ABORTED REAL ESTATE TRANSACTIONS IN A DECLINING MARKET – RECENT DECISIONS OF THE ONTARIO COURTS

BY HARRY HERSKOWITZ & AMY CRYSTAL – DELZOTTO, ZORZI LLP

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SUMMARY

1. INTRODUCTION

More than two years have passed since the provincial government introduced a comprehensive set of measures to cool down (and reduce speculation in) the Ontario housing market, including the introduction of a new 15% non-resident speculation tax on the price of homes in the Greater Golden Horseshoe purchased by individuals who are not citizens or permanent residents of Canada.[1] Following such government intervention, the housing market in the Greater Toronto Area experienced a rapid and significant decline, and consequently countless homebuyers sought to resile from their respective purchase transactions, as they were either unable to sell their own homes at the prices for which comparable properties had sold at the peak of the market, or they were unable to obtain the requisite financing to complete their purchase transactions because the appraised values of their purchased homes were significantly lower than their respective purchase prices.

The shifting market conditions served as a stark reminder, for both purchasers and practitioners alike, of the potential liability of a defaulting purchaser in a declining real estate market. Unfortunately, many purchasers mistakenly believe that their liability is limited to the forfeiture of the deposit (as is often the case in a rising market), but the exposure to damages in a falling market is a real and substantive concern.

The purpose of this paper is to revisit the law regarding deposits, and to highlight a number of recent Ontario cases involving aborted real estate transactions that were spawned by the declining housing market in the spring of 2017.

[1] The provincial initiatives were further compounded by the federal government's subsequent implementation, in 2018, of more stringent qualifications for mortgage loans issued by Canadian chartered banks and trust companies, and specifically the requirement that all homebuyers applying for a mortgage loan from a federally-regulated lender must demonstrate their ability to carry a mortgage for the same principal loan amount, but at an interest rate that is the greater of 2% above their contracted rate and the five-year benchmark mortgage rate published by the Bank of Canada.

2. A PRÉCIS OF THE LAW REGARDING DEPOSITS

(a) The Purpose of the Deposit

At common law, it is well established that a purchaser of land who fails to complete the purchase and sale transaction stands to lose his or her equitable estate or interest in the land, as well as any deposit monies paid in connection therewith. The seminal case of *Howe v. Smith*[2] confirmed that the purchaser's deposit serves two purposes: it is an "earnest" or guarantee that the contract will be performed by the purchaser, and it is also a prepayment of part of the purchase price. The prospect of the deposit's forfeiture provides an incentive for the purchaser to perform his or her obligations under the contract. If the transaction is completed successfully, then the deposit will correspondingly be applied as a credit towards the purchase price. Conversely, the deposit will generally be forfeited by a purchaser who repudiates the contract. A deposit that is ultimately forfeited to the vendor, consequent upon the purchaser's default, does not constitute damages for breach of contract, and is not dependent on the proof of actual damages incurred by the innocent vendor.[3] Rather, the deposit stands as security for the purchaser's performance of his or her contractual obligations, and can accordingly be forfeited to the vendor as his or her liquidated damages (and not as a penalty), but must be applied on account of any damage claim ultimately pursued by the innocent vendor against the defaulting purchaser.

At common law, a "true" deposit is, by its very nature, non-refundable,[4] unless the contract stipulates otherwise. Accordingly, in the absence of any express provision to the contrary, it is implicit that a deposit will be forfeited to the vendor if the contract is terminated

[2] (1884), 27 CH. D. 89 (Eng CA).
[3] *De Palma v. Runnymede Iron & Steel Co.*, [1950] 1 D.L.R. 557, [1950] O.R. 1 at p. 8.
[4] A number of equitable principles have emerged regarding the restitution of contractual payments categorized other than as "true" deposits, such as installments, designations of funds as liquidated damages, and contractual penalties.

because of the purchaser's default. The forfeiture of the deposit compensates the vendor for the lost opportunity in having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the revelation of the sale price of the property that the vendor was prepared to accept.[5] It is unnecessary for the agreement of purchase and sale to contain an express forfeiture clause, inasmuch as the vendor has the implied right at common law to retain the deposit monies in the event that the purchaser fails to complete the transaction, notwithstanding the fact that this might produce a windfall for the vendor (especially in a rising market).

(b) Relief Against Forfeiture

A deposit paid pursuant to a contract for the sale of land is an exception to the general rule that an amount subject to forfeiture resulting from a breach of contract is inherently penal in nature (and therefore illegal or unenforceable), unless such amount represents a genuine pre-estimate of the damages. A purchaser's deposit can therefore be validly forfeited even though the amount of the deposit bears no relationship or reference to the anticipated loss to the vendor flowing from the breach of contract.[6] It is, however, part of the court's equitable jurisdiction to grant relief against forfeiture in circumstances that it considers appropriate in order to achieve substantive justice. Section 98 of the *Courts of Justice Act*, R.S.O. 1990, as amended, has codified the longstanding doctrine against penalties, and gives the court the broad discretion to grant relief against forfeiture "on such terms as to compensation or otherwise as are considered just." The purpose of this form of relief is to prevent the vendor from being unconscionably overcompensated for the purchaser's breach of contract.

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[5] *H.W. Liebig Co. v. Leading Investments Ltd.*, [1986] 1 SCR 70 at para 33.
[6] *Workers Trust & Merchant Bank Ltd. v. Dojap Investments Ltd.*, [1993] A.C. 573 (PC) at p. 578.

A purchaser seeking relief from forfeiture must satisfy two essential requirements: firstly, that the forfeiture of the deposit is penal in nature, in the sense that the sum forfeited was out of all proportion to the losses suffered by the vendor; and secondly, that it would be unconscionable for the vendor to retain the deposit monies under the circumstances.[7] Although freedom of contract and certainty in the marketplace dictate that a finding of unconscionability would be the rare exception, the court may nevertheless be persuaded by strong and compelling facts to grant equitable relief from forfeiture, such as evidence of a disproportionately large deposit being forfeited. However, the courts in Ontario have been reluctant to specify a numerical percentage that would, in and of itself, constitute a "grossly disproportionate" or excessive deposit, since much turns on the specific facts of each transaction.[8] In addition to the quantum of the deposit being forfeited, other indicia of unconscionability include an inequality of bargaining power, a substantially unfair bargain, a significant disparity in the relative sophistication of the contracting parties, the lack of bona fide negotiations, and the gravity of the breach of contract.[9]

Of course, in order to make an application for relief from forfeiture, the purchaser must be in default. If not, relief is unnecessary. Accordingly, if the contract is subject to a condition precedent that is not met, or if the contract is not formed because an offer is repudiated before acceptance, or if the vendor is in default, then all deposit monies paid by the purchaser must be returned.

(c) Calculation of the Innocent Vendor's Damages

Where the vendor's loss consequent upon the purchaser's default exceeds the aggregate amount of the deposit, then the vendor may be entitled to pursue a claim in damages against the

[7] *Stockloser v. Johnson*, [1954] 1 QB 476.
[8] *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at para 28.
[9] *Ibid* at para 30.

defaulting purchaser. The common law provides that in the assessment of damages for breach of contract, the innocent party should be put in the position (or as close thereto as possible) as he or she would have been in had the contract been performed. However, in order to be recoverable, the losses or damages suffered must flow or result from the purchaser's repudiation of the contract and be: (i) reasonably foreseeable; (ii) proved with a sufficient degree of certainty; and (iii) unavoidable, in the sense that the innocent party cannot recover for losses that would (or could) otherwise have been avoided through reasonable mitigation efforts.

In the context of an aborted real estate transaction, it is generally accepted that the appropriate measure of damages for the innocent vendor's loss of bargain is the difference between the contract price and the market value of the land. Ordinarily, damages will be assessed at the date that the contract was to be performed (namely, the date of closing), but the court may choose a different date depending on the particular circumstances. In a falling market, the Court of Appeal has held that the vendor should be awarded damages equal to the difference between the contract price and the "highest price obtainable within a reasonable time after the contractual date for completion, following the making of reasonable efforts to sell the property commencing on that date."[10] The resale price of the property obtained by the vendor will, in most cases, constitute good and sufficient evidence of the market value of the property.[11] Where it is alleged that the vendor has failed to mitigate his or her damages, the onus of proof is on the purchaser to demonstrate, on a balance of probabilities, that the vendor failed to make reasonable efforts to mitigate, and that mitigation was possible. The vendor need not take any and all possible steps to reduce his or her loss. Rather, the vendor need only act reasonably (and not perfectly or flawlessly) in his or her mitigation efforts.

[10] *100 Main Street East Ltd. v. W.B. Sullivan Construction Ltd.* (1978), 88 D.L.R. (3d) 1 (ONCA) at para 73.
[11] *Ibid* at para 67.

Finally, it is important to note that when a vendor elects to sue for the losses or damages incurred due to the purchaser's failure to close, the deposit monies must be credited towards any damage award against the repudiating purchaser, rather than being added thereto. It should also be noted that the vendor may suffer other consequential losses as a result of the purchaser's breach of contract (for instance, legal fees and disbursements for the aborted transaction, additional realty taxes, utilities, real estate commissions, insurance costs, moving expenses, and additional marketing and staging costs). Generally, a claim for consequential losses must emanate from the purchaser's repudiation, and is subject to such factors as reasonable foreseeability, unavoidability, and adequate proof.

3. RECENT DECISIONS OF THE ONTARIO COURTS

(a) The Purchaser's Deposit Forfeited, Even Under a Pre-Incorporation Contract

(i) *Benedetto v. 2453912 Ontario Inc.*, 2019 ONCA 149

The purchaser entered into an agreement of purchase and sale to acquire from the vendor three adjacent residential properties located in Toronto, and the contract stipulated that the purchaser was executing the agreement "*in trust for a company to be incorporated without any personal liabilities*". The purchaser submitted a deposit in the amount of $100,000. Two weeks prior to the closing date, the purchaser advised the vendor that he would not be completing the transaction, and correspondingly sought the return of the deposit. The vendor refused, and ultimately brought a motion for summary judgment.

The motion judge held that the provisions of subsection 21(4) of the *Ontario Business Corporations Act*, R.S.O. 1990, as amended,[12] which address pre-incorporation contracts, do not

[12] Subsection 21(1) of the *Ontario Business Corporations Act*, R.S.O. 1990, as amended, provides that an individual who enters into an oral or written contract in the name of (or on behalf of) a corporation before it comes into existence is personally bound

displace the common law rules governing deposits in real estate transactions, and therefore concluded that the purchaser's deposit should be forfeited to the vendor as a consequence of the purchaser's default.

On appeal, the Court of Appeal upheld the motion court's ruling, and confirmed that a forfeited deposit does not constitute damages for breach of contract, but rather stands as security for the purchaser's performance of the contract. A purchaser's obligations under an agreement of purchase and sale are thus distinct from the obligation incurred by the payer of the deposit. A deposit's implied term is that upon the breach of a contract by the purchaser (or, in the case of a pre-incorporation contract, by the promoter on behalf of the intended corporate purchaser), the deposit will be forfeited to the vendor, absent express wording in the contract to the contrary.

In the case at bar, the contract did not contain any express provision concerning the return of the deposit in the event that the corporation was not ultimately incorporated or failed to formally adopt or assume the agreement. In the appellate court's view, such a contrary intention must be expressly stated if the deposit is not to be forfeited upon the failure of the purchaser to perform his or her contractual obligations. The Court of Appeal also held that it was reasonable for the motion judge to interpret the phrase "without any personal liabilities" in the context of the contract as a whole, as opposed to applying to the deposit specifically, inasmuch as any contrary determination would render the deposit meaningless, and would provide no incentive whatsoever to complete the transaction, nor any compensation to the vendor for the defaulting purchaser's failure to complete the transaction.

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by the contract and is entitled to the benefits thereof. However, pursuant to subsection 21(4), an individual will not be bound by the contract (nor entitled to the benefits thereof) if such contract expressly stipulates otherwise.

(b) The Vendor Need Not Accept the Purchaser's Revised Terms in Order to Properly Mitigate Damages

(i) *Lucijanic v. Hashmi*, 2019 ONCA 97

The purchasers of a residential property located in Milton failed to complete their purchase and sale transaction on the scheduled closing date. On the vendor's motion for summary judgement, the purchasers argued that the vendors failed to take reasonable steps to mitigate their losses, inasmuch as the vendors had rejected the purchasers' offer to complete the transaction at a price that was lower than the purchase price stipulated in the contract, but nevertheless higher than the price at which the vendors ultimately resold the property. The motion judge found the purchasers to be in breach of contract, and rejected their argument regarding the lack of mitigation on the part of the vendors, and consequently ordered that the deposit be forfeited to the vendors.

On appeal, the purchasers did not contest the declaration that they had breached the agreement of purchase and sale. Rather, the purchasers claimed that the motion judge was wrong in failing to give proper consideration to the vendors' refusal to accept their offer to complete the transaction on revised terms that were more favourable than the price at which the vendors ultimately resold the property to a third party. The Court of Appeal rejected this argument, noting that the purchasers offered to complete the transaction at a reduced purchase price prior to the closing date, and before failing to complete the transaction as required by the agreement. The vendors were under no obligation to mitigate anything until the purchasers' breach of the agreement. Furthermore, after the purchasers failed to close, the property was relisted, and nothing prevented the purchasers from making a new offer at such later time. The appellate court further confirmed that the vendors were not required to specifically approach the purchasers in

order to give them an opportunity to better the third-party offer that the vendors had ultimately accepted.

(ii) *Bang v. Sebastian,* 2019 ONCA 501

On May 7, 2017, the purchaser entered into an agreement of purchase and sale to acquire from the vendors a residential property located in Mississauga, at a purchase price of $995,000, with the deposit totaling $35,000. The transaction was scheduled to be completed on August 7, 2017. A few days prior to the closing date, the purchaser notified the vendors that she was unable to complete the transaction because she could not obtain the necessary financing to close on an all-cash basis to the vendors. The purchaser purported to re-negotiate the price of the purchased dwelling with the vendors, and consequently offered to complete the transaction at the reduced price of $920,000. The vendors rejected the purchaser's re-negotiation efforts, and subsequently relisted their property consequent upon the purchaser's default. The property was ultimately resold in February 2018, for a sale price of $920,000. The difference between the contract price and the resale price formed part of the damage award against the defaulting purchaser, along with various financing and carrying costs that the vendors had incurred.[13]

On appeal, the Court of Appeal affirmed that the duty to mitigate does not compel the seller of residential property to accept the purchaser's reduced offer (in this case, a reduction of $75,000.00) as mitigation of the vendors' losses triggered by the purchaser's breach of contract, and to consequently abandon a perfectly valid agreement (and correspondingly accept a substantially reduced price) simply because the purchaser decides to abort said agreement due to

[13] The court found that it was reasonably foreseeable to the purchaser that the vendors would incur financing costs, or loss of use of funds, in not receiving the contracted net closing amount on the scheduled completion date. However, the court did not accept that the purchaser could reasonably have foreseen that the vendors' financing would involve four loan facilities (namely, a Scotia Bank bridge loan, a Scotia Bank line of credit, a National Bank mortgage, and a National Bank line of credit). The vendors' claim for financing broker fees of $1,690, home appraisal fees of $548.05, and lawyer's fees of $621.50 in managing these four loan facilities was therefore disallowed.

a declining real estate market, or due to the purchaser's inability to obtain the requisite mortgage financing.

In addition, the appellate court observed that there was evidence that the purchaser knew that the vendors were acquiring a new home with the sale proceeds, and it was therefore reasonably foreseeable that the vendors would incur financing and carrying costs related to such purchase, in the event that the purchase and sale transaction involving the vendors' home failed to close. The Court of Appeal therefore allowed some of the financing and carrying costs of the vendors to be included in the award of consequential damages against the purchaser.

(iii) *Azzarello v. Shawqi*, 2019 ONCA 820

The purchaser entered into an agreement of purchase and sale on March 27, 2017 to acquire a residential property located in Mississauga from the vendors at a purchase price of $1,555,000, with a closing date of June 28, 2017, and with a deposit of $75,000. The purchaser requested (and received) a number of extensions of the closing date, but failed to close on any of the extended dates. The vendors subsequently relisted their property at the original listing price, and ultimately resold same for less than the price that the purchaser had contracted to pay. On a motion for summary judgement, the motion judge awarded the vendors damages in the amount of $308,688.31, representing the difference between the contract price and the resale price, as well as consequential damages for the cost of staging, legal fees, carrying costs of the property, and interest on the vendors' line of credit. The motion judge further ordered that the purchaser's deposit be forfeited, but should not be credited towards the damage award.

On appeal, the purchaser contended, *inter alia*, that the motion judge erred in the application of the vendors' duty to mitigate, inasmuch as the vendors did not entertain the purchaser's offer (after the purchaser failed to complete the transaction on the extended closing

date) to acquire the property for a 10% reduction in the original purchase price. Instead, the vendors resold the property to a third party for $1,280,000, when they could have resold the property to the defaulting purchaser for just under $1,400,000. The Court of Appeal rejected this submission, noting that the duty to mitigate does not oblige a vendor to accept an offer from the defaulting purchaser for less than the original price, and then be relegated to suing the purchaser for the difference between the two prices. While a vendor may choose to accept such a reduced offer, particularly in a declining market, the vendor cannot be obliged to do so. As the appellate court observed, the duty to mitigate is derived from the proposition that the innocent party cannot recover losses from the defaulting party that could have been avoided by the innocent party's reasonable efforts. However, the Court of Appeal affirmed that it is not reasonable to oblige the vendor, in an effort to reduce the losses claimed from the defaulting purchaser, to resell the property to the same defaulting purchaser, and then pursue a claim in damages against that purchaser for the difference. Although the defaulting purchaser would, in the foregoing scenario, be obliged to pay the same amount either way, the defaulting purchaser would nevertheless attain a significant tactical and procedural advantage over the innocent vendor. In the appellate court's view, the effect of endorsing the proposition advanced by the purchaser would be to undermine the sanctity of the original bargain, by effectively encouraging purchasers to default in a falling market, and to offer a lower price for the same property, leaving vendors with the risk and expense of recovering the balance of the original contract price in an action against the same defaulting purchaser. Simply put, the duty to mitigate does not go that far.

The appellate court did, however, find that the motion judge erred in law by holding that the forfeited deposit should not be credited towards the vendors' damage award. The Court of Appeal confirmed that where the vendor suffers a loss, and decides to pursue a claim in damages

against the defaulting purchaser, the deposit must then be taken into account, and shall correspondingly be treated as part payment towards the unpaid purchase price, whether received on completion or reflected in the amount of the damages suffered as a result of the defaulting purchaser's failure to close.

(iv) *McKnight v. Morrison*, 2019 ONSC 552

The vendor, as the estate trustee of her late sister's estate, listed the deceased's residential property for sale in March 2017 for $439,900. The vendor quickly received five offers to purchase the property and decided to proceed with an offer presented by the purchaser, as it was the highest offer and contained no conditions. The parties executed an agreement of purchase and sale for the property to be sold for a purchase price of $532,500, with a closing date of June 30, 2017, and with a deposit in the amount of $10,000.

Despite executing the agreement of purchase and sale on March 18, 2017, the purchaser did not list her own property for sale until May 26, 2017. Three days before the scheduled closing date, the purchaser requested an extension of the closing to August 18, 2017, as she needed more time to sell her own property in order to finance her purchase. As this was an estate sale, the vendor did not want to maintain a vacant property and incur additional expenses to the estate, without any certainty of a closing date. After consulting with a real estate lawyer, the vendor advised the purchaser that she was agreeable to extending the closing date to July 14, 2017, on certain conditions. Negotiations ensued, which included the purchaser offering to accelerate the closing date from August 18, 2017 to July 31, 2017, but the parties were unable to reach an agreement on the terms of the extension. On the closing date, the purchaser implored the vendor to provide a four-week extension of the closing date, and confirmed her intention to complete the transaction when she was in receipt of funds from the sale of her own property. The

vendor rejected this request once again, and the purchaser failed to complete the transaction on the scheduled closing date. The vendor subsequently relisted the property for sale on July 2, 2017 for $459,000, and ultimately resold the property in a declining market at the sale price of $455,000, with a closing date of July 28, 2017. The vendor consequently brought an action against the defaulting purchaser for breach of contract and damages.

On a motion for summary judgment, the purchaser argued that the vendor did not prove her damages, inasmuch as the vendor failed to adduce evidence that subsequent to the purchaser's default, the property was resold for the highest price obtainable. The purchaser asserted that it was unreasonable for the vendor to have sold the property for $77,500 less than what she had agreed to pay, with essentially the same extended closing date that she had proposed during the negotiations for the requested extension thereof. The purchaser also believed that it was unreasonable for the vendor to have only listed the property for two days (namely, a Sunday and a holiday Monday) before accepting the new offer. In acting as the vendor did, the purchaser submitted that the vendor failed to mitigate her losses.

The court rejected each of the purchaser's submissions, and confirmed that the vendor was not required to obtain the highest possible price for the property, but rather was only required to obtain a price that was reasonable, given all of the facts of the case, including the prevailing market conditions. The court found that the sale price of $455,000 was reasonable in the circumstances, given the undisputed evidence that the market had shifted from a "seller's market" to a "buyer's market" by the end of June 2017. Notwithstanding the changing market conditions, the vendor had listed the property at a price that was $20,000 over her original listing price, and the ultimate sale price was negotiated with the third-party purchaser before the vendor

had agreed to accept same. Moreover, the vendor agreed to a closing date with the third-party purchaser only twenty-five days later, thereby reducing her carrying costs.

The court further observed that the vendor was not required to wait for the defaulting purchaser to have sold her own property in the hope that the purchaser will then revive the repudiated contract, regardless of how sincere the defaulting purchaser's intentions may have been. The vendor was not obliged by law, nor by any provisions in the agreement of purchase and sale, to negotiate an extension of the closing date in order to accommodate the defaulting purchaser, particularly in the face of an unconditional resale agreement. In the court's view, it was entirely the purchaser's failure to list her own property in a timely manner that engendered the need for an extension of the closing date, and such failure should not be foisted upon the vendor to the latter's prejudice. Additionally, it was clear on the evidence that even if an extension of closing had been granted, there was no guarantee that the purchaser would have sold her own property by July 31, 2017, and correspondingly have sufficient funds to the complete the transaction with the vendor. In fact, the evidence indicated that the purchaser's property had not been sold by August 29, 2017. The vendor was therefore entitled to damages in the amount of $78,376.85 (with the $10,000 deposit to be credited against such amount), representing the difference in the contract price and the resale price of the property, together with various carrying costs incurred by the vendor for utilities, realty taxes, and legal fees for the aborted transaction.

(v) *Friese v. Arfa,* 2019 ONSC 3332

On April 15, 2017, the parties entered into an unconditional agreement of purchase and sale, pursuant to which the vendor agreed to sell to the purchaser a residential property located in Keswick for the purchase price of $590,000, with a closing date of June 26, 2017, and with a

deposit of $15,000. On the date of closing, the vendor's lawyer was notified that the purchaser was unable to complete the transaction, since the purchase and sale transaction in respect of the purchaser's own property had failed to close. The following day, the vendor relisted the property for sale at the original listing price of $599,900.

A few weeks later, the purchaser proposed certain terms, by way of an amendment to the agreement of purchase and sale, whereby the vendor's sale of the property to the purchaser could be revisited. The vendor, however, did not accept the proposed amendment, and continued to list the property for sale. Since there was no interest or activity in respect of the listing, the vendor reduced the listing price of the property to $529,000, and then again to $499,000. The property was ultimately resold in September 2017 for a purchase price of $425,000. The vendor subsequently commenced an action against the purchaser for breach of contract and damages.

At trial, the purchaser submitted that the vendor should have entertained her proposal to amend the agreement of purchase and sale. She argued that if the vendor had accepted the purchaser's proposal (or agreed to other negotiated terms), then the transaction would have closed, and there would have been no damages. The purchaser further contended that by lowering the listing price repeatedly, the vendor did not take reasonable steps to mitigate his damages.

In rejecting the purchaser's submissions, the court observed that while the vendor did consider the purchaser's proposal, the amendment to the agreement of purchase and sale was problematic, because it did not reflect what the parties were discussing. Moreover, there was no obligation on the part of the vendor to pursue further dealings with the defaulting purchaser. It was clear that the vendor received incorrect or inaccurate information from the defaulting purchaser, and did not have the confidence to continue negotiations, which was reasonable in the

circumstances. The court further concluded that the actions taken by the vendor, and by his lawyer and real estate agent, demonstrated a course of action whose objective was to sell the property for the best price and in a timely fashion. The purchaser failed to lead any evidence to establish that the vendor did not make reasonable efforts to mitigate. Accordingly, the vendor was entitled to damages of $165,000, based on the difference between the contract price and the resale price of the property, plus special damages of $2,729.29 (which included legal fees for the aborted transaction, increased interest payments on money borrowed, and additional realty taxes).

(c) The Size of the Deposit and its Impact on the Purchaser's Ability to Attain Relief from Forfeiture

(i) *Dar v. The Yards Corporation*, 2019 ONCA 362

The purchaser, a non-resident buyer, entered into an agreement of purchase and sale to acquire a residential property from the vendor, and provided deposits totaling $134,960 (being approximately 28% of the purchase price), but failed to submit the last five deposits due and owing thereunder. The vendor granted the purchaser several extensions of time to pay the outstanding deposits before ultimately terminating the transaction. The purchaser commenced an action for relief from forfeiture, claiming that the amount of the deposit was grossly disproportionate to the damages suffered by the vendor. The purchaser further contended that there was an inequality of bargaining power between the parties to the transaction, given that the vendor was an experienced land developer and the purchaser was an ordinary citizen.

The motion judge found that the amount of the deposit agreed to by the purchaser, as a non-resident buyer, was not unconscionable in and of itself. Moreover, the purchaser received the advice and assistance of both a real estate agent and a lawyer, in connection with this

purchase and sale transaction, and there was nothing in the conduct of the vendor that was considered shocking, oppressive, or offensive, in terms of the resulting agreement of purchase and sale or the performance of the contractual obligations of the parties. Finally, the motion judge found that the vendor acted diligently, fairly, and, to some extent, to its own disadvantage in not terminating the agreement of purchase and sale earlier, when the purchaser first failed to advance the requisite deposit monies when due. The vendor's multiple indulgences, in the motion judge's view, should not be turned into an equitable reason to grant relief from forfeiture that would deprive the innocent vendor of its contractual rights.

The Court of Appeal dismissed the purchaser's appeal, and confirmed that, having regard to the circumstances surrounding the making of the agreement and the relationship between the parties, there was nothing that would justify a finding of unconscionability, nor was the amount of the deposit so forfeited by the defaulting purchaser disproportionate to the damages suffered by the innocent vendor.

(ii) *Nawara v. Riverstone,* 2019 ONSC 111

In August 2011, the purchaser's brother agreed to acquire a residential condominium unit from the vendor, but was unable to complete that transaction, and ultimately forfeited his deposit in the amount of $84,498.50 (hereinafter referred to as the "**First Deal's Deposit**"). On May 7, 2016, the purchaser entered into an agreement of purchase and sale with the vendor for the acquisition of a different condominium unit within the same complex (the "**Second Property**"), for a purchase price of $359,999, with a series of deposits due and owing thereunder totaling 20% of the purchase price. Shortly thereafter, the parties executed an amendment to the agreement of purchase and sale in respect of the Second Property, whereby the vendor agreed to transfer and credit the First Deal's Deposit towards the purchaser's acquisition of the Second

Property, and also agreed to increase the deposit required to be paid on the interim-occupancy closing date. Although the purchaser failed to make the required deposit payment on the interim-occupancy closing date, the vendor provided the purchaser with an opportunity to rectify the latter's outstanding default, and the purchaser proceeded to do so three weeks later.

However, the purchaser ultimately failed to complete the final closing of the purchase and sale transaction in respect of the Second Property, despite the fact that the vendor had granted an extension of the final closing date to accommodate the purchaser. Consequently, the vendor terminated the agreement of purchase and sale, and purported to retain the purchaser's deposit, as well as the First Deal's Deposit, collectively totaling $101,063.50 (amounting to approximately 28% of the purchase price).

On a motion for the determination of a point of law, the purchaser urged the court to conclude that the deposit was out of proportion to the damages suffered by the vendor, inasmuch as the vendor was ultimately able to resell the property for $11,000 more than the purchaser contracted to pay. The vendor contended that the parties specifically agreed that the forfeiture of the deposit would not constitute a penalty, and that it would not be necessary for the vendor to prove that it suffered any damages in order for the vendor to be entitled to retain same. Additionally, the vendor relied on the Court of Appeal's decision in the case of *Redstone Enterprises Ltd. v. Simple Technology Inc.*,[14] in which the court concluded that although the vendor in that case had suffered no damages, that fact alone did not render the forfeiture of the deposit unconscionable.

At the outset, the court noted that merely examining the percentage of the deposit to the total purchase price will not always be conclusive or determinative of whether or not a defaulting purchaser will be entitled to relief from forfeiture. Since the deposit in this case (namely, 28% of

[14] 2017 ONCA 282.

the total purchase price) exceeded the 20% range required to be paid by other unit purchasers in this particular condominium project, and was also above the upper range of 25% that has been judicially accepted for the forfeiture of deposits in the prevailing case law, the court concluded that it was appropriate to look closely at the facts of this case for any indicia of unconscionability.

However, the court ultimately concluded that there was no inequality of bargaining power, nor any substantial unfairness regarding the bargain that had been negotiated between the contracting parties. Additionally, there was no indication that the purchaser was relatively unsophisticated compared to the vendor, or that the negotiations were not *bona fide*, nor did the vendor's conduct support a finding of unconscionability. The court held that the gravity of the purchaser's breach of contract was significant, and that, by contrast, the vendor was more than fair by allowing the purchaser the substantial benefit of treating the First Deal's Deposit as a further deposit on account of the purchase price of the Second Property, and also by offering to extend the timelines to allow the purchaser to complete the transaction, on two separate occasions. The purchaser failed to establish that the deposit was disproportionately large in the circumstances, or even if it was larger than customary, that the size of deposit by itself was sufficient to make its forfeiture unconscionable. Accordingly, notwithstanding that the deposit totalled 28% of the purchase price, the court concluded that it would not be unconscionable for the vendor to retain the full amount of the deposit, as a consequence of the purchaser's repudiation of the contract.

(d) Additional Deposits Paid for Extensions of the Closing Date Being Forfeited

(i) *Greco v. Padovani*, 2019 ONSC 4105

The purchaser entered into an agreement of purchase and sale to acquire the vendors' residential property in Richmond Hill, for a purchase price of $3,200,000, with a closing date of September 29, 2017. The agreement called for two deposits, with the first deposit of $50,000 to be paid upon acceptance of the offer, and with the second deposit of $150,000 to be paid two weeks later. Two days prior to the scheduled closing date, the purchaser requested a four-week extension of the closing, and agreed to submit a further deposit in the amount of $200,000 payable directly to the vendors. This was the first of eight extensions requested by the purchaser. In order to obtain each of these extensions, the purchaser agreed to pay an additional deposit to the vendors' real estate lawyer, in trust (ultimately paying a total of $200,000 in further deposits), together with interest at the rate of 6% per annum on the outstanding balance of the purchase price. The final extension of the closing date was established to be on March 20, 2018. The vendors indicated that they would agree to a further extension to April 30, 2018, provided that the interest was prepaid to date. The purchaser failed to close on March 20, 2018, and did not prepay the interest on the outstanding balance of the purchase price, which had amounted to $18,871.23. The vendors' lawyer advised the purchaser's lawyer that the vendors considered the purchaser in breach of the agreement. Without prejudice efforts were made to revive the agreement on certain terms, but those efforts ultimately failed.

The vendors relisted the property for sale on June 26, 2018 with an asking price of $2,499,000, reflective of prices in the declining housing market, and correspondingly applied for a declaration that they were entitled to retain the deposits paid by the purchaser totalling $400,000. As of the date of the hearing of the application, the property had not been sold. After

reviewing the law with respect to deposits, the court found no unconscionability in the vendor retaining the full $400,000 deposit. The original deposit of $200,000 was equivalent to 6.25% of the purchase price, and was not disproportionate. While the additional deposits resulted in a 12.50% total deposit, the court found that this was also not disproportionate, especially given the fact that the additional deposits were made in consideration for extensions of the original closing date. By agreeing to these extensions, the vendors lost the opportunity to resell their property at an earlier date. In the court's view, each extension increased the risk to the innocent vendors, and should correspondingly be accompanied by an increased risk of forfeiture to the defaulting purchaser. Accordingly, the court ordered the release of the deposit monies that were being held in trust by the vendors' real estate agent and lawyer, without prejudice to the right of the vendors to pursue a claim for damages against the defaulting purchaser.

(e) The Purchaser's Inability to Obtain Financing Due to Market Conditions Not Amounting to Frustration of the Contract

(i) *Paradise Homes North West Inc. v. Sidhu*, 2019 ONSC 1600

Pursuant to an agreement of purchase and sale dated March 4, 2017, the purchaser agreed to acquire from the vendor a residential property located in Brampton, for a purchase price of $819,990. Prior to the closing date, the purchaser paid four deposits totalling $45,000, but defaulted on the fifth deposit. The purchaser subsequently sought to assign the agreement of purchase and sale to a third party, but refused to pay the assignment fee requested by the vendor for granting its consent thereto (being $25,000, plus $1,000 for legal fees). The purchaser ultimately failed to complete this transaction, and the vendor later resold the property to a third party for $715,000 in the spring of 2018.

The vendor commenced an action against the defaulting purchaser for damages in the amount of $82,059.50, representing the difference between the contract price and the resale price, together with carrying and sale costs, less the purchaser's deposit in the amount of $45,000. On a motion for summary judgment, the purchaser took the position that it was impossible to perform the contract due to market-driven conditions (and the consequent reduction in financing available as a result thereof). The purchaser submitted that the precipitous drop in the real estate market, and the purchaser's corresponding inability to obtain satisfactory financing, were not foreseeable, and were beyond the purchaser's control, and thereby rendered the purchaser's performance of the contract frustrated. Additionally, the purchaser contended that the contract was further frustrated by the fees charged by the vendor to grant its consent to an assignment.

At the outset, the court noted that the doctrine of frustration operates to relieve the parties to a contract of their bargain because a supervening event has occurred, without the fault of either party, which renders the performance of the contract substantially different than that for which the parties had bargained. The court held that the decline in the housing market did not trigger the defence of frustration. The parties had intended that the vendor would sell the property to the purchaser for the agreed-upon price of $819,990, and the purchaser's inability to obtain the requisite financing to complete the transaction on an all-cash basis with the vendor did not change or alter the nature of the contract.

With respect to the purchaser's submission that the vendor's desired assignment fee amounted to frustration, the court noted that the agreement of purchase and sale expressly confirmed that the purchaser could not assign the contract unless the vendor consented to same (which consent could be arbitrarily withheld). In other words, the vendor was entitled to

unilaterally refuse any assignment, but nevertheless agreed to the purchaser's request, on the condition that the purchaser pay the requisite assignment fee. In the court's view, the assignment fee was reasonable, given the purchase price of the property. Accordingly, the court rejected the purchaser's submissions and granted the vendor summary judgement, and allowed the vendor to retain the deposit without relief from forfeiture.

(ii) *Forest Hill Homes v. Ou,* 2019 ONSC 4332

On November 19, 2016, the purchasers agreed to acquire a residential property to be built by the vendor in a subdivision known as Cornell Rouge in Markham. After accounting for various closing adjustments described in the agreement of purchase and sale, the total purchase price of the property was $1,729,820.99. On the scheduled closing date, the purchasers did not have the necessary funds in order to complete the transaction. The vendor subsequently commenced an action for damages consequent upon the purchasers' default.

On a motion for summary judgment, the purchasers advanced various arguments in defense of their failure to close, including frustration, delay by the vendor, and misrepresentation by the vendor's sales agent. With respect to frustration of the contract, the purchasers argued that a drastic and unforeseeable drop in the real estate market made it impossible for them to obtain the financing they needed to perform their obligations under the agreement of purchase and sale. However, the purchasers did not adduce any real estate market evidence in support of this assertion. Rather, they simply claimed that they could not obtain the requisite financing, which they subjectively attributed to a change in the market. The court found that even if there was evidence to support the purchasers' assertion, there is nothing about a change in the market that amounts to an unforeseen event that substantially alters the nature of the agreement. In other

words, it could not be said that the contract itself was rendered totally different from what the parties had intended.

The court went on to reject the purchasers' additional arguments, including the purchasers' assertion that the vendor's excessive delay in setting the final closing date undermined the enforceability of the agreement of purchase and sale. As the court observed, the vendor was within its contractual rights to set the final closing date when it did, inasmuch as the agreement of purchase and sale expressly entitled the vendor to select a closing date at its own discretion, so long as such date was prior to January 18, 2019 (and established in accordance with the mandatory requirements of Tarion Warranty Corporation). In any event, the longer time until closing did not prejudice the purchasers, who admitted in cross-examination that they did not have the funds to complete the transaction on the original tentative closing date.

The vendor was ultimately awarded damages in the amount of $554,308.41, representing the difference between the sale price and the appraised market value of the property, less the deposit received, together with ancillary expenses claimed under the agreement of purchase sale (including realty taxes, utilities, and insurance premiums). The vendor was not, however, entitled to charge interest (in the amount of 20% of the unpaid purchase price) for the purchasers' failure to pay the balance due on closing, notwithstanding the fact that the agreement of purchase and sale had expressly afforded such a right to the vendor. In the court's view, a party in the vendor's position, namely a subdivision builder with a standard form contract for each of its homebuyers, cannot enforce such an onerous and unexpected term in the contract, without at least drawing same to the purchaser's attention.

(f) The Vendor Need Not Obtain an Appraisal of the Property in Order to Properly Mitigate

(i) *Zou v. Sanyal,* 2019 ONSC 738

The purchasers entered into an agreement of purchase and sale to acquire from the vendors a residential property located in Milton, for the purchase price of $971,000, and with a deposit in the amount of $40,000. The transaction was scheduled to be completed on July 18, 2017. Approximately one month prior to closing, the purchasers requested an extension of the closing date, as they were unable to sell their current property. The vendors, however, rejected this request, as they required the sale proceeds in order to complete the purchase of their own new property. A few weeks later, the purchasers indicated that they were unable to obtain mortgage financing to complete the transaction, unless the vendors were willing to renegotiate the purchase price. The vendors were not agreeable to this request.

On the day of closing, the vendors took steps to tender the closing documents and keys on the purchasers' lawyer, but did not receive payment of the outstanding balance of the purchase price. Instead, the purchasers' lawyer wrote a letter to the vendors' lawyer advising that the agreement of purchase and sale was null and void on various grounds, including the fact that the approximate square footage of the property (as noted in the vendors' listing) was incorrect, and that the vendors had failed to provide a survey of the property.

The vendors subsequently relisted the property for sale on July 25, 2017 at a listing price of $910,000. The vendors lowered the listing price to $859,000 on August 14, 2017, and then to $819,000 on September 19, 2017. By October 18, 2017, the vendors had received one offer to purchase the property at a purchase price of $745,000. On that day, the vendors lowered the listing price to $799,000. On October 24, 2017, the vendors received an offer in the amount of

$780,000 and, later that day, after several rounds of bargaining, the vendors accepted an offer to acquire the property for a purchase price of $797,000. The vendors thereafter commenced an action against the purchasers for breach of contract and damages.

On a motion for summary judgment, the purchasers contended, *inter alia*, that the vendors misrepresented the floor area of the property, and that the vendors' failure to provide a survey of the property, in contravention of the provisions of the agreement of purchase and sale, justified the purchasers' failure to complete the transaction. However, the purchasers had inspected the property (being a fully-completed home) for one hour prior to the vendors accepting their offer, and there was no evidence to support the claim that the vendors misrepresented the size or square footage of the property. Additionally, the agreement of purchase and sale only called for the delivery of a sketch or survey of the property if one was within the vendors' control, and there was no evidence submitted in this regard. In the court's view, the vendors' failure to provide a survey (if one was, in fact, in the vendors' possession or control) was not a breach that substantially deprived the purchasers of the benefit of the contract.

The purchasers further submitted that the vendors' failure to obtain one or more appraisals of the property when it was relisted for sale raised a genuine issue requiring a trial, in order to determine whether the vendors properly mitigated their damages. In rejecting this argument, the court noted that the vendors were not under any obligation to obtain an appraisal of the property. The evidence demonstrated that the vendors exposed the property to the marketplace for a reasonable period of time, and that they ultimately accepted the highest offer that they received, after engaging in negotiations with the new purchaser that resulted in an increase to the purchase price that was initially offered. The purchasers failed to show that the vendors did not act reasonably by taking the steps that they did to sell the property.

Accordingly, the vendors were entitled to damages in the amount of $134,000, representing the difference between the contract price ($971,000) and the resale price ($797,000), less the amount of the deposit ($40,000). The vendors were also entitled to damages in the amount of $20,256.38, based upon the increase in the commission fees that they had paid to the real estate agent who represented them on the resale.

(ii) *Degner v. Cabral*, 2019 ONSC 1610

The vendor, as the estate trustee of her late aunt's estate, listed the deceased's residential property for sale in April 2017 for $399,900, and quickly received sixteen offers to purchase the property in excess of the listing price. The purchasers submitted an unconditional offer to purchase the property for $551,000, together with a $10,000 deposit. On the scheduled closing date, the purchasers failed to complete the transaction, as they were unable to obtain financing, despite the fact that the vendor had previously granted them two extensions of the closing date. On July 18, 2017, six days later, the vendor relisted the property for sale and received three offers to purchase (at $400,000, $426,000, and $450,000 respectively). On July 24, 2017, the vendor accepted the highest offer, with a closing date of August 10, 2017. The vendor subsequently brought an action against the original purchasers, seeking damages of $100,842 on account of the purchasers' failure to close. Only one purchaser defended the action.

The purchaser took the position that the vendor did not properly mitigate her damages, inasmuch as she ought to have relisted the property for at least thirty days, as suggested by the purchaser's expert, before considering and accepting any offers, as opposed to selling the property after it was listed for only six days in duration. However, the purchaser failed to adduce any evidence to support the assertion that, had the property been listed for such time, the vendor

would have likely received an offer higher than $450,000. On the contrary, it was established (and acknowledged by the purchaser) that the property was resold in August 2017 for more than its market value. The vendor's evidence confirmed that the real estate market in Hamilton had experienced a significant downturn from the "seller's market" that had prevailed at the time that the purchasers had submitted their original offer to acquire the property. The court found that the vendor acted reasonably in taking her real estate agent's advice, and accepting the resale offer when she did. It would not be appropriate to require the vendor to speculate in a declining market and to correspondingly assume the burden of the changes in the market following the original closing date.

Although the vendor did not provide expert appraisal evidence of the fair market value of the property at the time of the subsequent sale, the vendor was not obliged to do so, given the clear evidence of the declining real estate market, as well as the resale price which afforded good evidence of the market value of the property. The court further confirmed that in a falling market, the vendor will generally be awarded damages equal to the difference between the contract price and the highest price obtainable within a reasonable time following the scheduled closing date, after making reasonable efforts to resell the property. The vendor was therefore entitled to damages in the amount of $100,092, which included the difference between the two sale prices (less the deposit received), as well as the legal fees incurred in the aborted transaction, realty taxes, insurance premiums, and the utility fees incurred between the two closing dates.

(g) The Vendor's Damages Calculated on the Difference Between the Contract Price and the Listing Price, Where the Property Remained Unsold

(i) *Wang v. Tribute (Grandview) Ltd.,* 2019 ONSC 201

In April 2017, the purchaser agreed to acquire a new home to be constructed in Oshawa from the builder/vendor, for a purchase price of $954,000, with a deposit in the amount of $96,000, payable in several installments. The tentative closing date for the transaction was scheduled for March 25, 2019. In total, the purchaser paid $24,000 towards the requisite deposit, leaving $72,000 outstanding. Throughout May and June of 2017, the purchaser expressed concerns about her ability to complete the transaction, and made attempts to have the vendor transfer her deposit monies to a different residential property with a lower purchase price. She also sought to terminate the agreement of purchase and sale altogether. A representative of the vendor advised the purchaser that she could not transfer the deposit monies to a different property, and warned the purchaser that she risked losing her deposit monies if she failed to complete the transaction.

Between July 27, 2017 and August 31, 2017, the purchaser retained counsel with a view to recovering her deposit, and subsequently commenced an action against the vendor. In its counterclaim, the vendor initially sought specific performance to compel the purchaser to complete the transaction, but ultimately accepted the purchaser's repudiation of the agreement of purchase and sale, and claimed damages for breach of contract.

An appraisal report estimated that the value of the property, as at the date of termination of the contract (namely, on or about March 2018), was $690,000. Despite this estimate, the vendor had relisted the property for sale at a purchase price of $763,992, before upgrades and adjustments. The evidence confirmed that the housing market reached its peak in April 2017,

evidenced by record prices, a high number of properties sold, and a short exposure time. However, the housing market subsequently declined, and bottomed-out in July 2017, and thereafter gradually rebounded to a more balanced and stabilized level.

On a motion for summary judgment, the purchaser argued, *inter alia*, that the vendor was precluded from pursuing any damages in excess of the deposit monies already received, inasmuch as the vendor, through its agents, entered into a settlement agreement with the purchaser. In rejecting this argument, the court noted that the vendor's warning (i.e. that the purchaser risked losing her deposit) was not tantamount to an agreement to abandon any other claims for damages in the face of the purchaser's breach of contract. Even the subsequent letter from the purchaser's lawyer, requesting that the purchaser be released from the agreement of purchase and sale, belies the suggestion that the parties had negotiated a settlement of the outstanding issues.

With respect to the assessment of damages, the vendor took the position that the damages should be calculated based on the difference between the contract price and the estimated value of the property on the date of termination of the contract. However, even though the appraisal report listed the value of the property at $690,000 on the date of termination, the property was nevertheless listed (and remained listed as at the date of the motion) at a purchase price of $763,992. In the court's view, the vendor was only entitled to the difference between the contract price and the current listing price, less the purchaser's deposit of $24,000. The court concluded that this would be the fairest way to calculate the damages in the circumstances, having regard to the fact that the property remained unsold, and that the market continued to be in flux.

(h) The Vendor's Delay in Completing Common Element Amenities Did Not Justify the Purchaser's Failure to Close

(i) *Lin v. Brookfield Homes (Ontario) Limited*, 2019 ONCA 706

The purchaser entered into an agreement of purchase and sale with the vendor in November 2016, to acquire a vacant land condominium unit with a newly-constructed detached home being erected by the vendor thereon, at a purchase price of $1,657,107.86, with a closing date originally scheduled for December 13, 2017 (and ultimately extended, on consent, to December 21, 2017), and with the deposit being $133,031.09. The purchaser had requested further extensions of the closing date beyond December 2017, in order to arrange mortgage financing, but the vendor denied the purchaser's requests. On the scheduled closing date, the purchaser's lawyer failed to tender the requisite closing funds, and claimed that a number of promised common element amenities had not yet been completed (including a parkette and entry/exit gates to make the project a gated community), and correspondingly asserted that the vendor's failure to complete said amenities before final closing constituted a fundamental breach of contract, and in the alternative, resulted in a material change to the disclosure statement committed by the vendor, thereby entitling the purchaser to rescind the contract with impunity. In response, the vendor's lawyer confirmed that even though the common element amenities were not yet completed, the house was fully constructed and a registerable transfer of title thereto was available on the scheduled closing date, and therefore the purchaser was in breach of her contractual obligations by not closing. Furthermore, the vendor's lawyer contended that there was no material change to the disclosure statement, inasmuch as the contract expressly confirmed that the vendor's failure to complete other units within the condominium, or to complete the common elements on or before the occupancy date, shall not be deemed to be a

failure to complete the unit. As a result of the foregoing default of the purchaser, the vendor terminated the agreement of purchase and sale, and forfeited the purchaser's deposit monies, together with all amounts paid for extras, and expressly reserved its right to recover any losses sustained by reason of the purchaser's default.

Subsequent to the termination of the contract, the vendor resold the property in August 2018 for $1,300,000. Parenthetically, the parkette was completed by the vendor at the end of August 2018, and the gates were installed as of September 12, 2018. The purchaser commenced an application seeking the return of her deposit, and the vendor commenced an application seeking a declaration that the purchaser breached the agreement of purchase and sale by failing to close, and was correspondingly not entitled to a return of her deposit, nor relief from forfeiture, and that the vendor was entitled to claim additional damages for such breach.

The motion judge confirmed that in light of the provisions of the agreement of purchase and sale, the purchaser had breached the agreement, thereby entitling the vendor to terminate the contract, to retain the purchaser's deposit, and to sue for damages over and above the amount of the forfeited deposit. The court also confirmed that once the agreement had been validly terminated by the vendor (i.e. as a consequence of the purchaser's default), the purchaser no longer had any rescission rights pursuant to the provisions of the *Condominium Act, 1998*, S.O. 1998, as amended (hereinafter referred to as the "**Act**"), inasmuch as the agreement ceased to exist. The purchaser appealed the motion judge's decision.

The appellate court confirmed that the vendor's non-construction of the common element amenities, as at the closing date, did not constitute a material change within the meaning of section 74 of the Act, and that the entry/exit gates were common element components to be constructed as part of the overall development (as and when intended to be completed by the

vendor), rather than same comprising essential features of the community that ought to be in place (presumably at the time of occupancy), as asserted by the purchaser, despite the express terms of the agreement to the contrary. Given the relevant language in the agreement of purchase and sale (which confirmed that the failure to complete the common elements on or before the occupancy closing shall not be deemed or construed as a failure to complete the unit), time was not considered to be of the essence with respect to the construction and completion of the common element amenities. Accordingly, the purchaser had no legitimate justification to refuse to complete the transaction on the scheduled closing date.

4. OBSERVATIONS & PRINCIPLES ARISING FROM THE JURISPRUDENCE

Although issues concerning the forfeiture of the deposit, and the circumstances under which the court will grant the defaulting purchaser relief from forfeiture, inevitably turn on the specific facts and context of a particular case, the following general observations and principles can be extracted from the recent jurisprudence:

(a) Notwithstanding the court's broad jurisdiction under section 98 of the *Courts of Justice Act* to grant relief to the defaulting purchaser from the forfeiture of the deposit, in order to prevent the vendor from being unconscionably overcompensated for the purchaser's breach of contract, Ontario courts have been reluctant to exercise this discretionary remedy, absent strong and compelling facts of unconscionability, inasmuch as the underlying purpose of the deposit is to incent and motivate the purchaser to complete the transaction, failing which forfeiture of the deposit will be the inevitable result. Even in those circumstances where the agreement of purchase and sale was entered into on behalf of a company to be incorporated, and without personal liability, the Court of Appeal has

confirmed that if the transaction is terminated through no fault of the vendor, the latter is nevertheless entitled to retain the forfeited deposit, absent clear contractual language that compels the vendor to return the deposit in the event that the company is not incorporated or fails to take the requisite steps to assume the agreement and complete the transaction.

(b) There is no judicial consensus on the maximum percentage of the total purchase price that a deposit can be before same will automatically be considered or construed to be a penalty, and therefore susceptible to the court granting relief from forfeiture. In fact, there are several recent court decisions confirming that merely examining the percentage of the deposit to the purchase price will not, in most cases, be determinative of unconscionability and/or the availability of relief from forfeiture, since much turns on the terms and provisions of the particular contract, as well as the surrounding circumstances. In two recent cases, a deposit totalling 28% of the purchase price was not, in and of itself, disproportionately large enough to make its forfeiture unconscionable.

(c) The fact that the vendor has suffered no damages whatsoever consequent upon the purchaser's default will not, in and of itself, render the vendor's forfeiture of the deposit unconscionable, nor entitle the defaulting purchaser to relief from forfeiture.

(d) If the vendor's losses incurred due to the purchaser's failure to close exceed the amount of the deposit so forfeited (which often transpires in a declining market), then the liability of the defaulting purchaser will not be limited to the amount of the deposit. However, if the vendor does pursue a claim in damages against the defaulting purchaser, then the deposit monies must be brought into account, and correspondingly credited towards the aggregate of the damages being claimed.

(e) A sudden and unexpected decline in the real estate market (and the consequent reduction in financing available to the purchaser as a result thereof) will not entitle the defaulting purchaser to claim frustration of the contract, nor absolve the defaulting purchaser from liability for his or her failure to complete the transaction as and when scheduled.

(f) The duty to mitigate is derived from the proposition that the innocent party cannot recover losses from the defaulting party that could have been avoided by the innocent party's reasonable efforts. The onus will be on the defaulting purchaser to demonstrate, on a balance of probabilities, that the vendor has failed to take reasonable steps to mitigate the losses incurred due to the purchaser's repudiation of the contract. The vendor need only act reasonably (and not perfectly or flawlessly) to mitigate the damages that he or she has suffered or incurred.

(g) In an aborted real estate transaction, the resale price of the property obtained by the innocent vendor will, in most cases, afford good and sufficient evidence of the market value of the property, and the innocent vendor need not necessarily obtain an appraisal of the property at the time of relisting same, in order to establish the market value of the property in connection with the mitigation of his or her damages.

(h) Where a vendor relists the property following an aborted transaction, there is no minimum duration or specific timeframe that the property must stay on the market, before the vendor can accept an offer to resell the property in an effort to mitigate his or her damages. Rather, the vendor need only demonstrate that he or she acted reasonably, in all of the circumstances. The court will not compel the vendor to speculate in a declining market, nor to assume the burden of changes in the marketplace, following the aborted transaction. Furthermore, the Court of Appeal has confirmed that in a declining market,

the vendor should be awarded damages equal to the difference between the contract price and the highest price obtainable within a reasonable time after the aborted closing date, following reasonable efforts to resell the property thereafter.

(i) Following the formation of the contract, and prior to the scheduled closing of the transaction, the court will not oblige an innocent vendor to accept a revised or lower price from the purchaser, or to renegotiate other salient terms or provisions of the contract with said purchaser. Likewise, the vendor need not accept the defaulting purchaser's revised terms or lower price, after the purchaser has repudiated the contract, in the vendor's efforts to mitigate his or her damages, notwithstanding the fact that the property may ultimately be resold to a third party at a price that is less than the defaulting purchaser's reduced offer. Simply put, the court will not compel the innocent vendor to continue to negotiate or deal with the defaulting purchaser after the aborted closing, in those circumstances where the vendor has reasonably lost confidence or trust in the purchaser, as a result of the latter's breach of contract.

(j) The vendor has no obligation, at law, to extend the closing date, or to provide the purchaser with any other accommodations not expressly contemplated by the agreement of purchase and sale (such as waiting for the purchaser to sell his or her own property in a declining market, in the hope that the purchaser will subsequently be in a better position to complete the closing with the vendor). Nevertheless, the courts clearly do take into account the fact that the vendor has granted the purchaser one or more indulgences, or one or more extensions of closing, when determining whether or not to grant relief from forfeiture of the deposit. Furthermore, in the context of an additional deposit being paid by the purchaser in consideration for the vendor granting an extension of the closing date,

particularly in a declining market (where the extension is sought in order to facilitate the purchaser's procurement of required financing, or the sale of the purchaser's own home), the courts have confirmed that each extension of the closing date constitutes an increased risk to the innocent vendor, and should therefore be accompanied by a corresponding increased risk of forfeiture of the additional deposits so paid.

(k) In addition to the difference between the contract price and the market value of the property, the innocent vendor may be entitled to compensation for the consequential damages suffered or incurred as a result of the purchaser's breach of contract (i.e. legal fees and disbursements for the aborted transaction, additional realty taxes, utilities, real estate commissions, insurance costs, moving expenses, and additional marketing and staging costs). Accordingly, if the defaulting purchaser knew, at the time of contract formation, that the vendor was intending to use the sale proceeds to acquire another property, then the vendor's reasonable financing costs incurred to complete the vendor's acquisition (i.e. in order for the vendor to avoid repudiating his or her purchase agreement) would be reasonably foreseeable, and would correspondingly be caused or triggered by the purchaser's default, and therefore would likely be recoverable as damages against the defaulting purchaser.

(l) Where the innocent vendor in an aborted real estate transaction has relisted the property for sale, but has not successfully resold the property in a declining market, at the time that the court is assessing damages for breach of contract, the court has concluded, in the case of *Wang v. Tribute, supra,* that the fairest way to calculate the vendor's damages in such circumstances is to determine the difference between the contract price and the vendor's listing price of the property, rather than the difference between the contract price and the

lower appraised value of the property as at the date of the termination of the contract. However, in the authors' respectful opinion, this approach unfairly penalizes the innocent vendor (i.e. by a reduced damage assessment against the defaulting purchaser) for having listed the property at a price that is higher than its appraised value, and in doing so, gives far too much weight or importance to the listing price, as opposed to the appraised value, for the purposes of determining the market value of the property. The listing price may not be a fair or accurate representation of the real value of the property, and generally reflects the vendor's subjective consideration and determination of the property's value. Arguably, the innocent vendor should not be punished by the quantum of damages ultimately awarded simply because the vendor listed the property for sale at (and correspondingly endeavoured to obtain) a price that is higher than the property's appraised value, inasmuch as such efforts (if ultimately successful) would have reduced the total amount of damages ultimately being sought against the defaulting purchaser, which is, after all, the paramount objective of the vendor's duty to mitigate. Parenthetically, had the vendor relisted (and correspondingly resold) the property at a lower price, and thereby increased the defaulting purchaser's liability exposure for damages, then the purchaser would most assuredly have argued that the vendor failed to take proper steps to mitigate its damages.

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