IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Peters v. East 3rd Street North Vancouver Limited Partnership,* 2023 BCSC 879

Date: 20230524
Docket: S211133
Registry: Vancouver

Between:

Blair Michael Peters

Plaintiff

And

East 3rd Street North Vancouver Limited Partnership and Kaminsky and Company Law Corporation

Defendants

And

East 3rd Street North Vancouver Limited Partnership

Third Party

- and -

Docket: S212292
Registry: Vancouver

Between:

Peter D. McDonald and Sandra J. McDonald

Plaintiffs

And

East 3rd Street North Vancouver Limited Partnership and Kaminsky & Company Law Corporation

Defendants

Before: The Honourable Mr. Justice Crerar

Reasons for Judgment

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Place and Dates of Hearing:	Vancouver April 13-14, 2023
Written submissions	May 19, 2023
Place and Date of Judgment:	Vancouver May 24, 2023

Table of Contents

I. INTRODUCTION

[1] Does “must” mean “must”?

[2] Specifically, must a trustee release the purchaser’s deposit for a strata unit to the developer upon receipt of the developer’s certification that the purchaser has failed to provide all required deposits, and that the developer has elected to cancel the purchase agreement, under s. 18(4) of the *Real Estate Development Marketing Act*, SBC 2004, c 41 [**REDMA**]? Must the trustee release it even if on notice that there exists a dispute between the developer and purchaser about the completion of the unit and the veracity of the certification? Must the trustee release the deposit even though the Purchase and Sale Agreements (the “**purchase agreements**”), article 4.3, and REDMA, s. 18(2)(g), expressly permit payment of funds into court should a dispute arise?

[3] The present summary trial arises from two actions brought by the purchasers (the McDonalds, and Mr Peters) against the developer (East 3rd Street North Vancouver Limited Partnership) and the trustee (Kaminsky & Company Law Corporation).[1] The Court and the parties agree that this matter is suitable for determination by summary trial: amongst other considerations, the material facts are not in dispute, there are no credibility conflicts, and summary resolution is proportionate to the amounts at stake.

[4] In autumn 2017, the purchasers bought their respective units in the “Evolv 35” townhouse strata project on East 3rd Street, in the Moodyville neighbourhood of North Vancouver. In February 2020, the outside completion date was extended from February 28, 2020 (itself an earlier extension) to June 27, 2020.

[5] As the completion date approached, the development remained largely a construction site, although the developer took the position that the specific building containing the purchasers' units was ready for habitation. On June 26th, the day before the outside completion date, purchasers’ then-counsel (who was neither the purchasers’ present litigation counsel nor their firms) wrote to the trustee that unless the lots were registered, and the occupancy certificates issued, on or before June

27th, they would terminate their purchase agreements and demand a return of the deposits. That day, the trustee (in its co-capacity as the developer's solicitors), replied that the developer had confirmed that occupancy approval would be secured by the closing date of June 29th, and otherwise disagreed with the purchasers' legal and factual assertions.

[6] On June 29th, the trustee (still acting as the developer's solicitors), sent an information package and an interim certificate of occupancy. That same day, purchasers' counsel also invited the developer to send a proposal for resolution of the dispute, despite the statement of termination three days earlier.[2]

[7] On July 4th, the trustee (still acting as the developer's solicitors) sent a link to a video of the units, purporting to verify their readiness for occupation.

[8] On July 7th, the trustee (still acting as the developer's solicitors) followed up with purchasers' counsel; he also advised that the developer was seeking litigation counsel. On July 13th, purchasers' counsel apologised for the silence, and advised that he would send a letter the next week. No letter was sent, however. This was to be the final communication from the purchasers before the deposits were released to the developer, 26 days later.

[9] On July 23rd, the developer, through its new litigation counsel, advised the purchasers that it accepted their repudiation of the purchase agreements, and asserted that they had forfeited their deposits. On July 31st, developer's litigation counsel delivered to the trustee the developer's certification that the conditions under s. 18(4) were satisfied, and requested release of the deposit. On August 4th, the trustee wrote to purchasers' counsel, enclosing the certifications, and advised that under s. 18(4), it was required to release the deposits to the developer: "*[a]s a courtesy, we are giving you notice that on Friday August 7, 2020 we will release to the [developer] the deposits…*". On August 7th, receiving no reply, the trustee released the deposits to the developer.

[10] On August 27, 2020, purchasers' counsel responded to the trustee's August 4th letter, and demanded the return of the deposits. On December 4, 2020, purchasers' counsel delivered a notice of rescission for the purchase agreements to the developer's litigation counsel and to the trustee.

[11] The purchasers argue that the trustee should not have released the deposits to the developer in light of the live dispute between the purchasers and developer, notwithstanding the plain imperative language of "must" in s. 18(4). Instead, the trustee ought to have applied to pay the deposits into court, pursuant to article 4.3 of the purchase agreements, and s. 18(2)(g). By paying the deposits to the developer, the trustee breached his fiduciary duties to the purchasers and, in effect, acted as the developer's agent, contrary to s. 18(2): "[a] trustee under subsection (1) holds the deposit for the developer and the purchaser and not as an agent for either of them". They argue that in s. 18, "must" cannot literally mean "must", lest it lead to the absurdity that a blatantly false developer's certification — for example, asserting completion of a development unit on a lot that the trustee knows remains vacant — would nonetheless trigger the s. 18(4) obligation to release the deposits to the developer. "Must", they say, must be read as directory, rather than mandatory, such that the trustee retains discretion to decline to release the deposits to the developer and, instead, deposit them in court in the face of a dispute, or an apparent inaccuracy in the certification.

[12] For the reasons that follow, the purchasers' claims against the trustee are dismissed. REDMA carefully delineates between mandatory actions, with "must", and permissive actions, with "may", in a manner mandated by, and consistent with the definition of those terms in the *Interpretation Act,* RSBC 1996, c 238. There exists no ambiguity such as to import interpretative principles extraneous to the plain language and context of the statute, such as a presumption against an absurd result. In any case, interpretation of "must" as "must" does not lead to an absurdity, as urged by the purchasers. Interpreting "must" as "must' does not undermine REDMA's consumer protection objectives: developers who file inaccurate s. 18 certifications may face criminal, civil, and regulatory proceedings. Further, reading

the s. 18(4) "must" as "may" would put a trustee in an impossible situation of second-guessing and investigating the veracity of the developer's certification, undermining the efficacy and efficiency of REDMA, and placing trustees, rather than developers, in litigation cross-hairs for any failures under REDMA.

II. DECISION AND DISCUSSION

A. Interpretation of REDMA

[13] Section 18 governs the trustee's handling of deposits received from the purchaser:

> **Handling deposits**
>
> **18** (1) 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.
>
> (2) A trustee under subsection (1) ***holds the deposit for the developer and the purchaser and not as an agent for either of them*** and must not release the deposit from trust except as follows:
>
> (a) if the money was paid into the trust account in error;
>
> (b) to the purchaser with the written consent of the purchaser and the developer;
>
> (c) in accordance with subsection (3) or (4);
>
> (d) in accordance with section 19 *[developer use of deposit]* of this Act;
>
> (e) in accordance with section 21 *[rights of rescission]* of this Act;
>
> (f) in accordance with section 32 *[unclaimed money held in trust]* of the Real Estate Services Act;
>
> ***(g) in accordance with*** section 33 **[payment of trust funds into court] *of the*** Real Estate Services Act***;***
>
> ***(h) in accordance with a court order;***
>
> (i) in accordance with the regulations under this Act.
>
> (3) A trustee under subsection (1) must release the deposit to the developer if the developer certifies in writing that
>
> (a) the purchaser who paid the deposit has no right to rescission under section 21 *[rights of rescission]*,
>
> (b) if required, the subdivision plan, strata plan or other plan has been deposited in the appropriate land title office,

> (c) the approvals required for the lawful occupation of the development unit have been obtained, and
>
> (d) as applicable,
>
> (i) if all or part of the purchaser's interest in the development unit is registrable in a land title office, the interest has been registered in the appropriate land title office and an instrument evidencing the registration has been delivered to the purchaser, or
>
> (ii) if all or part of the purchaser's interest in the development unit is not registrable in a land title office, an instrument evidencing the interest of the purchaser has been delivered to the purchaser.
>
> ***(4) A trustee under subsection (1) must release the deposit to the developer if the developer certifies in writing that***
>
> (a) the purchaser who paid the deposit has ***no right to rescission*** under section 21 *[rights of rescission]*,
>
> (b) ***the purchaser has failed to pay a subsequent deposit or the balance of the purchase price when required by the purchase agreement*** under which the deposit held by the trustee was paid,
>
> (c) ***under the terms of the purchase agreement, if the purchaser fails to pay a subsequent deposit or the balance of the purchase price when required, the developer may elect to cancel the purchase agreement and, if the developer elects to cancel the purchase agreement, the amount of the deposit is forfeited to the developer,*** and
>
> (d) the developer has ***elected to cancel the purchase agreement***.
>
> (5) For the purposes of subsection (2) (f) and (g), the provisions of the Real Estate Services Act referred to in that subsection apply to a trustee as if the trustee were a brokerage.
>
> ***(6) Payment to a person in accordance subsection (2) (b), (c), (d) or (e) discharges the trustee from liability for the deposit in the amount paid out.***
>
> [emphasis added]

[14] *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42 sets out the principles of statutory interpretation:

> 26 In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, ***the words of an Act are to 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.***

> ….
>
> 28 ***Other principles of interpretation*** — such as the strict construction of penal statutes and the "Charter values" presumption — ***only receive application where there is ambiguity as to the meaning of a provision***.
> ….
>
> 29 What, then, in law is an ambiguity? To answer, an ambiguity must be "real"…***The words of the provision must be "reasonably capable of more than one meaning"….***By necessity, however, one must consider the "entire context" of a provision before one can determine if it is reasonably capable of multiple interpretations. In this regard, Major J.'s statement in *CanadianOxy Chemicals Ltd. v. Canada (Attorney General)*, [1999] 1 S.C.R. 743, at para. 14, is apposite: ***"It is only when genuine ambiguity arises between two or more plausible readings, each equally in accordance with the intentions of the statute, that the courts need to resort to external interpretive aids" (emphasis added), to which I would add, "including other principles of interpretation".***
>
> 30 ….It is necessary, in every case, for the court charged with interpreting a provision to undertake the contextual and purposive approach set out by Driedger, and thereafter to determine if "the words are ambiguous enough to induce two people to spend good money in backing two opposing views as to their meaning"….
>
> [underlining in original; emphasis added; citations streamlined]

[15] While no court appears to have examined s. 18(4), two Court of Appeal decisions, each written by Garson JA, applies the interpretative principles above to REDMA. They identify the twin purposes of REDMA: protection of consumers, within the efficient operation of the real estate development sector. The interpreting court, however, must not derogate from REDMA's plain language and resort to external interpretative principles, absent ambiguity.

[16] *Drake v. North Ellis Developments Ltd.*, 2012 BCCA 256, identifies the twin goals of REDMA:

> [38] The *Act* appears to have twin goals: to afford consumers protection whilst also enabling efficient and profitable operation of the real estate development sector, a "key economic driver in British Columbia". The specific provisions under consideration here protect consumers by limiting deposits in respect of condominium units not yet built while permitting developers to market before the commencement of construction.

[17] *Drake* also rejects an expansive interpretation of REDMA contrary to its plain wording:

> [39] ***Mr. Drake argues that permitting a developer to use a deposit bond in the manner done in this case would "subvert the purpose of the legislative scheme", i.e. to protect purchasers***. He argues further that by using a deposit bond, "A developer could secure any amount in advance by way of bond at an early stage, thus compelling the purchaser to close on units they might no longer wish to purchase through fear of financial ruin and exposure to what amounts to a penalty through redemption of the bond."
>
> [40] In my view, ***Mr. Drake's argument requires us to ignore the plain language of the statute. Rizzo Shoes[3] does not stand for the principle that a purposive interpretation permits a court to override clear and unambiguous statutory language.*** The deposit bond is an option offered to a purchaser. The purchaser may accept the option or not. The advantage to the purchaser is the reduction in the amount of the deposit. There is nothing in the statute or the policy statement that mandates a precise structure of an agreement of purchase and sale. The legislation merely restricts the amount of deposit payable during the early marketing phase. It does not otherwise restrict the parties' rights to contract freely. There is nothing nefarious about the deposit bond that would be inconsistent with the overall scheme of the legislation. Mr. Drake freely chose to accept the option of a deposit bond. ***If the Legislature had wished to further restrict the manner in which developers could pre-sell property, it could have done so explicitly.***
>
> [emphasis added]

[18] More recently, *Markin v. Fasken Martineau DuMoulin LLP*, 2019 BCCA 275, similarly rejected an expansive interpretation of REDMA beyond its express and plain wording:

> [73] The crux of the appellants' argument is that REDMA is consumer protection legislation that ought to be interpreted expansively in favour of the consumer so as to achieve its purpose. This Court's decision in *Drake* makes clear, however, ***that the consumer protection purpose of REDMA does not override the express language of the statute or, in this case, the terms of the agreement the parties entered into.*** …
>
> [emphasis added]

B. Interpretation of s. 18(4): "must" means "must"

[19] REDMA contains many instances of where a person (the developer, the purchaser, the superintendent of real estate, the court) "may" or "must" do certain actions: some 79 relevant instances of "must" and 70 relevant instances of "may". For example, s. 15.1(4), concerning phase disclosure statements, distinguishes between the permissive "may" and mandatory "must":

> (4) A ***new purchaser*** who receives a phase disclosure statement ***may*** request in writing a copy of a disclosure statement referred to in subsection (3) (a), (b), (c) or (d), and ***the developer must*** provide to the new purchaser, without charge, a copy of the disclosure statement no later than 30 days after receipt of the request.
>
> [emphasis added]

[20] REDMA, Part 2, Division 5 ("Deposits") contains only two sections: s. 18, under present enquiry, and s. 19, which similarly delineates between "must" and "may":

> **Developer use of deposit**
>
> 19 (2) ***A developer*** who desires to use for the developer's own purposes a deposit the developer has placed with a trustee under section 18 (1), ***must enter into a deposit protection contract*** in relation to that deposit and provide notice of the deposit protection contract to the purchaser in accordance with the regulations.
>
> (3) ***A trustee must pay a deposit*** held under section 18 (1) to a developer who has entered into a deposit protection contract in relation to the deposit on receiving
>
> (a) from an insurer the original or a true copy of the deposit protection contract, and
>
> (b) from the developer a certification, in writing, that the purchaser who paid the deposit has no right to rescission under section 21 [*rights of rescission*].
>
> (4) If a deposit is paid under subsection (3), ***the developer may use that deposit*** only for the developer's own purposes.
>
> [italics in original; emphasis added]

[21] That said, REDMA itself does not define either term.

[22] The *Interpretation Act*, however, does define both terms. Section 29 defines and contrasts the legislative meanings of "must" and "may":

> **"may"** is to be construed as permissive and empowering;
>
> …
>
> **"must"** is to be construed as imperative;
>
> [bolded in original]

[23] Further, the *Interpretation Act*, s. 2(1), provides an overarching interpretative guide to all legislation: its definitions above will apply to REDMA, unless REDMA provides a contrary intention:

> Every provision of this Act applies to every enactment, whether enacted before or after the commencement of this Act, unless a contrary intention appears in this Act or in the enactment.

[24] Apart from the *Interpretation Act,* the jurisprudence abounds with confirmations that "must" in a legal context retains its plain language imperative meaning. For example, *Re Massey-Ferguson Industries Ltd. v. U.A.W., Local 458* (1979), 94 DLR (3d) 743 (ONSC) at 745 states:

> The word "must" is a common imperative. It is hard to think of a commoner. There is no dictionary of stature of which I am aware that accords to the word any other connotation. In its present or future tense ***it expresses command, obligation, duty, necessity and inevitability…***
>
> [emphasis added]

[25] The purchasers point to a line of authority for the proposition that in certain specific contexts, "must" (or, more precisely, its synonym "shall") has been interpreted as "directory" rather than "mandatory": *Blueberry River Indian Band v. Canada (Department of Indian Affairs and Northern Development)*, [1995] 4 SCR 344 at para. 42, citing *Montreal Street Railway Co. v. Normandin*, [1917] AC 170 (PC) at 175:

> When the provisions of a statute relate to the performance of a public duty and the case is ***such that to hold null and void acts done in neglect of this duty would work serious general inconvenience***, or injustice to persons who have no control over those entrusted with the duty, and at the same time would not promote the main object of the Legislature***, it has been the practice to hold such provisions to be directory only*** . . . .
>
> [emphasis added]

[26] While somewhat confusing, this passage is not of general application; it specifically does not illuminate the present dispute. This line of authority does not concern the interpretation of the terms "must" and "shall" in legislation generally. It is, rather, remedial: where a governmental body fails to do something that a statute states it "must" or "shall" do, are its actions and effects void *ab initio*, or merely

voidable, such that they may survive, despite the irregularity? This is clear from the context of *Blueberry River.* Under the heading of "(c) Whether the Surrender Was Invalid for Failure to Comply with Section 51 of the *Indian Act",* the Court concluded that the technical non-compliance with the statute (the failure of chiefs to personally certify the land surrender on oath, even after the land surrender had been validly assented to by the band), despite the statutory "shall", should not invalidate the surrender:

> 43 …I therefore agree with the conclusion of the courts below that the "shall" in the provisions should not be considered mandatory. Failure to comply with s. 51 of the *Indian Act* therefore does not defeat the surrender.

[27] Ruth Sullivan, *The Construction of Statutes*, 7th ed. (Toronto: LexisNexis Canada, 2022) at 4.05 [11], explains this somewhat counterintuitive distinction, while confirming the strong and unambiguous definitions of "must"/ "shall" confirmed in our *Interpretation Act*:

> **"Shall" / "must"**
>
> When "shall" and "must" are used in legislation to impose an obligation or create a prohibition (as in "no person shall"), ***they are always imperative. A person who "shall" or "must" do something has no discretion to decline.*** A person prohibited from doing something is equally devoid of lawful choice. ***The issue that arises in connection with "shall" and "must" is not whether they are imperative, but the consequences that flow from a failure to comply.*** In some legislation, the consequences are clearly set out, as in the Criminal Code or in much legislation that regulates through licensing or prohibition. In other contexts the legislation is silent and it is left to the courts to determine whether non-compliance can be cured.
>
> ***If breaching an imperative provision entails invalidity or a nullity, the provision is said to be mandatory; if the breach can be fixed or disregarded, the provision is said to be directory. The term "directory" is unfortunate in so far as it implies that "shall" is sometimes not imperative, that it sometimes has the force of a mere suggestion.*** The confusion is compounded when "mandatory" and "imperative" are used interchangeably — that is, when "mandatory" is used to indicate that a provision is binding or "imperative". Properly understood, mandatory and imperative are distinct concepts. ***Unless the drafter had made a mistake, "shall" and "must" are always imperative (binding); neither ever confers discretion. But they may or may not be mandatory; that is, breach of a binding obligation or requirement may or may not lead to nullity***. The mandatory-directory distinction reflects the fact that there is more than one way to enforce an obligation.
>
> [emphasis added]

[28] These principles, coupled with *Drake* and *Markin,* provide a complete answer to the purchasers' arguments. The terms are unambiguous. REDMA sets out no contrary intention, either expressly or implicitly. The purchasers' appeals to the REDMA consumer protection goals and hypothetical absurdities cannot override the express and unambiguous meaning and use of "must." Section 18(4) means what it plainly says: "[a] trustee under subsection (1) must release the deposit to the developer if the developer certifies in writing…" the four conditions (a) through (d).

[29] That said, these reasons will address certain additional arguments advanced by the purchasers, and in the course of so doing, note how the above reading of s. 18(4) is consistent with REDMA as a whole, textually, contextually, and purposively.

C. Was the trustee obliged to apply to pay the deposits into court?

[30] The purchasers argue that s. 18(4) must be read with both s. 18(2)(g), and article 4.3 of the purchase agreements, which permit payment of deposits into court should a dispute arise. They argue that s. 18(4) cannot trump those statutory and contractual provisions, which contemplate an exercise of discretion by the REDMA trustee.

[31] The purchasers correctly emphasise that it would have been prudent, from a point of personal liability, for the trustee to have applied to interplead the deposits immediately upon the emergence of a dispute. For the reasons set out above and below, however, the trustee was not obliged to interplead the deposits, based on either the wording and purpose of REDMA, or the purchase agreements, or on the facts of this case.

[32] With respect to the legislation and the purchase agreements, just as "must" means "must", "may" means "may".

[33] Under s. 18(2) of REDMA, the trustee "…must not release the deposit from trust except as follows: …(g) in accordance with section 33 *[payment of trust funds into court]* of the *Real Estate Services Act*" [SBC 2004, c 42 ("**RESA**")].

[34] RESA, s. 33, uses the permissive "may" rather than the mandatory "must":

> **Payment of trust funds into court**
>
> **33** (1) If, in relation to money held in trust by a brokerage, it appears to the brokerage that
>
> (a) there are adverse claimants to the money,
>
> (b) the identity of one or more of the persons entitled to it is unknown, or
>
> (c) there is no person capable of giving, or authorized to give, a valid discharge for it,
>
> ***the brokerage may apply to the Supreme Court*** for an order for payment of the money into court.[4]
>
> …
>
> (4) On an application under this section, ***the court may make an order for payment of the money into court***, and payment into court under the order discharges the brokerage from liability for the amount paid.
>
> [emphasis added]

[35] The purchase agreement, article 4.3, is similarly permissive, not mandatory:

> 4.3 The Vendor and the Purchaser hereby irrevocably ***authorize*** the Vendor's Solicitor:
>
> (a) to deal with the Deposit in accordance with the provisions hereof; and
>
> (b) ***to interplead the Deposit***, at the expense of the party ultimately determined to be entitled to such funds, ***should any dispute arise regarding the obligations of the Vendor's Agent with respect to the Deposit***.[5]
>
> [emphasis added]

[36] Thus, while both statute and contract authorise the trustee to seek judicial authorisation to pay the deposit into court, the trustee is not required to do so.

[37] Nor do the facts, and the communications between the parties, surveyed above, indicate that the present trustee ought to have elected to interplead the deposits, let alone required him to do so. At no point did purchasers' counsel ask or demand that the trustee pay the deposits into court, either by reference to the purchase agreements, or to s. 18(2)(g) of REDMA, or to the interpleader Rule 10-3 of the Supreme Court Civil Rules, B.C. Reg. 168/2009, or otherwise.

[38] Again, over a month passed between the purchasers' communication asserting termination and demanding the return of the deposits, and the release of the deposits to the developer. Over a month passed between the developer's July 4th provision of the video purporting to show the units as habitable, and the release of the deposits. The subsequent silence from purchasers' counsel, despite follow-up communication from the trustee and from the developer's litigation counsel, would reasonably lead the trustee to assume that the purchasers had retreated from their position, and that the dispute had subsided. And, if the purchasers were in fact maintaining their position, the month's passage would also provide them with ample time to apply to court for an interpleader, injunction, asset preservation order, or a declaration (under s. 18(2)(g) or (h) or otherwise) preventing the statutorily mandated s. 18(4) release of the deposits to the developer.

[39] Further, while the trustee was not obliged to do so, he provided advance notice that he would remit the deposits to the developer. Still receiving no response, by way of communication, or court application or order, or otherwise, it was wholly reasonable for him to comply with the express language of s. 18(4).

[40] The sequence surveyed above also provides an answer to the purchasers' argument that reading "must" as "must" in s. 18(4) leaves purchasers helpless in the face of a dispute. As in the present case, most disputes do not suddenly arise on the brink of the release of the deposit, but develop slowly over time. During that period, as here, a purchaser will usually have ample time to seek agreement that a disputed deposit not be released and, if refused, to obtain an order to that effect. A purchaser has other litigation options for its protection: indeed, in the present case, one purchaser filed a certificate of pending litigation on the title of other strata lots in the development.[6]

D. Did the trustee breach common law trustee obligations?

[41] As a related argument, the purchasers emphasise that the holder of the deposit is, indeed, expressly a "trustee" under s. 18(4). As such, they argue, the trustee has all of the fiduciary obligations of a common law trustee, and could not act

in a manner contrary to the interests of either beneficiary: by releasing the deposits to the developer, rather than applying to pay them into court, it preferred the interests of the developer, to the detriment of the purchasers.

[42] The plaintiff places particular weight on the following passage from *Bison Properties Ltd. (Re),* 2018 BCSC 1299:

> [265] As a final note, *REDMA* does not provide a cause of action in the event of a breach of trust. In terms of consequences, the statute states that it is an offence to contravene its provisions and contravention renders the contract unenforceable by the developer: ss. 23, 39. There is no provision in the statute that would render an offending contract void *ab initio*.
>
> [266] ***A claim for breach of trust against a trustee, such as that advanced by the claimants, is grounded in a common law action for breach of trust. The legislature did not remove or alter common law rights when enacting REDMA, such that the presumption that no alteration is intended absent express words applies***: *Sullivan* at 538-539; *Grinnell Supply Sales Company v. Heger Contracting Ltd.* (1999), 22 B.C.T.C. 155 at para. 18 (S.C.) (WL).
>
> [267] ***The equitable and legal rules and defences applicable to common law trusts apply to the defences to claims for breach of a REDMA trust in appropriate circumstances.***
>
> [emphasis added]

[43] As a preliminary observation, this passage is *obiter dicta.* It speaks of the unextinguished and continuing right of a beneficiary to sue a REDMA trustee (notwithstanding that REDMA fails to confirm that right, while setting out other remedies), rather than the current issue: the rights and obligations of a statutory REDMA trustee within the REDMA framework.[7]

[44] While REDMA does not expressly extinguish common law fiduciary and other obligations of the statutory trustee, that statutory trustee must exercise his or her powers and duties in a manner consistent with the words and objects of the statute. While the common law imposes general obligations on a trustee, the trustee's duty is, first, to adhere to the terms of the trust (that is, the statute), and, second, to observe the general principles of trustee law which do not run counter to the express terms of the trust: *Swintuch Estate v. Erickson*, 2016 BCSC 1623 at para. 47, citing *Merrill Petroleums Limited v. Seaboard Oil Company* (1957), 22 WWR (ns) 529

(ABQB) at 557. Non-fiduciary powers are usually dispositive powers, although they need not be: Donovan W.M. Waters et al., *Waters' Law of Trusts in Canada*, 5th ed (Toronto: Carswell, 2021) at ch. 17.IV. Professor Waters confirms, at ch. 2.VI, that statutory trusts are "created and governed as to [their] operation and effect by statute." Statutory trustees often have different obligations and considerations than common law trustees. Examples include construction law (*CED* (online), *Construction Liens* (Ont) "Special Obligations of a Trustee Under the Act" (X) at §40), bankruptcy (*Toyota Canada Inc. v. Imperial Richmond Holdings Ltd.*, [1997] 10 WWR 335 (ABQB) at para. 20), and in relation to the public guardian and trustee (*Williams (Guardian of) v. Williams Estate* (1991), 57 BCLR (2d) 223 (CA) at 227).[8]

[45] In *Varity Corp. v. Howe*, 516 US 489, 115 SCt 1065 (1996), the United States Supreme Court similarly confirms that the common law of trusts is only a "starting point" for interpreting the powers and duties of a statutory trustee, which must be interpreted according to the terms and purposes of the governing statute. Speaking of the *Employee Retirement Income Security Act of 1974* ("**ERISA**"), the Court states at 497:

> Consequently, we believe that the law of trusts often will inform, but will not necessarily determine the outcome of, an effort to interpret *ERISA*'s fiduciary duties. In some instances, trust law will offer only a starting point, ***after which courts must go on to ask whether, or to what extent, the language of the statute, its structure, or its purposes require departing from common-law trust requirements.*** And, in doing so, courts may have to take account of competing congressional purposes, such as Congress' desire to offer employees enhanced protection for their benefits, on the one hand, and, on the other, its desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.
>
> [emphasis added]

[46] In *C.H. Robinson Co. v. Alanco. Corp*., 239 F.3d 483 (2001) at 487, the United States Court of Appeals (Second Circuit) applies the *Varity* interpretive principles to the *Perishable Agricultural Commodities Act* ("***PACA"***):

> Trusts created under *PACA* are statutory trusts, and common law trust principles are not applicable if they conflict with the language of the statute, the clear intent of Congress in enacting the statute, or the accompanying regulations. Cf. Varity Corp. v. Howe….

> For example, trustees are generally required to keep trust assets separate from non-trust assets. Under *PACA*, however, *PACA* trustees are specifically permitted to commingle *PACA* trust assets. ***The applicability of any principle of trust law to a PACA trust must be tested against the language and purpose of the statute and the accompanying regulations.***
>
> [emphasis added]

[47] Thus any general common law trustee duties and powers, including any purported duty of evaluation and discretion in the face of s.18(4), must be interpreted and exercised within the statutory parameters of REDMA. This is consistent with the comments of the minister responsible for introducing REDMA, the Honourable Gary Collins, in the legislative debates, when specifically discussing the release of deposits pursuant to s. 18(2):

> ***It's not a discretionary role***. The trustee has to act within the confines of this section. It says the trustee "must not release the deposit from trust except as follows…" Then there are nine ways that could happen, and only nine…. ***The trustee must act within those provisions…..***
>
> ***…[i]t is not up to the trustee to say you are hard done by, so therefore you can have your money back.*** You have to go through the processes as prescribed here. They don't get to sit in judgment. ***They have professional obligations to follow this and to deliver upon it…***
>
> ***…But it's not up to the trustee to say this person is really inconvenienced here.*** Give them the money, and if you don't give it to them, I'm going to give it to them. ***They don't have that power to do that.*** *Somebody could go to court, I suppose, and claim an undue hardship… They could, I suppose, try and do that, but that would again have to be a decision of the court and an order of the court****, not at the discretion of the trustee***.[9]
>
> [emphasis added]

[48] Again, the statutory trustee did what REDMA, s. 18(4), unambiguously told him to do: release the deposits upon receipt of the developer's written certification.

E. Was the trustee entitled to treat the certification as valid?

[49] The role of the statutory trustee leads to the purchasers' final main argument concerning the validity of the certification, and the trustee's obligations with respect to the certification. As with the other aspects of REDMA, s. 18, this is a case of first instance on the issue of what constitutes a certification under that section.

[50] The purchasers argue that the developer's certification, provided pursuant to the s. 18(4) requirement that it "certif[y] in writing" the four conditions under that subsection, is insufficient to trigger the release of the deposit. As a related, interpretative point, they argue that the s. 18 "must" cannot literally mean "must", lest it lead to the absurdity that a blatantly false developer's certification — for example, asserting completion of a development unit on a lot that the trustee knows to be empty — would nonetheless trigger the s. 18(4) obligation to release the funds to the developer.

[51] Again, and as a preliminary point, without ambiguity, hypothetical absurdities cannot contort the plain language of the statute.

[52] Counsel were unable to provide authorities in the specific context, but generally agree that "certify" denotes a formal affirmation or guarantee of a fact, with potential legal consequences for misrepresentation. For example, *Reference re: Companies' Creditors Arrangement Act, Chapter C-25, R.S.C. 1970*, 1988 ABCA 383, states at para. 22:

> … The word "certify" has the connotation that the person so doing formally vouches for the statement or guarantees its certainty.

[53] Under this definition, the gist of which was generally agreed upon by the parties, the written certification sent by the developer to the trustee satisfies the plain wording of s. 18(4).

[54] REDMA provides multiple forms of consequences for a developer who provides a false certification under s. 18(4), and thus provides reassurances to purchasers worried by the hypothetical example above. Under s. 39(1)(a), a person who contravenes s. 18 commits an offence. Under s. 40, this is punishable by a fine up to $1.25 million (first offence), and $2.5 million (each subsequent offence); an individual developer may also face imprisonment of up to two years in addition to the fine (first offence) and over two years in addition to the fine (each subsequent offence). Further, a developer who issues a false or misleading s. 18(4) certification faces investigation by the Superintendent of Real Estate, under ss. 25-26. Under s.

30, the Superintendent may order the developer to cease marketing development units, pay recovery of enforcement expenses, and pay administrative penalties of up to $500,000 (for a corporate developer) or $250,000 (for an individual developer). Section 24 expressly includes in its definition of "non-compliant": a "developer" who "mak[es], or allow[s] to be made… (ii) a false or misleading statement in a certification under section 18…"

[55] These significant consequences also provide reassurances to the trustee receiving the s. 18(4) certification that its contents may be reliably acted upon, by release of the deposit. They in turn also provide reassurances realising the real estate development efficiency goal of REDMA, identified in *Drake*, above.

[56] These significant consequences faced by a breaching developer also illustrate the eponymous focus of REDMA: the regulation of real estate development marketing. As noted, the statute is sparse on the duties and powers of the trustee holding the deposit. The focus of the statute is not regulation and sanctioning of trustees, but rather of developers.[10] The purpose of the statute is not to place the trustee, an insured professional, into the role of indemnifier and primary defendant for any development unit sale dispute. Subsection 18(6), which expressly discharges the trustee from liability for the deposit if released under s. 18(4) (via reference to s. 18(2)(c)) confirms the legislative purpose and intent of protecting a trustee acting according to the terms of the statute.

[57] The limited and protected role of the trustee in the REDMA scheme also answers the purchasers' extreme hypothetical. As noted above, *Drake* identifies the legislative objective of REDMA to be not only consumer protection, but also efficiency in real estate development, marketing, and sales. Efficiency necessitates that the trigger for the release of the deposit be certain and clear for the trustee. The purchasers' position would require a REDMA trustee to second-guess and investigate the validity and veracity of the developer's certification, both as a matter of fact and a matter of law. The trustee will not necessarily know the state of the development. The trustee will not be aware of all communications back and forth

between the developer and the purchaser. Apart from these factual investigations, the trustee would be placed in a semi-adjudicative role. For example, the trustee would be obliged to make a legal assessment of whether, as a matter of common law and contract, the purchaser has a right of rescission (s. 18(4)(a)), or whether the terms of the specific purchase agreement permits a developer to cancel the agreement upon the purchaser's failure to pay a deposit (s. 18(4)(c)). These exercises would be difficult and inefficient, even where the trustee is a law firm. They would be more profoundly difficult and inefficient with other trustees: REDMA anticipates non-lawyers, including "a brokerage, lawyer, notary public or prescribed person" (s. 18(1)), serving as trustee.

[58] Imposing on the trustee a factual investigatory obligation to second-guess the contents of the certification, and a legal investigatory obligation to examine the developer's legal position, as well as undertake a statutory interpretation of its own role in the overall scheme of REDMA, notwithstanding the plain-language mandatory wording of s. 18(4), would undermine the statutory efficiency goal. It would create litigation and delay costs that would likely ultimately be passed on to the purchaser. Fewer, and perhaps few, lawyers, brokerages, and notaries would step forward to serve as REDMA trustees given the litigation and liability exposure.

[59] In the present case, the certification provided by the developer to the trustee complies with the plain language requirements of s. 18(4): it is in writing, and it certifies that the four conditions, (a) through (d), have occurred. The Court agrees that a certification need only comply with those requirements, statutorily stated in plain language. The legislative goal of efficiency requires clarity and certainty not only with respect to the obligation to release the deposit to the developer upon receipt of the certification, but also with respect to the contents of the certification itself.

III. CONCLUSION

[60] The trustee — both the individual solicitor and the defendant law firm — acted in compliance with their obligations under REDMA, in releasing the deposits upon receipt of the developer's certification under s. 18(4).

[61] The purchasers' applications are dismissed, and the trustee's applications are granted.

[62] The trustee has been successful, and is presumptively entitled to its costs at Scale B for both actions.

[63] If any party wishes to seek to dislodge that presumptive order, that party shall inform the other parties within 20 days of issuance of these reasons and schedule a time for a court hearing as soon as practicably possible thereafter, with delivery of primary written arguments to the Court and the other parties 10 days before the hearing, with replies 5 days before the hearing.

[64] The Court emphasises that nothing in these reasons is intended to pronounce on the underlying dispute between the purchasers and the developer, or any other related current or prospective litigation. Any passages or language in these reasons that could be marshalled one way or the other in those proceedings should be considered *obiter dicta vis-à-vis* those disputes.

[65] The Court is particularly grateful for the excellent oral and written submissions provided by these advocates. Having these counsel arguing their respective clients' cases so competently, zealously, and persuasively makes adjudication a most agonizing joy.

"Crerar J."

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[1] The individual solicitor who served as trustee no longer practices with the firm.

[2] While the initial letter is expressly sent "[o]n a strictly without prejudice basis" at the hearing, the purchasers do not assert privilege over this communication. In any case, it would appear not to be subject to settlement privilege, as no actual terms of settlement are offered: *Coombs v. LeBlond*

Estate, 2013 BCSC 518 at para. 23, citing *Belanger v. Gilbert* (1984), 14 DLR (4th) 428 (BCCA) at paras. 6-8.

[3] *Rizzo & Rizzo Shoes Ltd. (Re),* [1998] 1 SCR 27.

[4] For the RESA "brokerage" read REDMA "trustee". Subsection 18(5) states that "[f]or the purposes of subsection (2) (f) and (g), the provisions of the *Real Estate Services Act* referred to in that subsection apply to a trustee as if the trustee were a brokerage."

[5] Further, the purchase agreements expressly confirm that "… the deposits paid by the Purchaser under this Agreement are subject to section 18 of the *Real Estate Development Marketing Act* with regard to the holding of such deposits in trust and the release of such deposits from trust." In other words, the required deposit release under s. 18(4) applies contractually as well as statutorily.

[6] Apparently the developer obtained the release of those certificates of pending litigation by the deposit of funds into trust: those funds may be subject, however, to other claims, and may not satisfy any judgment the purchaser may ultimately obtain against the developer.

[7] The facts and issues in *Bison* are of little application to the present case. There, the plaintiffs argued an interpretation of REDMA that would deem the monies that they had paid to purchase at-risk equity bonds issued by Bison to be deposits, and thus trust funds, under s.18. The plaintiffs alleged that the recipient solicitors breached trust duties when they disbursed them to the (now bankrupt) developer: paras 2 and 3. The Court rejected this tortuous interpretation.

[8] *Ermineskin Indian Band & Nation v. Canada*, 2006 FCA 415, provides an example of a statutory scheme limiting the powers and obligations of a trustee. There, the Crown was the statutory trustee. The plaintiff Band unsuccessfully brought an application alleging that the Crown had breached its fiduciary duty to invest royalties. The Federal Court of Appeal agreed that the statutory trustee could not act unilaterally as though if it were a common law trustee, as Parliament had enacted statutory provisions that were not consistent with that common law duty (paras. 124-125). There was no federal legislation of general application that dealt with the rights and obligations of federal statutory trustee, so in the absence of this, the Court could not conclude that the Crown had such a fiduciary duty (para. 127).

[9] British Columbia, *Official Report of Debates of the Legislative Assembly (Hansard)*, 37-5, vol 25, No 9 (11 May 2004) at 11025–26.

[10] That said, to be fair, a trustee could also conceivably be found to have committed an offence under s. 39(1)(a).