

WHAT TO DO WITH YOUR PENDING REAL ESTATE DEAL.

(even though this is a legal discussion – THIS IS NOT LEGAL ADVICE – just one lawyer’s observations and views intended for a general audience)

The concern for buyers is that they may be laid off and not have the financial resources to carry a mortgage for an indefinite time until things get back to normal.

It is a real dilemma.

Your Agreement of Purchase and Sale may contain a “Force Majeure” clause – whether it’s a standard OREA form, builder agreement or private agreement – but even if the Purchase Agreement doesn’t contain the clause, I am of the view that this very unique legal concept called “force majeure” applies in current circumstances.

Generally speaking, “force majeure” is a principle of law that relieves parties from their legal obligations – like closing on a real estate transaction - on the narrow and high threshold exception where something not reasonably expected interferes and makes closing impossible or impracticable.

That’s not to say that the legal principle applies as an automatic right. I suspect there will be much litigation following the end of the pandemic and economy recovery. However, force majeure will be a compelling argument for many buyers to make against sellers that refuse to consent to return of deposits for deals that don’t close.

In the present environment, the virus is a worldwide *pandemic* that no one could have reasonably expected resulting in such great economic decline, particularly of non-essential products and services – with massive layoffs, financial uncertainty, massive number of EI applications – individuals have an obligation, based on their lending terms, to inform the banks of any material change to their income, which a layoff would constitute – thus, banks / lenders may likely consider that a “material change in circumstances” such to refuse the mortgage before closing.

Even for new builds, builders require a bank letter indicating a buyer’s financial ability to close on the deal. The builder’s contract may too contain a continuing legal obligations to notify them of a financial material change in circumstances. The question is, what will builders do? Will they let buyers out of the deal and return their deposits? After all, builders are also on the hook to their lenders.

But even without layoffs, the economic slowdown is so great that most industries are affected with reduced hours of employment and uncertainty as to full shutdown.

Clearly the State of Emergency called by City’s and Provinces and the looming imposition of the Federal War Measures Act – all speak loudly to the application of a “force majeure”.

So, what to do? I suspect we will see more and more deals not closing – hopefully buyers don’t lose deposits – the reality is that sellers usually have their own purchase pending and same would apply to them – it is circular as you can see.

The point is that the principle of “force majeure” can relieve the parties from their contractual obligations and buyers should get their deposits back.

See the definition of Force majeure in Wikipedia:

Force majeure (/ˌfɔːrs mɑːˈʒɜːr,-məˈʒɜːr/ *FORSS mah-ZHUR, -mə-ZHUR*; French: [fɔʁs maʒɔʁɛ]) – or **vis major** (**Latin**) – meaning "superior force", also known as **cas fortuit** (French) or **casus fortuitus** (Latin) "chance occurrence, unavoidable accident",^[1] is a common clause in **contracts** that essentially frees both parties from **liability** or obligation when an extraordinary event or circumstance beyond the control of the parties, such as a **war**, **strike**, **riot**, crime, plague, or an event described by the legal term **act of God** (**hurricane**, **flood**, **earthquake**, **volcanic eruption**, etc.), prevents one or both parties from fulfilling their obligations under the contract. In practice, most force majeure clauses do not excuse a party's non-performance entirely, but only suspend it for the duration of the force majeure.^{[2][3]}

Force majeure is generally intended to include occurrences beyond the reasonable control of a party, and therefore would not cover:

- Any result of the **negligence** or **malfeasance** of a party, which has a materially adverse effect on the ability of such party to perform its obligations.^[4]
- Any result of the usual and natural consequences of external forces.
 - To illuminate this distinction, take the example of an outdoor public event abruptly called off.
 - If the cause for cancellation is ordinary predictable rain, this is most probably not *force majeure*.
 - If the cause is a flash flood that damages the venue or makes the event hazardous to attend, then this almost certainly **is** *force majeure*, other than where the venue was on a known flood plain or the area of the venue was known to be subject to torrential rain.^[5]
 - Some causes might be arguable borderline cases (for instance, if unusually heavy rain occurred, rendering the event significantly more difficult, but not impossible, to safely hold or attend); these must be assessed in light of the circumstances.
- Any circumstances that are specifically contemplated (included) in the contract—for example, if the contract for the outdoor event specifically permits or requires cancellation in the event of rain.

Under **international law**, it refers to an irresistible force or unforeseen event beyond the control of a state making it materially impossible to fulfill an international obligation, and is related to the concept of a **state of emergency**.^[6]

Lastly, I think rentals will increase, as people decide to hold onto their savings and wait out the pandemic and economic slowdown.

Regards,
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