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FINANCIAL POST

If you bought a house before the coronavirus crisis hit, don't expect force majeure to save you

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Real estate transactions, even at the best of times, are complicated and stressful for buyers and sellers.

For the thousands of people who made or received firm offers before the coronavirus outbreak changed everything — and who are now left wondering whether their deals will close in the weeks or months to follow — the anxiety level is even greater.

Some have wondered whether a pandemic is considered *force majeure* (unforeseeable circumstances or “acts of God”), which could free them of their obligations in case housing prices were to plummet in the next few weeks. Others may be facing other liquidity issues.

Data from the Canadian Real Estate Association (CREA) indicates that 65,494 homes were sold across Canada in the first two months of 2020, meaning that as many as 130,000 families may be in limbo, waiting for their transactions to close.

Residential sales often involve a few weeks or months between when a firm offer is accepted, and the deal is “closed.” When a transaction is booked, buyers transfer a deposit that is held in escrow by the seller’s lawyers. At closing, buyers transfer the remaining amount to the sellers.

In uncertain times, much can change between a sale and its closing. When prices fall before closing, buyer’s remorse sets in, and purchasers may feel they have overpaid.

Even those who would like to follow through on the transaction may face challenges. Valuation metrics might change by the closing time such that declining prices could increase the loan-to-value (LTV) ratio, leading lenders to require that buyers put up additional funds.

In a highly unlikely scenario of severe liquidity constraints, financial markets might not extend credit, thus preventing sales from closing. If firm sales fail to close, even sellers will be at risk. Also, many buyers are simultaneously trying to sell their current residences; a failure to sell may limit their ability to buy.

Another concern is the trillions of dollars lost in investments since the onset of the pandemic. Some buyers had planned to cash in on investments to make their down payments. As portfolios bleed across the board, real estate transactions contingent on healthy investment returns could be in jeopardy.

So what kind of recourse do buyers have in this situation?

We consulted lawyers specializing in real estate transactions and contract law and the unanimous advice we received was that in at least Ontario, B.C. and Quebec, standard residential real estate transactions do not include *force majeure* provisions.

Hence, in Ontario, buyers and sellers are bound by their obligations under the Ontario Real Estate Association's (OREA) Agreement of Purchase and Sale.

Mark Weisleder, a partner with the law firm Real Estate Lawyers.ca LLP, told clients in a note that the "only way a deal cannot close is if the government registration system closes down or lenders cannot fund loans, which is not the case right now."

Real estate businesses have been deemed an essential service in Ontario. Thus, real estate brokerages and law firms are allowed to function but with new guidelines to observe social distancing. At the same time, financial institutions are working and extending mortgage credit.

While buyers' remorse is real, it is no ground to back out of the deal, warned Weisleder. During and after the Great Recession in 2008-09 and when the foreign homebuyers' tax was imposed first in British Columbia in 2016 and later in Ontario in 2017, many buyers tried to avoid closings after housing prices declined.

Courts, though, have found in favour of sellers in cases where buyers reneged on a signed deal. An Ontario couple who reneged on a firm offer to buy was ordered by the court to pay \$470,000 to make up for the difference in the price they agreed to pay and the subsequent sale price paid by a different buyer.

Rosa Lupo, a partner with the law firm Gowling WLG (Canada) LLP, advises that whereas *force majeure* is not covered in OREA's Agreement of Purchase and Sale, parties can include additional clauses in Schedule A of the Agreement. However, such terms must be entered at the execution of the agreement and not after the fact.

In some circumstances, parties may invoke frustration of contract when unforeseen circumstances make it impossible to perform their obligations under a contract. However, the bar to prove the frustration of contract is very high.

If a deal hits a snag, the best way forward is to work it out collegially, advises Andrea Sanche, a partner at the law firm Ricketts Harris LLP. Instead of trying to nullify a contract, the parties could agree to a postponement until such time that the transaction can be completed. It is up to the parties to demonstrate that they have made reasonable, good faith efforts to fulfill their obligations, advises Sanche.

Given the current pandemic and recent uptick in flooding and severe weather, which can cause severe damage to homes, it might be time to review standard buyer and seller agreements, which are province-specific.

Much can transpire during a sale and its closing. Introducing new standard clauses to protect both sides while providing opportunities for insurers to price risk will offer greater stability in uncertain times.

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