Paper to be presented by John W. Chandler, Q.C.

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I HAVE JUST LOST MY JOB AND CAN'T COMPLETE THE HOUSE DEAL - DO I HAVE TO MOVE?

This issue is all too topical in today's society. It is bound to happen or, indeed, it already has happened to one or several of your clients.

Despite the realities of today's society, common law still maintains rigid rules with respect to contracts and their enforceability. Unless a party falls within one of the accepted means of avoiding a contract, that party will be held to the terms of the contract regardless of the hardship it may impose on that party.

Upon reviewing the accepted means of avoiding a contract, I have determined that the closest doctrine that could be applied in this situation would involve the doctrine of frustration. It may be argued that the loss of your client's job, which presumably results in the loss of mortgage financing, makes completion of the purchase impossible, therefore, frustrating the contract. To that end I have made the following assumptions concerning this topic. They are as follows:

(1) An Agreement of Purchase and Sale has previously been entered into;

(2) Your client is a purchaser rather than a vendor;

(3) The deadline for approval of financing in the Agreement of Purchase and Sale has already passed;

(4) Your client has not yet signed the commitment letter with the mortgagee and upon learning of your client's loss of job, the mortgagee has refused to advance funds;

(5) Other options such as assigning the Agreement of Purchase and Sale and declaring the Agreement null and void (with or without a forfeit of the deposit) have been ruled out.

Frustration:

The seminal case in the area of frustration is Davis Contractors Limited v. Fareham Urban District Council, [1956] 2 All E.R. 145 (H.L.). This case involved a construction contract that took much longer than expected to complete because of the unavailability of labour and materials. The House of Lords held that this was insufficient to constitute frustration. Lord Reid stated (at p. 155):

> The Appellant's case must rest on frustration, the termination of the contract by operation of law on the emergence of a fundamentally different situation. Using the language of Asquith, L.J., which I have already quoted, the question is whether the causes of delay or the delays were
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> > fundamental enough to transmute the job the contractor had undertaken into a job of a different kind, which the contract did not contemplate and to which it could not apply. . .

In the same judgment Lord Radcliffe described the doctrine of frustration as follows (at p. 160):

> So, perhaps, it would be simpler to say at the outset that frustration occurs whenever the law recognizes that, without default of either party, a contractual obligation has become incapable of being performed because the circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract. Non haec in foedera veni. It was not this that I promised to do. There is, however, no uncertainty as to the materials on which the court must proceed.

He went on further to state (at p. 160):

> It is for that reason that special importance is necessarily attached to the occurrence of any unexpected event that, as it were, changes the face of things. But, even so, it is not hardship or inconvenience or material loss itself which calls the principle of frustration into play. There must be as well such a change in the significance of the obligation that the thing undertaken would, if performed, be a different thing from that contracted for.

Now, of course, many of you may be of the view that frustration cannot apply to land contracts, since the thing undertaken by contract is the sale of land. For example, whether or not a

building on the land is destroyed by fire or the land is otherwise adversely affected prior to the closing date is immaterial. You may feel that these events do not affect the true nature of the contract, which is still the sale of the land. I do not take exception to this point, however, I submit that the true nature of the contract depends on the terms associated with that contract. There is a line of cases in Canada beginning with Capital Quality Homes Limited v. Colwyn Construction Limited (1975), 61 D.L.R. (3rd) 385 (C.A.) in which the courts have held that frustration can apply to the sale of land.

Capital Quality involved a plaintiff purchaser who agreed to buy a parcel of land divided into twenty-six building lots. Prior to closing amendments were made to the governing planning legislation. The effect of the amendments were such that the entire parcel could still be conveyed but the individual lots could not be conveyed without obtaining the necessary approval from the appropriate authorities. This approval could not be obtained prior to the date of closing. In these circumstances, Evans, J.A. recognized that the terms of the contract required twenty-six lots of land to be conveyed. Since this was now impossible, he understandably stated (at p. 394) that the effect of the planning legislation was "of such a nature that the law would consider the fundamental character of the agreement to have been so altered as to no longer reflect the original basis of the agreement". He, therefore, concluded that "the legislation destroyed the very foundation of the agreement".

As for the type of event that must occur prior to the finding of frustration, Evans, J.A. stated (at p. 391) that it "must be beyond the control of the parties".

Regarding the law of frustration as it applies in Nova Scotia, the leading case would appear to be Kesmat Investments v. Canadian Indemnity (1985), 70 N.S.R. (2d) 341 (C.A.). That case involved a developer who wanted to obtain the rezoning of an owner's land and gave a bond as security. While pursuing the application for rezoning, a requirement that an expensive environmental study be done was imposed. The rezoning was not obtained and the developer and the surety pleaded that the contract had been frustrated because of the requirement for the environmental study. They were successful at trial but this decision was overturned on appeal. On appeal, MacDonald, J.A. for an unanimous court stated (at p. 348):

> It is clear from the authorities that hardship, inconvenience or material loss or the fact that the work has become more onerous than originally anticipated are not sufficient to amount to frustration in law so as to terminate a contract and relieve the parties thereto of their obligations to each other - see Goldsmith, Canadian Building Contracts, at page 105.

MacDonald, J.A. went on to discuss the situation of impossibility and impracticability of performance of a contract. However, I submit that the ensuing discussion by His Lordship is limited to the performance of the thing or item that is the essence of the contract itself. Impossibility or impracticability of performance does not refer to financial hardship that is unrelated to the true essence of the contract. As such, in our situation, failure to

complete a house purchase because of impecuniosity, although rendering the contract impossible to perform on a practical level, does not affect or alter the true essence of the contract; i.e., the purchase of a house. Since the essence of a contract has not changed, it is submitted that frustration is not applicable.

The above view is reinforced by the following quote from Buckley, L.J. in Universal Corporation v. Fiveways Property Limited, [1979] 1 All E.R. 552 (C.A.) at p. 554 wherein he stated the following to be an accurate and proper statement of the law:

> But quite emphatically the doctrine of frustration cannot be brought into play merely because the purchaser finds, for whatever reason, he has not got the money to complete the contract.

Similarly in McDermaid v. Food-Vale Stores (1972) Ltd. (1983), 117 D.L.R. (3d) 483 (Alta. Q.B.), Egbert, J. stated (at p. 489): "It matters not that the obligation has become more onerous or expensive to carry out".

Based on the foregoing, it is quite clear that in our situation the purchaser, despite his impecuniosity, is bound by the contract. By failing to complete the contract, the purchaser will be in breach and liable for either specific performance or damages.

As an aside to the above, I would recommend that you inform counsel for the vendor immediately after you are informed of your clients' predicament. Although it will not affect your clients' ultimate

liability for breach of contract, it at least affords the vendor the opportunity to consider his or her options prior to closing. It may also impact on the amount of damages for which your client may be liable. I would like to draw your attention to a recent Nova Scotia case wherein Mr. Justice Saunders has held that a purchaser is liable for mental anguish inflicted on a vendor for the breach of an Agreement of Purchase and Sale. The case is Gourlay v. Osmond (1991), 104 N.S.R. (2d) 155. In that case Mr. Justice Saunders awarded the vendors general damages of $6,000 for the distress and mental anguish which they underwent as a result of the aborted transaction.

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