REAL ESTATE LAW

Your Continued Obligation to Close Your Real Estate Transaction During the COVID-19 Pandemic

Michael Drouillard
Harper Grey LLP

The ongoing socioeconomic crisis created by the COVID-19 pandemic has caused many to wonder about their obligations to close real estate transactions they entered into before the crisis hit British Columbia. Some of us who have contracted to buy a home may not have the same economic ability to service mortgage payments, and may wonder if they are simply better off not closing and waiting to see what happens next. This article discusses how such a decision likely is a breach of contract that could lead to unintended consequences greater than if a purchaser closed and did their best to service mortgage payments upon taking ownership.

Firstly, the concept of *force majeure* likely will not protect a purchaser under a typical residential real estate contract. *Force majeure* is a contractual concept, meaning a party can only raise *force majeure* if the contract provides for it. The typical standard form real estate contract used by real estate licensees across British Columbia does not contain a *force majeure* clause. Our courts typically will not imply a complex concept like *force majeure* into a contract, because the circumstances in which courts imply terms into contracts are very limited.

But second, it is even doubtful that the COVID-19 pandemic, in the context of real estate transactions, even amounts to a *force majeure* event. There is no statutory concept of *force majeure* in British Columbia (i.e., a definition of *force majeure* created by legislation), and *force majeure* itself has rarely been dealt with by Canadian courts.

In fact, the last time British Columbian courts considered *force majeure* in the context of an economic event making performance of a contract impractical was back in 2011 in the case of *Domtar Inc. v. Univar Canada Ltd.*, 2011 BCSC 1776. In that case, the court confirmed that the mere fact economic circumstances have made performance of a contract more difficult, even to a burdensome level, does not amount to *force majeure* unless the contract expressly says so.

In short, the Court found that, to amount to *force majeure,* means the contract must be essentially impossible to perform because of that event. It is difficult, in the context of a real estate deal, to say that a socioeconomic disaster like COVID-19 has made the contract impossible to perform. It may be more financially difficult to perform, but that in itself does not create a *force majeure* event.

In British Columbia, when a buyer fails to close on a real estate transaction, our Court of Appeal in *Tang v. Zhang*, 2013 BCCA 52 set out what the consequences could be. In addition to forfeiture of the deposit, the buyer will be responsible to pay any damages suffered by the seller which exceed the amount of the forfeited deposit. So, and for example, if a purchaser paid a $100,000 deposit to a seller under a real estate transaction, and if the purchaser failed to complete on time, and if the seller suffered $200,000 in damages because of increased carrying costs and having to re-sell the property at a lower price because of a collapsing real estate market, the buyer will lose the $100,000 paid and also be subject to judgment for an additional $100,000 to compensate the seller. A purchaser's exposure, therefore, could be greatly in excess of the amount of the deposit paid under the typical standard form residential real estate contract used by real estate licensees across British Columbia.

Ultimately it depends on what your contract says and individual circumstances could be relevant which is why legal advice is recommended. But generally speaking, and unless legislation is passed which attempts to stabilize the result the COVID-19 crisis may have on real estate transactions in British Columbia, purchasers typically will have to close, and close on time as set out in the contract, despite the immense impact this ongoing crisis may have had on purchasers across British Columbia.

Michael is associate counsel at Harper Grey and co-chair of the firm's Real Estate Law group. His practice focuses on commercial real estate transactions and real estate disputes.

Michael Drouillard

mdrouillard@harpergrey.com
604.895.2904