

## COVID-19: IS YOUR AGREEMENT OF PURCHASE AND SALE ENFORCEABLE?

by Samantha Green

The Government of Canada has lowered interest rates in order to help the economy grapple with the COVID-19 public health crisis. However, businesses remain shuttered. Employees can't go to work. Canadians are being told to stay home. For many, the financial outlook may be very different today than it was a month ago. In this new and sudden reality, some people are facing this significant question: do agreements of purchase and sale signed before the outbreak remain enforceable?

Courts will first look to the language of the contract to determine whether it is enforceable post-outbreak. These are some of the relevant factors:

- **Conditions:** If the contract is conditional on financing that the purchaser can no longer obtain, the purchaser may be able to terminate the agreement. If there is no financing condition, or if there is one but it has been waived, the purchaser has to look elsewhere for a reason to terminate.
- **Extensions:** Unless the contract allows for extensions of the closing, neither party has an obligation to grant them. Agreements of purchase and sale for new homes will often include a Tarion Warranty. The Tarion Warranty prescribes a framework for extensions and termination.
- **"Force Majeure" Clauses:** These clauses typically address what happens in the event of an extraordinary event outside of either parties' control. Such a clause in an agreement of purchase and sale will need to be examined carefully to determine whether it applies to the current public health crisis. See Fogler Rubinoff's more detailed discussion on these clauses [here](#).

### Doctrine of Frustration

If no contractual provision applies, the question may be whether the contract has been frustrated. The doctrine of frustration operates to relieve parties of their bargain because of a supervening event that has occurred without the fault of either party, and renders the performance of the contract substantially different from what the parties bargained for<sup>1</sup>. It is a flexible doctrine, not restrictive to any formula<sup>2</sup>. However, our courts have repeatedly held that a fall in the real estate market which prevents a purchaser from obtaining financing does not support a plea of frustration<sup>3</sup>.

Generally, the Courts hold people to the bargains they have made. It remains to be seen how the Courts will deal with the current public health crisis.



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<sup>1</sup> *Bang v. Sebastian*, 2018 ONSC 6226.

<sup>2</sup> *Dhillon v. PM Management Systems Inc.*, 2014 ONSC 5407 (CanLII), par. 13.

<sup>3</sup> *Paradise Homes North West Inc. v. Sidhu*, 2019 ONSC 1600

However, parties to a contract should be cautious and should not assume that a Court will release them from their obligations based on the disruptions the COVID-19 virus has caused.

## **Practical Considerations**

If you are in self-isolation you may be concerned about how to close your real estate transaction. Lawyers have many resources that enable them to work remotely. Consult with counsel early in order to ensure your transaction can be completed on time.