**development unit**" means any of the following in a development property:
>
> …
>
> (f) a shared interest in land;
>
> …

[1] *Cambie Hotel (Nanaimo) Ltd. v. British Columbia (General Manager, Liquor Control and Licensing Branch),* 2006 BCCA 119, para. 38.
[2] *Cambie Hotel,* paragraph 38.

"**director**" means

(a) in the case of a corporation as defined in the *Business Corporations Act*, a director as defined in that Act,

…

"**disclosure statement**" means a statement that discloses material facts about a development property, prepared in accordance with section 14 (2) [filing disclosure statements], and includes a consolidated disclosure statement, a phase disclosure statement and an amendment made to a disclosure statement;

…

"**market**" means

(a) to sell or lease,

(b) to offer to sell or lease, and

(c) to engage in any transaction or other activity that will or is likely to lead to a sale or lease;

…

"**purchaser**" means

(a) a purchaser, from a developer, of a development unit,

(b) a lessee, from a developer, of a development unit, and

(c) a prospective purchaser or lessee, from a developer, of a development unit;

…

"**shared interest in land**" means a person's interest in one or more parcels of land if

(a) the parcel or parcels are owned or leased, directly or indirectly, by the person and at least one other person, and

(b) as part of any arrangement relating to the acquisition of the person's interest, that person's right of use or occupation of the land is limited to a part of the land;

13. Section 2 of REDMA provides that REDMA applies to a developer who markets a development unit in British Columbia, regardless of whether the land that a developer owns, leases, or has a right to acquire or dispose of has not yet been divided into development units. Section 2(c) further sets out that REDMA applies regardless of whether a developer who is marketing a development unit does not intend to market one or more development units within a development property.

14. Section 3(1)(c) of REMDA sets out that a developer who markets or intends to market a development unit must file and provide a disclosure statement in accordance with Division 4 of

REDMA. Section 3(2) sets out that a developer who receives a deposit must deal with the deposit in accordance with Division 5 of REDMA.

15. Section 14(1) provides that:

> **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.

16. The form and content required by the Superintendent for disclosure statements filed in relation to a development property consisting of two or more shared interest in land is set out in Policy Statement 11, published October 1, 2014.

17. Section 18 of REDMA provides that a developer who receives a deposit from a purchaser in relation to a development unit must promptly place the deposit with a brokerage, lawyer, notary public or prescribed person who must hold the deposit as trustee in a trust account in a savings institution in British Columbia.

Background and Evidence

18. The evidence and information before me included a significant number of documents from a joint book of documents, as well as the evidence of a number of witnesses, including [Individual 1] and [Individual 2], the prospective purchasers of a portion of the property identified in the notice of hearing, and the respondent Dale Tortorelli. I also heard from [Manager 1], manager of real estate development with BCFSA.

19. In providing the background below, I note that I have considered all of the evidence provided by the witnesses. The following is intended to provide context for my reasons.

General Summary

20. This matter came to the attention of the former Office of the Superintendent of Real Estate ("OSRE") in July 2017. In general terms OSRE was made aware at that time of a dispute regarding the purchase of a portion of a property in the Arrow Lakes area of British Columbia.

21. The property in question, which is referred to as the Development Property in the notice of hearing, is legally described as [Property 1] (the "property").

22. The owner of the property was Halcyon Point Development ULC ("Halcyon"). Dale Tortorelli was a director of Halcyon.

23. The dispute that was brought to OSRE's attention was between the intended purchasers of the portion of the property, [Individual 1] and [Individual 2] (collectively the "[Purchasers]"), and the respondents, Halcyon and its director Mr. Tortorelli.

24. After discussions between the [Puchasers] and Mr. Tortorelli in the fall of 2016, construction work started on the portion of the property the [Purchasers] were seeking to purchase. The parties developed a plan to place a trailer on the property in which [Individual 1] would live, with a subsequent plan to build a house on another location of the portion of the property the [Purchasers] were seeking to purchase. Work on the installation of electrical and water services also began around that time.

25. As will be set out below, the [Purchasers] and the respondents have differing views as to the nature of the intended transaction relating to the property. Their views differed on whether the portion of the property the [Purchasers] were seeking to purchase was being purchased in fee simple or as a shared interest, as well as what the price for the purchase of the portion of the property was. The [Purchasers] eventually brought a claim against the respondents in relation to the property in the Supreme Court of British Columbia, with a consent order entered into by the parties on April 18, 2023. That consent order provided the [Purchasers] judgment against the respondents in the amount of $265,000, and the [Purchasers] having no further interest in the property.

Documents Relating to the [Purchasers]' Purchase of the Property

26. There are a number of documents in evidence before me which provide context to the nature of the transaction between the [Purchasers] and the respondents.

27. On September 28, 2016 Mr. Tortorelli sent an email to [Individual 1]. In that email Mr. Tortorelli wrote that:

> **Halcyon Point will sell one of the north property lots to you for a price of 150,000.00**. In addition I will sell you the 41 foot Quantum fifth wheel trailer for 25,000 set up and in place. The property has electrical and telephone services at the main road and will need to be brought into the house site at the buyers costs. As well a proper septic system. As far as the services go, I will assist with machine work in order to get costs down as low as possible. I will also help in building an addition to the trailer to facilitate a washroom, heating system, etc…
>
> In short we will get the unit cozy and habitable.

> The trailer should be paid for at time of agreement.
>
> **The property will be paid for separately. As it is a shared title time will be given to facilitate payment. I would think that a small deposit to Halcyon Point for the land**, and then a payment schedule for the balance until such time as you are able to get financing from a lender would be in order. I would like to see the property paid for or significantly paid down prior to the building of a house on the site.
>
> [emphasis added]

28. On November 28, 2016 Mr. Tortorelli again wrote to [Individual 1]. In an email of that date Mr. Tortorelli indicated that he was providing an "accounting of costs" to date. The email indicated:

> Received: From [Individual 1] 30,000.00 For the purchase of one Quantum 5th wheel trailer 41 foot long 5 slides. (25,000.00) **and (5000.00) for deposit on one acre in [Property 1] at Halcyon.** After our discussions it was decided that you would prefer moving the lot up the hill a little in order to have an easier building site in the future for a second home. This will require a little more land than the one acre, I think about 1.3 acres. I will include that amount for no additional costs.
>
> [emphasis added]

29. Mr. Tortorelli noted in that November 28, 2016 email that the "first site" on the property had been prepared, and that electrical would be connected on December 7, 2016. He provided a list of costs incurred in respect of the electrical in the amount of $5,494, as well as details regarding upcoming costs for purchase of septic system hardware of approximately $5,000. Mr. Tortorelli noted that he would like to see payment for the electrical and septic hardware, and that he would do the installation of the septic system at no charge.

30. [Individual 2] sent a wire transfer to [Company 1] (a company owned by Mr. Tortorelli) in the amount of $10,500 on December 2, 2016. [Individual 2] noted on the wire transfer detail form that the reason for the transfer was for payment for a "water and sewer project".

31. On May 24, 2017 [Individual 1] wrote to Mr. Tortorelli. In that email she indicated that in order to move forward with the project on the property she and her co-purchasers required a legal document setting out the purchase agreement. [Individual 1] noted in that email that the [Purchasers] had already paid $40,494, including $25,000 for the trailer, a $5,000 deposit for the land, $5,000 for the septic system and $5,594 for electrical.

32. Mr. Tortorelli replied to [Individual 1] and [Individual 2] on May 25, 2017. He indicated that "the property purchase agreement is here in my office and we can sign it at any time". Mr. Tortorelli indicated that he needed the project to be "funded" by May 29, 2017 in order to move forward.

33. The contract of purchase and sale for the property between Halcyon and [Individual 1] is dated November 28, 2016.[3] The contract of purchase and sale sets out that the purchase price of the

[3] Given the content of the contract of purchase and sale document, it is apparent that that document was not in fact completely filled out on November 28, 2016.

property will be $150,000, with the size of the [Purchasers'] interest in the property being 1.3 acres. The terms of conditions indicate that the property will be mortgage free, road accessed, will include hot spring water and required services of 800 gallons per day. The contract of purchase and sale calls for the sale of the property to be completed on October 1, 2017.

34. The contract of purchase and sale further sets out that a deposit of $5,000 had been paid on November 28, 2016, with a further $75,000 having been paid on June 3, 2017. Those deposits are noted to have been delivered to Tortorelli and [Company 2].

35. The contract sets out that the balance of the purchase price will be paid July 1, 2017. The contract of purchase and sale is signed by both [Individual 1] and Mr. Tortorelli.

36. Attached to the contract of purchase and sale is a document entitled Service Installation Agreement (the "services agreement"). That agreement is between Tortorelli and [Company 2] (as the seller), [Individual 1], [Individual 2], and [Individual 3] ([Individual 1]'s mother). The services agreement was signed by the parties (other than [Individual 3], who did not sign it) on July 2, 2017. The services agreement sets out that the following services will be made available to the buyer:

    - Hot and cold water lines;
    - Functional sewer and septic system; and
    - Functional electric.

37. The service agreement indicates that the seller would incur all costs of those services to the property, with the buyer incurring the costs for the parts required to deliver the services from the property to the [Purchasers]' portion of the property.

38. Mr. Tortorelli, [Individual 1], and [Individual 2] also signed, on July 2, 2017, a document entitled "Purchase Agreement – Shared Interest in Land" (the "purchase agreement"). That agreement is between Halcyon Point Development ULC as seller, and [Individual 2], [Individual 1], and [Individual 3] as buyers.

39. The purchase agreement sets out that the buyers will purchase 1.3 acres of the property, and affixes geographic boundaries to the area in question. The purchase price is identified as $150,000, with an initial deposit of $100,000 having been paid. The remaining $50,000 was to be paid upon inclusion of the buyer on the title of the property, with a completion date of July 31, 2017.

40. The purchase agreement goes on to set out that the buyer will have tenancy in common with the seller on the total land area, with real and beneficial ownership of the total 1.3 acre area. It further sets out that the buyer will purchase the 1.3 acre area, the shared interest.

41. On July 27, 2017 [Individual 1] wrote to Mr. Tortorelli and indicated that she wished to rescind the purchase and requested that Mr. Tortorelli refund the money that the [Purchasers] had paid to date.

42. Mr. Tortorelli replied, also on July 27, 2017. He indicated that:

> It is too far and too late [to] do that. The land has been changed and you have started a house there. There are no issues of substance that stop you from finishing this transaction. The excuse you use has no bearing as I only heard from [Lawyer 1] a few days ago. Not one month ago. I understand that you have had a life change and perhaps changed your mind but this is not and will not be left on me. I will be meeting with the lawyers tomorrow and will act on their advice…

43. Despite the indications from [Individual 1] regarding her desire to rescind the purchase, construction continued on the house being built on what was to be the [Purchasers]' portion of the property.

44. On September 29, 2017, a lawyer for Mr. Tortorelli wrote to [Individual 2] and indicated that he was in the process of drafting the necessary documents to put [Individual 2] on title of the property.

Complaint to OSRE

45. [Manager 1] is the current manager of real estate development with BCFSA. Previously, he held the same position at the former OSRE, until that entity was integrated into BCFSA in August of 2021.

46. [Manager 1] provided evidence regarding the manner in which the Superintendent became aware of the complaint with respect to the property.

47. [Manager 1] indicated that in July 2017 he had been contacted by [Lawyer 1], a lawyer who [Manager 1] knew to practice primarily in the area of real estate law in Revelstoke, B.C. [Manager 1] indicated that [Lawyer 1] had reported, in a July 20, 2017 email, that he had a client who may be engaging in a transaction for a shared interest in land, and that he wanted to know [Manager 1]'s view as to whether REDMA would apply to the transaction in question. In that July 20, 2017 email to [Manager 1], [Lawyer 1] attached the contract of purchase and sale and the services agreement.

48. [Manager 1] indicated that he had reviewed the contract of purchase and sale as well as the services agreement provided by [Lawyer 1], and that based on that review and the email from [Lawyer 1], he had considered whether REDMA applied to the transaction between [Individual 1] and Halcyon. Specifically, [Manager 1] noted that although neither the contract of purchase and sale nor the services agreement referred to a shared interest in land, the documents had left him with the impression that the purchase may involve a shared interest in land which may be captured by REDMA.

49. [Manager 1] noted that he had concerns that if REDMA did apply, it may not have been complied with due to the fact that the contract of purchase and sale did not refer to disclosure statements required by REDMA. [Manager 1] further indicated that he was also concerned that the information from [Lawyer 1] appeared to indicate that the owner was not holding the deposit in trust as required by REDMA.

50. The following day, July 21, 2017, [Lawyer 1] sent another email to [Manager 1]. In that email [Lawyer 1] indicated that [Individual 1] had provided him with a second document, entitled "Purchase Agreement – Shared Interest in Land", dated July 1, 2017 (the "purchase agreement"

described above), which [Lawyer 1] attached to his email. [Lawyer 1] indicated that his understanding was that the purchase agreement called for completion of the transaction on July 31, 2017, with [Individual 1] to provide a further $50,000 to close, in addition to the $100,000 she had already paid to the seller, Halcyon.

51. [Manager 1] indicated that upon reviewing the purchase agreement, which expressly referred to the purchase of a shared interest in land, he came to the conclusion that REDMA applied to the transaction between [Individual 1] and Halcyon.

52. [Lawyer 1] continued to forward [Manager 1] a number of emails between [Individual 1] and Mr. Tortorelli over a number of days from July 21 to July 28, 2017.

53. Having reviewed all of the information provided to him by [Lawyer 1], [Manager 1] wrote to the respondents on July 28, 2017.

54. In that letter [Manager 1] indicated that it had come to OSRE's attention that Halcyon may have been marketing shared interests in land such that the offering was governed by REDMA. [Manager 1] noted that REDMA governed a development property involving two or more shared interests in land, and that developers marketing any development property, including any two or more shared interest in land was required to comply with REDMA, including the filing of a disclosure statement and providing a copy of that disclosure statement to each purchaser before entering into a purchase agreement. The July 28, 2017 letter further noted that REDMA required that purchaser deposits be held in trust by a lawyer, notary public, or real estate brokerage.

55. [Manager 1] requested that the respondents provide a written undertaking, by August 4, 2017, that the property would not be sold, offered for sale, or offered for lease with a term exceeding three years, unless the developer filed the necessary disclosure statement.

56. [Manager 1] indicated that upon sending that July 28, 2017 letter, his expectation was that if the developer did not believe that REDMA applied, the developer would inform OSRE of that fact. [Manager 1] indicated that his intention in sending the July 28, 2017 letter to the respondents was to protect any future prospective customers.

57. [Manager 1] received an email in reply from Mr. Tortorelli on August 4, 2017. In that email Mr. Tortorelli indicated that he would "get the form 11 disclosure done as soon as possible". Mr. Tortorelli further indicated that "no further marketing of that property will occur without all property documentation."

58. Mr. Tortorelli further indicated in an August 29, 2017 email to [Manager 1] that he had hired a lawyer, that he had decided "not to split the property as we discussed", and that he was looking at other options and waiting on instructions from his lawyer.

59. [Manager 1] engaged in email correspondence with Mr. Tortorelli's lawyer in September 2017, requesting updates on the undertaking and disclosure statements requested in the July 28, 2017 letter. On October 2, 2017 [Manager 1] received an undertaking signed by Mr. Tortorelli and Halcyon's other director, [Director 1]. The undertaking was not dated, however, and as a result [Manager 1] requested an undertaking with the date entered.

60. Having not received a dated undertaking or disclosure statement, OSRE issued, on February 22, 2018, a Notice to Produce Records pursuant to section 25(2)(b) of REDMA. That Notice to Produce required that the respondents produce records including but not limited to marketing materials, disclosure statements, copies of all agreements of purchase and sales, copies of cheques and receipts regarding payments made by purchasers, and copies of bank account statements, including any trust account statements showing deposits of purchase monies.

61. Mr. Tortorelli replied to OSRE by email on March 5, 2018. He indicated in that email that the property was not for sale and was therefore not being marketed, and that there were no marketing materials or any other materials that OSRE had requested in the Notice to Produce. Mr. Tortorelli wrote:

> …We thus do not have any marketing materials, or any of the other items that you request in your letter. Halcyon Point has received no funds for sales from this lot. I did allow an employee of ours to build a house on the property and the same lawyers are writing up a disclose for that, as well as a co-owners agreement and I have been assured that it will be finished in the next two weeks. As soon as it is It will be forwarded to your office.

62. On April 1, 2018, legal counsel for the respondents wrote to OSRE and indicated that:

> There are no marketing materials as my clients have never marketed the Development to the general public. My client agreed to allow the parents of one of their employees to build a cabin on the Development and they would transfer a shared interest in the Development to them for $50,000. My clients intend to retain ownership of the remaining shared interest. This was a private arrangement that never involved marketing or soliciting purchasers from the general public. There was never any intention to sale any more than this one shared interest. My clients intend to apply to subdivide a lot for sale on the Development where the purchaser's cabin is located and transfer title to them. My clients were unaware that the sale of one shared interest by a private sale would require that they file a Disclosure Statement.

63. Legal counsel for the respondents further indicated in that April 1, 2018 letter that the [Purchasers] had not paid any money to the respondents for the shared interest in land. Rather, according to the respondents:

> A related company of Halcyon Point Developments ULC prepared the ground and constructed services for the cabin [and] the Development and the purchaser paid for this work.

64. On May 4, 2018 OSRE received a disclosure statement from Halcyon regarding the property. On June 15, 2018 OSRE wrote to Halcyon's legal counsel indicating that there were deficiencies in the disclosure statement. [Manager 1] indicated that to his knowledge the disclosure statement was never revised, but that OSRE had eventually received from the respondents an undertaking to cease marketing on June 20, 2018, and that he had been satisfied that this undertaking would protect any subsequent purchasers.

65. [Manager 1] further indicated that he had referred the transaction involving the [Purchasers] to OSRE's investigations department.

[Individual 1]

66. [Individual 1] is a paramedic and educational assistant. She testified that she had, from around 2014/2015 until 2017, worked at the Halcyon Point Hot Springs operated by the respondents. The Halcyon Point Hot Springs are located at a separate location approximately two kilometers to the south of the property.

67. On [Individual 1]'s evidence, she began, in the spring of 2015, to discuss with Mr. Tortorelli the possibility of purchasing a portion of the property. [Individual 1] indicated that she had witnessed Mr. Tortorelli trying to sell properties to other people, and that he would bring people by the Hot Springs and show them different areas that could be purchased. [Individual 1] stated that she had also witnessed Mr. Tortorelli taking people to the property, and that she considered that he had marketed the property to persons other than herself.

68. [Individual 1] indicated in her evidence that her original agreement with the respondents was the purchase of 1.3 acres of the property, as well as rights to the hot springs water and fresh water. [Individual 1] indicated that she understood this to be an "outright purchase" for the price of $150,000, and that she had intended to make that purchase with her parents. [Individual 1] indicated that she had not intended to purchase a shared interest in land, or to be part of a strata. She stated that she had wanted to buy the property and develop a house on it on her own.

69. However, [Individual 1] also testified that throughout the transaction process the nature of the purchase kept changing. She stated that she had understood that the property was all subdivided, but that the more she questioned Mr. Tortorelli regarding the property, the more confusing things became. [Individual 1] indicated that eventually there became a question of whether Mr. Tortorelli could in fact sell the property that she wished to purchase. [Individual 1] noted that she had initially thought that the property could be subdivided, but that she came to ultimately understand that was not the case.

70. [Individual 1] indicated she had written to Mr. Tortorelli on May 24, 2017 due to the fact that Mr. Tortorelli had failed to show proof of what he was allowed to sell at the property. She noted that subsequently, around June 21, 2017, she had attended BC Services and determined through a search that the 41 foot trailer she was to have purchased as a result of the $25,000 provided in November 2016 had a PPSA security agreement registered against it. [Individual 1] indicated that she took that finding to mean that the trailer was not able to sold to her outright and that Mr. Tortorelli would not be able to sell it to her. [Individual 1] indicated that she had informed Mr. Tortorelli of her findings and asked for her money back, and that they had agreed that Mr. Tortorelli could take the $25,000 off of the amount she owed on the property.

71. When asked about the contract of purchase and sale, [Individual 1] noted that the initial portion setting out the details of the parties and the purchase price had been completed by Mr. Tortorelli. [Individual 1] indicated that she did not believe that she had signed the contract in November 2016, but more likely in the spring of 2017.

72. With respect to the services agreement, [Individual 1] indicated that she and her family had drafted that document. She explained that Mr. Tortorelli had provided her with documents used

by other developers, and that she had relied on those documents to draft the services agreement. [Individual 1] noted that Mr. Tortorelli had changed the seller from Halcyon to "Tortorelli and [Company 2]". [Individual 1] indicated that, from her perspective, the purpose of the services agreement was to document the work that was being done and to ensure that the work was completed. [Individual 1] indicated that she, [Individual 2], and Mr. Tortorelli had all signed the services agreement at the same time.

73. With respect to the purchase agreement, [Individual 1] indicated that she had again used another developer's agreement (again provided by Mr. Tortorelli) as a reference. [Individual 1] indicated that the purchase agreement was signed by the parties at the same time as the services agreement.

74. [Individual 1] indicated that by late July 2017 she had become concerned that the "whole situation" in respect of the purchase of the portion of the property was not "legit", and that it was for that reason she had sought the services of the lawyer, [Lawyer 1].

75. [Individual 1] indicated that when she wrote to ask Mr. Tortorelli for recission of the purchase agreement and contract, she did so due to the fact that she felt it was in her best interest to end the agreement. Specifically, [Individual 1] indicated that Mr. Tortorelli had failed to provide supportive documents indicating his ability to sell her the portion of the property, and that he was not fulfilling his end of the contract.

76. [Individual 1] stated that by the time the civil claim was filed in the spring of 2018, she was no longer interested in acquiring an interest in the property.

[Individual 2]

77. [Individual 2] testified that he and [Individual 1] began discussing the purchase of a portion of the property in the summer of 2016. He indicated that he had subsequently discussed the matter of such a purchase with Mr. Tortorelli while on Mr. Tortorelli's patio at Halcyon Hot Springs. [Individual 2] explained that he had a budget of approximately $350,000-400,000, which would be used to purchase a portion of the property and to construct a home for [Individual 1]. [Individual 2] indicated that he had anticipated spending $150,000 on the land and $250,000-300,000 on construction of the home.

78. [Individual 2] explained that his understanding of the land purchase was that he would provide $150,000 for the purchase of the portion of the property, and pay for materials, and that Mr. Tortorelli would do the work to put the services in on the property. He confirmed that he expected to obtain the 1.3 acre lot on the property, with services, for $150,000. [Individual 2] confirmed, in cross-examination, that it was likely that Mr. Tortorelli had informed him that the cost of the installation of the services, including roads, water supply, and electrical, was going to cost more than $150,000. He indicated, however, that his understanding was that the services being installed would not only benefit the portion of the property he was purchasing, but the land on the remainder of the property. [Individual 2] denied that it appeared that he was paying for the services to develop the land and in return receiving the land for free.

79. [Individual 2] indicated that he had understood that they would be buying a 1.3 acre lot, outright, and that the lot would have a pad for his trailer.

80. [Individual 2] noted that as the property was not surveyed, they had difficulty establishing where the lot was. He indicated that eventually he did put a down payment on the portion of the property that was to constitute their 1.3 acre lot, and that construction had started on a trailer pad, as well as a house. [Individual 2] described the down payment as the payment of the $5,000 in November 2016 to "get the ball rolling", with the expectation that Mr. Tortorelli would let him know when further money was required.

81. [Individual 2] indicated that he had never been interested in obtaining a shared interest in the property. He acknowledged, however, that documents were prepared indicating the purchase of a shared interest in land. [Individual 2] acknowledged having signed both the services agreement and the purchase agreement. [Individual 2] reiterated that his understanding was that the purchase price of the portion of the property was $150,000.

82. [Individual 2] noted that he had provided a $75,000 deposit for the land on June 1, 2017, in order to indicate that everyone was serious about the purchase of the portion of the property proceeding. Of interest, [Individual 2] noted that he was never really very clear as to how the transaction was going to work, and that, in his view, the purchase agreement was never a "very valid document", and that he had just kind of gone along with it. [Individual 2] indicated that he had assumed that the services agreement and the purchase agreement had been prepared by Mr. Tortorelli.

83. [Individual 2] noted that he had also made payments of approximately $22,500 for construction and forming of the house on the portion of the property the [Purchasers] were seeking to purchase (the "[Purchasers] portion"). That payment occurred in mid-June 2017. A June 14, 2017 email from Mr. Tortorelli to [Individual 2] set out expenses for excavation of a house pad, as well as the construction of forms and concrete for the foundation of a house on the [Purchasers] portion.

84. [Individual 2] agreed, on cross-examination, that as of the summer of 2017 the goal was to get the house to lock up before the winter of 2017. He further acknowledged that [Individual 1] and her then boyfriend had separated, likely in the fall of 2017, but stated that the termination of that relationship was not the trigger which caused the [Purchasers] to not wish to proceed with the purchase of the portion of the property. [Individual 2] indicated that he had continued to do work on the portion of the property through the summer of 2017, as he continued to believe at that time that he was going to have legal title to the land.

Dale Tortorelli

85. Mr. Tortorelli indicated that [Individual 1] had commenced working for Halcyon in 2015.

86. Mr. Tortorelli indicated that he had initially purchased the property with a view to building a small cabin on the property. He stated that he did not have any specific plans, but considered that, down the road, once the Halcyon Point Hot Springs subdivision had been completed, he could have considered the property being another subdivision.

87. With respect to the agreement between the respondents and the [Purchasers], Mr. Tortorelli indicated that the September 28, 2016 email, which indicated that Halcyon Point would "sell one of the north property lots to you for a price of 150,000" was based on the fact that he considered $150,000 was the amount it would cost to get the portion of the property ready, and he and

[Individual 2] had already discussed that amount. Mr. Tortorelli acknowledged that the September 28, 2016 email did not indicate that the $150,000 was for the installation of services, but he suggested that that fact was inferred. Mr. Tortorelli indicated that in the September 28, 2016 email he considered the references to the house site to be the site upon which the trailer was to be moved, not the site on which the house was eventually constructed.

88. Mr. Tortorelli acknowledged that the September 28, 2016 email appeared to address the sale of a portion of the property. He stated, however, that he had not intended, in that email, to indicate that there was a subdivided lot. Rather, he had meant that there was a building lot. On Mr. Tortorelli's evidence, it was well known to the [Purchasers] that there was only one lot. Mr. Tortorelli indicated that he had agreed to the price of $150,000 as he understood the [Purchasers] could not go over that amount.

89. When asked about the contract of purchase and sale, Mr. Tortorelli explained that he considered that he had not in fact offered to sell [Individual 1] a 1.3 acre interest in the property. Rather, on Mr. Tortorelli's explanation, the $150,000 payment was for the installation of services on the property, and the giving of the shared interest to the property would in fact be free. Mr. Tortorelli indicated that he was happy to provide the [Purchasers] with an interest on the property's title.

90. Mr. Tortorelli indicated, with respect to the purchase agreement, that he understood a shared interest in land to be when one had a partner in a property. He indicated that the parties were attempting to construct a home for [Individual 1] before winter of 2017, and that they would write up a shared interest in the property when they were legally allowed to do so. Mr. Tortorelli indicated that he wanted to ensure that [Individual 1]'s interest in the property was protected. He acknowledged that [Individual 1] had asked to purchase a portion of the property, and he indicated that he had informed her that she would end up with legal ownership.

91. Mr. Tortorelli indicated that from his point of view the property was a residential property, as he had planned to build a residence on it. He noted that at the time, there was in fact no specific zoning on the property. He indicated that he had completed a FORM A Freehold transfer document in respect of the property because, from his point of view, the project was proceeding as planned and he wanted to put the [Purchasers] on title. The FORM A completed by Mr. Tortorelli indicated that a 0.16 interest, undivided, was being transferred from Halcyon to the [Purchasers]. Mr. Tortorelli reiterated that he wanted to put the [Purchasers] on title because they had spent a substantial amount of money on construction and had built a house, and Mr. Tortorelli wanted to protect their investment.

92. Mr. Tortorelli stated that, from his point of view, the [Purchasers] at no point provided Halcyon with any money for the purchase of the portion of the property. Rather, the entirety of the money provided by the [Purchasers] was used for site work. Mr. Tortorelli testified that the total cost of improvements in relation to the [Purchasers] portion, including construction of a trailer pad and house pad, roads and ditching, aggregate, trenching and drainage, was more than $150,000. Mr. Tortorelli noted that the installation of services to the property, such as the construction of roads and water lines, was an expensive proposition, and that having the [Purchasers] pay some of that was helpful, as, in the event the property was subdivided in the future, the services would have already been put in place.

93. Mr. Tortorelli acknowledged that he did not have a disclosure statement until advised by [Manager 1] that one was required, at which point he sought a lawyer to prepare one. Mr. Tortorelli also

acknowledged that he had not placed any of the money received from the [Purchasers] into a trust account. He explained that he considered the money to be for the installation of services, rather than for the transfer of the property, and as such, was not required to be placed in trust.

94. With respect to allegations that he had marketed the property, Mr. Tortorelli indicated that he did not consider that he had done so, but that his conversations with [Manager 1] had led him to understand that even thinking about selling constituted marketing. As a result, Mr. Tortorelli considered that he may have been guilty of marketing the property inadvertently. He noted that he had not offered to sell the property. Rather, Mr. Tortorelli indicated that he had offered the [Purchasers] a spot to place the trailer, and subsequently a house, and that he would provide them with a shared interest to protect their investment.

Reasons and Decision

Did the respondents breach section 14 of REDMA by marketing a development unit in the property without preparing a disclosure statement?

95. As set out above, section 14 of REDMA provides that a developer must not market a development unit unless the developer has prepared and filed a disclosure statement respecting the development property in which the development unit is located.

96. In this case, the evidence is clear that the respondents did not prepare a disclosure statement respecting the property until May 4, 2018, well after the transaction between the respondents and the [Purchasers] had commenced in 2016.

97. Given the timeline of events set out above in respect of the interactions between the [Purchasers] and the respondents, I have no difficulty concluding that if I determine that the respondents were developers who marketed a development unit on a development property, a disclosure statement was not prepared prior to the occurrence of such marketing, and that a breach of section 14 of REDMA occurred.

98. A consideration of the definitions of “developer”, “market”, “development unit”, and “development property” as set out in REDMA, and the application of those definitions to the circumstances of this case is therefore required in order to make a determination of whether the respondents were in breach of section 14 of REDMA.

99. I note that, in considering the above noted definitions, that I do not consider that each definition can be considered in isolation. In my view, to do so, would create a situation in which it would not be possible for REDMA to have any practical application.

100. Rather, I consider that my interpretation of sections within REDMA, including the definitions contained therein, must be guided by the modern approach to statutory interpretation, which requires that statutory provisions must “be read in their entire context and, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 at para. 26.

101. As an example of the importance of considering the statutory provisions of REDMA in their entire context within the scheme of the Act, I note that if I were to consider only whether the property met the definition of a “development property” in isolation, without a consideration of the scheme

and object of the Act in question, I would likely be required to conclude, incorrectly in my view, that the property was not a development property.

102. As set out above, REDMA defines a development property as meaning two or more shared interest in land in the same parcel or parcels of land. A development unit is defined to mean a shared interest in land in a development property.

103. I consider that, on a stand alone consideration of the definition of development property, one would rightly conclude that the property was not a development property. During the time period in question from 2016 to 2018, there was only ever one owner of the property, that being Halcyon. While discussions were had, and documents were drafted which appear to indicate the intention of creating a shared interest in land on the property (as set out in the purchase agreement), that shared interest in land did not ever in fact become a reality. I note that the definition of shared interest in land is set out in REDMA as meaning:

> … a person's interest in one or more parcels of land if
>
> (a) the parcel or parcels are owned or leased, directly or indirectly, by the person and at least one other person, and
>
> (b) as part of any arrangement relating to the acquisition of the person's interest, that person's right of use or occupation of the land is limited to a part of the land;

104. On the respondents' submission, given the use of the present tense of the definition in subsection (a) of "shared interest in land", and the fact that there was only ever one owner of the property, that being Halcyon, a strict reading of the definition of a shared interest in land suggests that the property did not ever in fact involve a shared interest in land, and that as a result, the property was not, at any point in time, a development property.

105. I pause to note that I agree with the respondents' submission that the definition of "shared interest in land" as set out in REDMA is a curious one. It is true that subsection (a) of the definition uses the present tense, suggesting a requirement that at the time the definition is applied, the parcel or parcels must in fact currently be owned or leased by the person and at least one other person to constitute a shared interest in land. On the other hand, subsection (b) of the definition appears to suggest a forward-looking aspect to the definition, and specifically that a shared interest in land may be created by an arrangement relating to the acquisition of an interest in land limiting use or occupation to a part of the land.

106. Regardless of the curiousness of the definition of "shared interest in land", I reiterate the need to consider the statutory provisions of REDMA, including the definitions set out in that legislation, in their entire context. I note in this respect that, as provided by section 2, REDMA applies regardless of whether land has actually been divided into development units:

> **2** (1)This Act applies to a developer who markets, in British Columbia, a development unit.
>
> (2)**This Act applies regardless of whether**
>
> **…**

> **(b) the land that a developer owns, leases or has a right to acquire or dispose of**
>
> > **(i) has not yet been divided into development units, or**
> >
> > (ii)is divided once or in successive stages, if, in the opinion of the superintendent, the successive divisions occur reasonably close in time, or
>
> (c) a developer
>
> > (i) markets development units relating to the same development property simultaneously or at different times, or
> >
> > (ii) does not intend to market one or more development units within a development property.
>
> [emphasis added]

107. I consider section 2 to indicate that in a situation in which a property has not, at the time of marketing, been divided into development units, that property is still, for the purposes of the Act, considered to be development property that comprises of development units to which REDMA applies.

108. In sum, I am satisfied that although the property had not, at any point in time from 2016 to 2018, been divided into shared interests of land, it can properly be considered a development property if the respondents were marketing it as land that was going to be divided into development units, including a shared interest in land.

109. I return to section 14. That section provides that a developer must not market a development unit unless the developer has prepared and filed a disclosure statement respecting the development property in which the development unit is located. As I have indicated above, given the application of section 2, I consider it to be clear that regardless of whether a shared interest of land had in fact been created on the property, REDMA would apply as long as the developer was found to have marketed a **potential** development unit.

110. With that context in mind, I turn to the question of whether the respondents breached section 14.

Were the respondents Developers?

111. I find the answer to this question to be “yes”.

112. I consider that Halcyon was a developer as contemplated by REDMA and section 14. There did not appear to be any dispute at the hearing of this matter that Halcyon was a developer, in that it owned and had the right to acquire and dispose of the property. The land title search in evidence before me identified Halcyon as the registered owner in fee simple of the property.

113. I further consider that Mr. Tortorelli was a developer in respect of the property, given that he, as a director of Halcyon, had an indirect right to dispose of the property.

114. I note that the respondents have suggested that given the definition of developer, [Individual 2] should also be found to have been a developer, as he had a right to acquire or dispose of the property, by virtue of the arrangements he had made with Mr. Tortorelli. I do not consider the evidence to support such a conclusion.

115. The respondents submit that [Individual 2] had, upon paying $150,000 toward installation of services at the property, the right acquire a 1.3 acre portion of the property. I do not consider that submission to appropriately capture the nature of the agreements between the parties. Rather, I consider that the parties entered into an agreement in which the respondents would sell a shared interest in land to the [Purchasers].

116. In reaching the above conclusion regarding the nature of the agreement between the respondents and the [Purchasers], I note that in their submissions both BCFSA and the respondents have raised the issue of the credibility and the reliability of the evidence given by the witnesses in this hearing as to the nature of the agreement between the parties.

117. Credibility and reliability are related but distinct concepts. Reliability involves the accuracy of the testimony of a witness. It engages consideration of the ability of a witness to accurately observe, recall, and recount the events in issue. Credibility centers on the honesty of the witness. It involves an assessment of the trustworthiness of their evidence, based on their veracity and sincerity, as well as the accuracy of the evidence provided: *Bradshaw v. Stenner,* 2010 BCSC 1398 at para. 186.

118. A witness who is not telling the truth is not providing reliable evidence. However, the reverse is not the case—a credible witness may still give unreliable evidence. Sometimes an honest witness will be trying their best to tell the truth and will believe the truth of what they are recounting, but nevertheless be mistaken in their recollection*: R. v. H.C.,* 2009 ONCA 56 at paras. 41, 53-56.

119. In assessing the evidence at the hearing, I have kept in mind the often referred to test used by the B.C. Court of Appeal in *Faryna v. Chorny*, 1951 CanLII 252 (BCCA), [1952] 2 D.L.R. 354 (B.C.C.A.) at 357:

> In short, the real test of the truth of the story of a witness in such a case must be its harmony with the preponderance of the probabilities which a practical and informed person would readily recognize as reasonable in that place and in those conditions…Again a witness may testify what he sincerely believes to be true, but he may be quite honestly mistaken.

120. While it was clear at the hearing of this matter that the parties had somewhat differing views as to the precise nature of the agreements between them, I did not find the evidence of any of the parties to have been particularly incredible.

121. [Individual 1], [Individual 2], and Mr. Tortorelli all agreed that, in some fashion, the intention of the agreement between the parties was that there would be construction done on the [Purchasers] portion, that that construction would include the provision of building pads and the installation of services including roads, water, septic, and electricity, and that the [Purchasers] would be placed on title of the property.

122. The precise mechanism of the implementation of that agreement between the parties is what was really in dispute.

123. On [Individual 1]'s evidence, she had, from the beginning, intended to purchase a lot on the property, in fee simple.

124. On [Individual 2]'s evidence, he had discussed with Mr. Tortorelli the purchase of the [Purchasers] portion, with a view to constructing a home for [Individual 1] on that portion.

125. On Mr. Tortorelli's evidence, he and [Individual 2] discussed the cost to get the [Purchasers] portion "ready". He indicated that he had not intended to convey to the [Purchasers] that there would be a subdivided lot, but rather that the [Purchasers] would be paying $150,000 for the installation of services on the lot and that Mr. Tortorelli and Halcyon would then provide the [Purchasers] with a shared interest to the property by registering them on title for free, in order to protect their investment.

126. In my view, each of the witnesses, in providing their evidence, was earnestly attempting to provide the tribunal with their personal understanding of the nature of their agreements. I was not left with the impression that the witnesses were being dishonest in their recollection and understanding of the nature of the agreements between the parties. Rather, I consider that the differences in the evidence of the parties largely lay in their own personal interpretations of the situation.

127. I further acknowledge, as the respondents suggested in their submissions, that the witnesses did not have perfect recall of the details of the events that occurred in 2016 through 2018 in relation to this matter. That said, I generally found that each of the witnesses were largely able to recall their interactions and experiences regarding this matter.

128. There were minor matters that each individual witness was not able to recall with specificity due to the passage of time, such as, for example, [Individual 1]'s inability to specifically recall when she received the disclosure statement issued by Halcyon in 2018. The witnesses were all, however, largely able to provide detailed answers regarding the events that occurred in respect of this matter between 2016 and 2018.

129. Having heard from the [Purchasers] and Mr. Tortorelli regarding their differing personal views as to the nature of their agreements regarding the [Purchasers] obtaining an interest in the property, I consider that significant weight should be placed on the documentary evidence before me.

130. In my view, that documentary evidence clearly demonstrates that the respondents intended to enter into an agreement to sell a portion of the property to the [Purchasers].

131. The September 28, 2016 email from Mr. Tortorelli to [Individual 1] is unequivocal in this respect. That email specifically sets out that "Halcyon Point will sell one of the north property lots to you for a price of $150,000". The email goes on to indicate that there will be shared title on the land, that a small deposit ought to be paid to Halcyon "for the land", and that a payment schedule for the balance could be arranged, with the property paid for or significantly paid down prior to the building of a house.

132. The "small deposit" referred to in the September 28, 2016 email was detailed as a $5,000 deposit for a 1.3 acre lot at the property in the November 28, 2016 email.

133. I consider it to be noteworthy that in neither the September 28, 2016 email, nor the November 28, 2016 email, did Mr. Tortorelli indicate that the [Purchasers] would be receiving their interest in the [Purchasers] portion for free, and that they would merely be paying for the installation of services. To the contrary, both the September 28 and November 28, 2016 emails clearly set out that the [Purchasers] would be purchasing the [Purchasers] portion from Halcyon.

134. While I accept that the parties generally understood that Mr. Tortorelli would be using the purchase price of the [Purchasers] portion, that is the $150,000, for the construction of the services on the [Purchasers] portion, I do not consider that understanding to mean that Mr. Tortorelli was simply providing the [Purchasers] with a "gratuitous transfer" as he now submits.

135. Again, I consider the emails, written by Mr. Tortorelli, to make clear the nature of the agreement between the parties. Simply put, the agreement was that the [Purchasers] would be purchasing, from Halcyon, a 1.3 acre portion of the property, for the price of $150,000. That is what Mr. Tortorelli wrote in September 2016. That is also what was written in the contract of purchase and sale. That is also what was written in the purchase agreement. I consider that when parties continuously put the same agreement in writing, there comes a point that the only reasonable conclusion to reach is that the agreement they have written out is in fact the agreement that they in fact intended to make.

136. In reaching that conclusion, I acknowledge that both [Individual 2] and Mr. Tortorelli indicated that they did not feel that the contract of purchase and sale, as well as the purchase agreement, were particularly formal documents. While that may be the case, I do not consider the parties lack of viewing those documents as being "formal" to alter the fact that the overarching agreement between the parties appears to have been that the [Purchasers] would pay $150,000 for a 1.3 acre portion of the property.

137. Given my conclusions above, I do not consider the evidence to indicate that [Individual 2] should be found to have been a developer of the property.

138. Rather, I consider the evidence to show that [Individual 2], along with [Individual 1] and [Individual 3], was an intended purchaser of a shared interest in the property.

Did the respondents Market the Property?

139. I find that the respondents did market the property.

140. The definition of "market" in REDMA is broad. It includes not only to offer to sell or lease, but also to:

> …engage in any transaction or other activity that will or is likely to lead to a sale or lease.

141. On BCFSA's submission, Mr. Tortorelli, on behalf of Halcyon, offered to sell the [Purchasers] a shared interest in land in the property, that is a 1/16th share/1.3 acre parcel on the property limited to the geographic coordinates as set out in the purchase agreement.

142. BCFSA notes that the purchase agreement set out a purchase price for the shared interest in land, and that the [Purchasers] would purchase the shared interest for the purchase price of

$150,000. BCFSA's position was that by entering into the purchase agreement with the [Purchasers], Halcyon had offered to sell a shared interest in land in the property.

143. The respondents submit that no sale was in fact contemplated between the parties in this case. Rather, the respondents take the position that the only sale occurring was the sale of construction services, and that the transfer of land was a gratuitous transfer.

144. As I have indicated above, I am of the view that the documentary evidence provides a clear explanation of the nature of the transaction in this case. I find that Halcyon offered to sell a 1.3 acre shared interest in the property to the [Purchasers]. The September 28, 2016 email, in my view, clearly demonstrates that offer.

145. I reject the respondents' position that the only sale occurring in this case was the sale of construction services. That position is inconsistent with the September 28, 2016 email, the November 28, 2016 email, the contract of purchase and sale, and the purchase agreement. In my view, each of those documents makes clear that the agreement between the parties was that the [Purchasers] would pay $150,000 to Halcyon for the purchase of the [Purchasers] portion.

146. I have no doubt, based on the evidence provided by the [Purchasers] and Mr. Tortorelli, that discussions regarding the use to which the $150,000 would be put occurred between them. I consider it to be more likely than not that the [Purchasers] understood that Mr. Tortorelli intended to use the $150,000 identified as the purchase price of the property to pay for the installation of services to their portion of the property.

147. I do not, however, consider this fact to mean that the sale occurring in this case, or in the submission of the respondents, the "only sale", was the sale of construction services.

148. Again, all of the documents in this case, including the emails written by Mr. Tortorelli, make clear that a portion of the property was being sold to the [Purchasers], and that the price of that portion of the property was $150,000. While I acknowledge the respondents' submission that it would not make sense for Halcyon to have marketed a fully serviced 1.3 acre lot for the "paltry sum of $150,000", the documentary evidence before me suggests that is precisely what occurred.

149. In summary, I consider the evidence to support a conclusion that the respondents offered to sell a portion of the property to the [Purchasers] as a shared interest in the property. I consider that in doing so, the respondents marketed a development unit to the [Purchasers] as contemplated by section 14 of REDMA. As the respondents did not prepare or file a disclosure statement prior to engaging in that marketing activity, I find that the respondents were in breach of section 14 of REDMA, and that the allegation set out in item 1 of the Notice of Hearing has been made out.

Did the respondents breach section 18 of REDMA as described at item 2 of the Notice of Hearing?

150. As set out above, a developer who receives a deposit from a purchaser in relation to a development unit must promptly place the deposit with a brokerage, lawyer, notary public or prescribed person who must hold the deposit as trustee in a trust account.

151. BCFSA takes the position that the [Purchasers] provided a deposit in relation to their potential purchase of the property to Mr. Tortorelli, who received that deposit on behalf of Halcyon.

152. The respondents submit that Halcyon did not ever receive any deposit funds from the [Purchasers]. The respondents point to the fact that payments made by [Individual 2] were made to different companies owned by Mr. Tortorelli which were engaged in the service installation and construction work on the property, but that those payments were not made to Halcyon Point Development ULC. On that basis, the respondents submit that that the payments made by [Individual 2] ought not to be accepted to have been deposits in relation to the development unit (that is, the shared interest in land).

153. Once again, I turn to the documentary evidence before me. In each of the September 28, 2016 email, the November 28, 2016 email, the contract of purchase and sale, and the purchase agreement, there is reference to the [Purchasers] making deposit payments towards the purchase of a portion of the property.

154. Again, in the September 28, 2016 email Mr. Tortorelli requests that the [Purchasers] provide a "small deposit to Halcyon Point for the land". In the November 28, 2016 email Mr. Tortorelli wrote that he had received from the [Purchasers] $30,000, including "$5,000 for deposit on one acre" of the property.

155. I pause to note that there was much discussion at the hearing of this matter regarding the purpose to which that $5,000 was ultimately applied. As set out in the November 28, 2016 email, $25,000 of the $30,000 Mr. Tortorelli had received from the [Purchasers] was to be for the purchase of the 41 foot trailer, with the remaining $5,000 to be a deposit on the purchase of one acre of the property. Ultimately, in June 2017, the [Purchasers] concluded that the trailer could not be purchased due to an outstanding lien on that item. Whether or not the trailer could have in fact been purchased by the [Purchasers] in spite of that lien is not relevant to the matter at hand.

156. On the evidence of all of the parties, once the [Purchasers] had determined in June 2017 that the trailer could not be purchased, the parties then agreed that of the $30,000 that had already been received from the [Purchasers], the $25,000 that had been identified in the November 28, 2016 email as being for the purchase of the trailer would now serve as part of the deposit on the property, with the $5,000 identified in the November 28, 2016 email as being a deposit on the purchase of the one acre on the property largely being applied as rent for [Individual 1]'s use of the trailer over the previous months.

157. I note, in passing, that the fact that the parties, in or around June or July 2017 appear to have casually determined that the monies that had already been paid by the [Purchasers] to Mr. Tortorelli would take on a new form with some of those monies now forming part of a deposit (as suggested in the purchase agreement) and some of those monies now constituting the payment of rent, demonstrates the importance of deposit monies being held in trust.

158. On the evidence before me, I am satisfied that the [Purchasers] believed that in providing the $5,000 in 2016 they were providing deposit funds towards the purchase of the development unit, that is, the 1.3 acre portion of the property to which they would have a shared interest. I note that this belief was not only consistent with what Mr. Tortorelli wrote in the November 28, 2016 email, but also was consistent with the wire transfer request document that [Individual 2] completed on October 7, 2016. In that wire transfer request document [Individual 2] specifically noted that the reason for sending the wire transfer was "buying a trailer/down payment on a lot".

159. Similarly, when completing a wire transfer request document on June 1, 2017 in respect of the $75,000 payment to Mr. Tortorelli, [Individual 2] indicated that the reason for sending the wire transfer was a “property purchase”. Again, this is consistent with the indication in the contract of purchase and sale that the $75,000 was a deposit towards the purchase of the portion of the property.

160. In summary, I am satisfied that [Individual 2] transferred monies to Mr. Tortorelli with the purpose of providing a deposit towards the purchase of the [Purchasers] portion of the property. On the evidence before me, while it is clear that [Individual 2] transferred the monies in question to various corporate entities owned by Mr. Tortorelli, I agree with the submission of BCFSA the deposit monies were provided to those entities at Mr. Tortorelli’s direction when they in fact ought to have been held in trust as required by REDMA.

161. I note that I concluded above that the [Purchasers] and Mr. Tortorelli likely had discussions regarding the use to which the $150,000 would be put, and that it was more likely than not that the [Purchasers] understood that Mr. Tortorelli intended to use the $150,000 identified as the purchase price of the property to pay for the installation of services to their portion of the property.

162. I do not consider that understanding to alter my conclusion that the $5,000 provided in October 2016 and the $75,000 provided in June 2017 were deposits provided by the [Purchasers] towards the purchase of the [Purchasers] portion of the property. I do not consider the [Purchasers], as purchasers of a portion of the property, were required to know that the developer was required to put those deposit monies in trust. That responsibility lay with the respondents. The fact that the parties may have discussed an improper use of the funds provided by the [Purchasers] – that is, that rather than being held in trust, those funds would be used for construction purposes – does not, in my view, alter the fact that the funds provided by the [Purchasers] were in fact deposits.

163. As those deposits were not put into trust once received by Mr. Tortorelli’s companies, I consider that the respondents were in breach of section 18 of REDMA, as contemplated by item 2 of the Notice of Hearing.

Should the proceeding against the respondents be stayed due to delay?

164. In their closing submissions the respondents raised, for the first time, the issue of delay.

165. The Supreme Court of Canada has described, in *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, that there are two ways in which delay may constitute an abuse of process:

> [41] The first concerns hearing fairness. The fairness of a hearing can be compromised where delay impairs a party’s ability to answer the complaint against them, such as when memories have faded, essential witnesses are unavailable or evidence has been lost: *Blencoe*, at para. 102; D. J. M. Brown and J. M. Evans, with the assistance of D. Fairlie, *Judicial Review of Administrative Action in Canada* (loose-leaf), at § 9:57.
>
> [42] This is not what is in issue in this appeal. Rather, the Court is concerned with a second category of abuse of process. Even when there is no prejudice to hearing fairness, an abuse of process may occur if significant prejudice has come about due to inordinate delay: *Blencoe*, at paras. 122 and 132.

166. The respondents, in their submissions, focused on the first category set out above. Specifically, the respondents submitted that the witnesses in this case had all demonstrated difficulty recalling what had occurred, when it had occurred, and the meaning, intent, and significance of various historic interactions between the parties. The respondent submitted that some of the evidence provided by the [Purchasers] was "so muddled by the passage of time as to render it uncommonly difficult to adduce the true nature of the facts."

167. The respondents take the position that given the difficulties demonstrated by the witnesses in providing evidence, it would risk bringing the administration of justice into disrepute if the trier of fact was compelled to draw conclusions from an evidentiary matrix so compromised by the passage of time. In the respondents' submission, the delay in bringing this matter to a hearing amounts to an abuse of process, and the case against them ought to be dismissed.

168. BCFSA submitted that the respondents' ability to answer the complaint against them had not been compromised. BCFSA noted that the parties were able to recall the salient details of the transaction relating to the property.

169. As I have indicated above at paragraphs 126-128, I consider that although the witnesses who testified at the hearing of this matter did not have perfect recall, they were generally able to recall their interactions and the relevant details regarding the transaction at issue in this matter. While each of the witnesses admitted on occasion to being unsure of very specific details, they were largely able to provide lengthy and detailed answers regarding the interactions between the parties during the period from 2016 through 2018.

170. Having considered the submissions of the respondents, I find that the respondents' ability to answer the complaint against them was not compromised or impaired as a result of the delay in the bringing this matter to a hearing. I therefore find that an abuse of process of did not occur in relation to the fairness of the hearing.

171. The respondents did not make submissions regarding the second category of abuse of process discussed by the court in *Abrametz* relating to inordinate delay. Specifically, I note that the respondents did not make submissions regarding whether the delay in bringing this matter to hearing was inordinate, nor did the respondents make submissions regarding what, if any, significant prejudice they had experienced if an inordinate delay had occurred, such that an abuse of process ought to be found to have occurred.

172. In the absence of such submissions, I do not consider it necessary to consider the matter further at this time. I consider that it would remain open to the respondents to raise that issue in making their submissions on sanctions.

Conclusion

173. I find that the respondents, Halcyon Point Development ULC and Dale Tortorelli:

- Breached section 14(1) of REDMA when they marketed a development unit in a development property legally described as [Property 1] without preparing a disclosure statement; and

- Breached section 18(1) of REDMA when they received a deposit from a purchaser in relation to a development unit in the development property legally described as [Property 1] without placing that deposit in the trust account of a brokerage, lawyer, notary public or trustee.

Sanctions

174. I retain jurisdiction to determine issues of sanctions orders and expenses, and will hear evidence and submissions from the parties concerning orders under section 30 of REDMA, and expenses under section 31 of REDMA, and any other actions available to the Superintendent, at a date, time and place to be set.

175. BCFSA and the respondents must advise the Hearing Coordinator, by April 26, 2024 of any request for an in-person hearing respecting sanctions, and why an in-person hearing is necessary or desirable.

176. If an in-person hearing is directed, the Hearing Coordinator will contact the parties to arrange a suitable hearing date.

177. Unless an in-person hearing is directed, any further evidence will be received through affidavits, and submissions respecting sanction will be received in writing. Subject to further directions, the parties must provide affidavit evidence and written submissions to the Hearing Coordinator and to each other as follows:

- BCFSA must provide any affidavits and written submissions by May 3, 2024;
- The Respondents must provide any responding affidavits and written response submissions by May 24, 2024;
- BCFSA must provide any reply affidavits and written reply submissions by May 31, 2024.

178. Any party may apply to vary these dates, seek leave to cross-examine on an affidavit, or address other procedural matters.

179. Once I have arrived at a decision on sanctions issues, I will issue additional reasons (a "Decision on Sanctions & Expenses") that will form a part of this decision, make an order under section 30 of REDMA, and make such other orders under REDMA as I may deem appropriate.

180. Once an order has been made under section 30 of REDMA, the respondents will have a right to appeal to the Financial Services Tribunal, pursuant to section 37 of REDMA. The respondents will have 30 days from the date of the sanction decision: *Financial Institutions Act*, RSBC 1996, ch 141, section 242.1(7)(d) and *Administrative Tribunals Act*, SBC 2004, section 24(1).

Issued at Kelowna British Columbia, this 16 day of April, 2024

'Original signed by Andrew Pendray"

_____

Andrew Pendray
Chief Hearing Officer