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Damages for Failure to Complete

by
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This section features several court cases including *Gagne v. McCarthy*[43] and *Hassel v. Khoshgoo*.[44] It also covers:

- general concepts involved when analyzing a breach of contract;
- the role of the deposit in a real estate transaction and its treatment when either a buyer or a seller breaches the contract; and
- the general rule of when damages are assessed and when it might vary.

While the court cases in this section do not directly involve licensees, licensees will inevitably be involved in the breach of a contract and/or with clients seeking damages. This pertains to the advice licensees may give to their emotionally charged clients, engaging in the relisting of the property, or dealing with the deposit and/or damages of the property in question.

Introduction

The purpose of this section is to introduce licensees to the general concepts involved when a Contract of Purchase and Sale for a residential property has been breached. Contractual breaches are serious and can be legally complex. Licensees who take it upon themselves to advise their clients of their legal rights and obligations invite the risk of legal liability, as such claims would not be covered by E&O insurance. However, if licensees understand the basic elements and consequences of such breaches, he/she will be better equipped to know how to conduct themselves if a breach occurs. This will help minimize the negative impact for licensees and their clients. Keep in mind that licensees should always recommend that their clients obtain legal advice, if they have, or the other side has breached, or will breach the contract.

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Q&A

[43] *Gagne v. McCarthy,* 2011 B.C.S.C. 493.
[44] *Hassel v. Khoshgoo,* 2010 B.C.S.C. 233.

The Real Estate Council of British Columbia states:[45]

> *Although a licensee must apply his or her legal knowledge when advising a client, the licensee must not give legal advice to the client. If a client asks questions about the specific legal implications of particular terms or conditions, the licensee should explain that a licensee may not give legal advice and should encourage the client to consult a lawyer familiar with real estate matters.*
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> *For example, licensees who are drafting complex sales documents (for example, in the sale of a business or in the sale of a condominium requiring extensive remediation work), giving advice to sellers or buyers as to how to structure a transaction, or expressing an opinion as to the sufficiency of the terms of a Contract of Purchase and Sale to the buyer or seller, may be giving legal advice, and therefore, practising law contrary to sections 1(1) and 15 of the Legal Profession Act.*[46]
>
> *Licensees should ensure that the parties to a complex transaction are advised to obtain legal or other appropriate professional advice and the licensee should not be placed in a situation where he or she is giving legal advice or drafting documents beyond the licensee's expertise.*

Additionally, section 3-3(1)(d) of the Council Rules suggests that:[47]

SEC. 3-3 **(1) if a client engages a brokerage to provide real estate services to or on behalf of the client, the brokerage and its related licensees must do all of the following: . . .**

(d) advise the client to seek independent professional advice on matters outside of the expertise of the licensee.

Real estate transactions fall apart for a number of reasons. For example, a buyer may fail to complete the Contract of Purchase and Sale because: the buyer cannot obtain the necessary financing; the buyer has had a change of heart; or the property's market value has recently dropped by a significant amount. On the other side of the transaction, a seller may fail to complete the sale if: the seller has had a change of heart, the property's market value has recently increased significantly, or the seller has received a better offer for the property. In any of these cases, if one party fails to complete, he or she has breached the contract, and, as a result, the other party may be entitled to damages.

[45] Real Estate Council of British Columbia, "Unauthorized Practice of Law by Licensees," *Professional Standards Manual*, 2010, 7th Edition, online at http://www.recbc.ca/licensee/psm.htm

[46] *Legal Profession Act*, S.B.C. 1998, c. 9.

[47] Council Rules 3-3(1)(d).

The General Principles of Damages for Breach of Contract

When faced with a breached contract, the court's objective is to put the non-breaching party in the position which he or she would have been in had the contract been performed. In most cases, this can be done by making an award for monetary damages, where the breaching party will be ordered to pay the non-breaching party a certain sum of money. For example, if a seller fails to complete, the buyer may be able to obtain damages for the sum of money necessary to purchase a comparable property. In addition, the buyer may also be able to obtain damages for any expenses incurred as a result of having to purchase another property. The issue of damages is perhaps the most frequently contested issue in the law of contracts.[48]

To be successful in a claim for damages, the non-breaching party must clear a number of hurdles, which are discussed below.

Causation

Once a breach has been established, the non-breaching party (the buyer or the seller) must prove that this breach has caused a loss. Causation is not typically one of the major issues between the parties in the failure to complete cases.

Remoteness

While the non-breaching party is entitled to be compensated for the losses experienced as a result of the breach of the contract, not all losses qualify. The non-breaching party is entitled to recover, ". . . all of his losses which are reasonably considered by the parties as a result from the breach."[49] This concept is known as remoteness, as losses that are too remote will not be recovered.

In the failure to complete cases, the remoteness of certain losses can be a major point of contention between the parties.

Mitigation

Building on the concept of remoteness, a non-breaching party has the duty to mitigate (or minimize) his or her losses. In other words, ". . . a party who has suffered from a breach of contract [must] take all reasonable steps to avoid losses flowing from the breach."[50] In other words, once the non-breaching party learns of the breach, he or she has the obligation to keep the damages within reason.

In the failure to complete cases, the beaching party will often allege that the non-breaching party failed to mitigate his or her losses.

Quantification

The final hurdle for the non-breaching party to obtain damages is quantifying, in dollars, the loss that he or she incurred as a result of the breach. Some losses are relatively simple to quantify. Other losses, such as the lost profit on an overly speculative venture or hurt feelings, disappointment and stress, are much more difficult to quantify.

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[48] MacDougall, Bruce, *Introduction to Contracts*, (LexisNexis Canada, Markham, 2007) at p. 293.
[49] *Asamera Oil Corporation Ltd. v. Sea Oil and General Corporation et al.*, [1979] 1 SCR 633 at 647.
[50] *Asamera Oil Corporation Ltd. v. Sea Oil and General Corporation et al.*, [1979] 1 SCR 633 at 647.

A Licensee's Role in Breach of Contract Cases

It is important for licensees to remember that real estate contracts are complex legal documents that dictate the rights and obligations of the parties involved. Buyers or sellers can breach a contract, but a licensee representing either party must avoid giving legal advice on consequences or damages. To do so would not only be illegal but would also break the licensee's fiduciary duties to his/her client. In addition to section 3-3(1)(d) (*Duties to Clients*) of the Council Rules, Article 12 of the *REALTOR® Code* states:[51]

Article 12

A REALTOR® shall render a skilled and conscientious service, in conformity with standards of competence which are reasonably expected in the specific real estate disciplines in which the REALTOR® engages.

When a REALTOR® is unable to render such service, either alone or with the aid of other professionals, the REALTOR® shall not accept the assignment or otherwise provide assistance in connection with the transaction.

A licensee cannot counsel any party to a trade in real estate to breach the agreement. Section 5-5 of the Council Rules states:[52]

> *A licensee must not induce any party to an agreement for a trade in real estate to break the agreement for the purpose of entering into an agreement with another party.*

Additionally, article 20.1 of the *REALTOR® Code* reiterates the above section of the Council Rules similarly by stating:[53]

Article 20.1

A REALTOR® should not in any manner, by specific direction or suggestion, advise a party to a contract that the party should attempt to breach the contract.

[51] Canadian Real Estate Association, *REALTOR® Code*, article 12, online at www.realtorlink.ca/content/coe/art12.htm
[52] Council Rules 5-5.
[53] Canadian Real Estate Association, *REALTOR® Code*, article 20.1, online at www.realtorlink.ca/content/coe/art20.1.htm

The Seller's Claim to the Deposit

In the context of a real estate transaction, when a buyer fails to complete, the seller has lost the profit on the sale. The buyer is then liable for the seller's damages, as a result of his or her breach. A non-breaching party has the duty to mitigate his or her damages; therefore, when a buyer fails to complete, the seller will normally relist the property for sale.

Breach of Contract – Deposits

The Supreme Court of Canada has described the deposit in a real estate transaction as compensation to the seller for the lost opportunity to bargain with other buyers (for the property being taken off of the market), and for any resulting loss of bargaining power, as the price at which the seller is willing to sell has been disclosed.[54] Therefore, regardless of whether the seller is able to resell the property at a higher or lower price, he or she will normally be entitled to retain the deposit on account of damages. It is important to note, however, that if the seller is in breach of any of his or her obligations under the Contract of Purchase and Sale, he or she will likely lose the entitlement to retain the deposit.

The law surrounding deposits is not absolute and can be complex. For example, while the parties may characterize a certain sum of money as a 'deposit', if it is found by the court to have been intended to be a prepayment of the purchase price, the seller might not be able to retain it.

The standard form Contract of Purchase and Sale contains guidance for the seller's claim to the deposit in the event of a default by the buyer. It provides that if the buyer fails to complete the transaction, the seller may, at his or her option, terminate the contract and retain the deposit, on account of damages, without prejudice to the seller's other remedies.

According to the *Real Estate Services Act*,[55] any money held or received by the brokerage in respect of a trade in real estate is held by the brokerage as a stakeholder, and not as an agent for one of the parties in the transaction. Furthermore, the brokerage, aside from certain specific situations, cannot release that money unless both parties agree, in writing.

The Buyer's Claim to the Deposit

When a seller fails to complete and there has not been a breach by the buyer, the buyer will be entitled to a return of his or her deposit. On the other hand, a buyer may refuse to complete if he or she feels that the seller has done something that negatively impacts the buyer in the transaction. For example, a buyer may feel that the seller has breached a term of the Contract of Purchase and Sale because the seller has not completely disclosed a certain aspect of the property.

Whether or not a buyer is entitled to treat the contract as being at an end, (and thus being able to ask for a return of his or her deposit) as a result of the seller's breach, depends on the characterization of the breach. Breaches of fundamental

[54] *HW Liebig & Co. v. Leading Investments Ltd.*, [1986], 25 DLR (4th) 161 at para 33.
[55] *Real Estate Services Act*, S.B.C. 2004, c. 42.

LICENSEE PERSPECTIVES

Licensees have to contain their emotions. Don't abandon your client. Keep in touch with them and act on any instructions from the lawyer. Keep the lines of communication open. Panic/anger doesn't help anyone. Help solve the problem and let everyone move on with their lives.

{ STEWART HENDERSON }

terms, or conditions, will allow the innocent party to sue for damages and treat the contract as being at an end. Breaches of non-fundamental terms, or warranties, will allow the innocent party to sue for damages only.

The characterization of contractual terms as being conditions or warranties can be difficult, and many cases are decided in court. Therefore, a licensee should not be advising his or her clients with respect to their legal rights and obligations if the other party has, or is believed to have, breached the contract. Rather, legal advice should be recommended. Advising a buyer that he or she does not have to complete the contract because the seller has breached a condition of the contract can be negligent practice.

While deposits may not be released by the brokerage unless both parties consent to its release, in the case where a breach of a term of the contract is in question, one party will usually refuse to consent to such a release.

At What Time Are Damages Assessed?

The General Rule

An often controversial issue in the assessment of damages is the point in time at which damages should be calculated. There are a number of options such as: the date of the breach; a reasonable time after the breach; and, the date of the trial. The non-breaching party's entitlement to damages arises upon the breach of the contract. Therefore, the date of the breach is usually the time at which the damages are calculated. However, it has long been recognized that, "[w]hile damages are most often assessed as of the date of breach, this is not an absolute rule; the Court has the power to fix such other date as may be appropriate in the circumstances."[56]

The test applied by the courts in determining whether to deviate from the general rule is whether its application would create an injustice or would otherwise be inappropriate. A number of recent real estate cases in British Columbia suggest that because real estate markets have been, and tend to be volatile, the courts are more willing to deviate from the general rule of assessing damages as at the date of the breach.

[56] *Johnson v. Agnew* (1979), 2 WLR 487 at 489 (HL).

The Cases

FACTS OF THE CASE

Hassel v. Khoshgoo[57]

In *Hassel*, the sellers wished to sell their North Vancouver house in order to purchase a house on the Sunshine Coast for their retirement. Without a real estate agent, they marketed their property themselves and eventually entered into a Contract of Purchase and Sale with the buyer for $639,000. The buyer failed to complete the purchase primarily because the only financing he was able to obtain was not acceptable to him. The sellers, who had expected to use the proceeds from the North Vancouver house sale to completely pay for the Sunshine Coast house purchase, were forced to obtain mortgage financing to complete the purchase. The sellers then hired a real estate agent to assist in the resale of the North Vancouver house. However, due to a declining real estate market and numerous price reductions, the sellers finally completed a sale four months later for $480,000, $159,000 less than the sale price to the buyer. The sellers sued for this loss, in addition to some other expenses incurred as a result of the breach, including real estate commission, additional mortgage charges for the Sunshine Coast house purchase, and the extra utilities costs and property taxes incurred due to the delay in the sale of the North Vancouver house.

After finding that the buyer had breached the contract with the sellers, the court addressed the issue of when to assess damages. While it noted the rule that damages are normally assessed as at the date of the breach, it stated that in the context of, "*. . . a falling real estate market*, as a general rule, *the court should award the seller 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.*"[58]

To show that they used reasonable efforts and that the final resale price was the highest obtainable in the circumstances, the sellers provided evidence of: hiring a real estate agent; where and when the advertisements were placed; how many showings the real estate agent conducted; the timing of certain price reductions (on the real estate agent's advice); and, statistics on the declining real estate market at the time. Much of this evidence was given through the affidavits of their real estate agent. This helped the court to conclude that both the sellers and their real estate agent took all the necessary reasonable steps to sell the North Vancouver house for the highest price obtainable within a reasonable period of time (four months).

[57] *Hassel v. Khoshgoo*, 2010 B.C.S.C. 233.
[58] *Hassel v. Khoshgoo,* at para 34.

FACTS OF THE CASE

Gagne v. McCarthy[59]

In *Gagne,* the seller entered into a Contract of Purchase and Sale with the buyer, Ms. McCarthy, for the sale of her home in Penticton for $386,000. Ms. McCarthy did not complete the purchase on the closing date, but obtained an extension for closing and eventually signed a new Contract of Purchase and Sale for the property with her grandparents and herself as the buyers. Despite many assurances to, and multiple extensions from the seller, the buyers were still unable to provide the necessary funds to complete the purchase. After over four months of such interactions, the seller finally got fed up and filed a lawsuit against the buyers. The seller relisted the property and sold it four months later for $339,000.

In determining the date at which to assess damages, the trial judge noted that the general rule of assessing damages at the date of the breach would create an injustice in the circumstances. He stated:

> **[f]irst, the defendants gave the plaintiff repeated assurances over the course of four months following the contract completion date that they intended to complete the transaction imminently. Second, it is apparent that the real estate market was declining over the course of those four months. Third, the plaintiff acted reasonably in reselling the property after it became apparent that the defendants would not be completing the transaction. The property was sold within four months of the defendants' last assurance that they would be completing. It was sold for $339,000. . . . It is apparent from the face of that contract that the sale price was the subject of significant negotiation. . . . There is no evidence to suggest that this price was not the fair market value at the time the property was sold. There is no evidence to suggest that the plaintiff was either dilatory or precipitous in the manner in which she pursued the sale of this property. . . . [T]he plaintiff is entitled to the difference between the price at which the defendants agreed to purchase the property ($386,000) and the eventual sale price ($339,000), or $47,000.**[60]

The judge in *Gagne* was willing to vary the general rule in the case where the seller provided evidence that its application would create unfairness to her.

[59] *Gagne v. McCarthy*, 2011 B.C.S.C. 493.
[60] *Gagne v. McCarthy*, at para. 20.

Principles To Be Taken From These Cases

Both the *Hassel* and *Gagne* cases represent an important point. The goal in awarding damages is to put the non-breaching party in the same position as if the contract had been performed. It can often make sense to award the seller what he or she actually lost in the resale of his or her property, if he or she acted reasonably in that resale. This will mean that at the time at which damages are assessed, it will not be the date of the breach but rather the date a subsequent sale for the property was entered into.

Therefore, the licensee who is going to be involved should keep accurate records of all of the activities performed prior to the resale of the property. This includes the number of open houses, offerings, price negotiations, and price reductions to illustrate to the court that reasonable care was taken in the resale.

Other Losses

In addition to the loss of value a buyer or a seller might have suffered due to the other party's breach, a non-breaching party might also incur certain expenses in reliance on the other party to perform his or her obligations. The specific expenses, that can be recovered from the breaching party will be fact-specific; however, entitlement will always involve asking the following questions:

1. Can the non-breaching party establish that the breach caused the loss (causation)?
2. Can the non-breaching party establish that damages are not too remote (remoteness)?
3. Did the non-breaching party properly mitigate his or her losses (mitigation)?
4. Can the non-breaching party quantify (or put a numerical value on) the damages?

There are a number of recent cases in British Columbia that help to demonstrate the types of damages that have been awarded to a non-breaching party, when the other party failed to complete.

› **SELLER BREACHES:**

Roy v. 1216393 Ontario Inc.[61]

- The wasted expenditure by the buyers to initiate home design plans for an empty lot in a lakeside development.

Amar v. Matthew[62]

- The costs incurred by the buyers to store their furniture, and the extra moving expenses involved as a result of having to move into a smaller, temporary residence while waiting for the outcome of their case.

Did you know that licensees made the top 10 list of the most stressful jobs in Canada and the US?

CNBC[1]

and

MSN[2]

[61] *Roy v. 1216393 Ontario Inc.*, 2011 B.C.S.C. 465.
[62] *Amar v. Matthew*, 2010 B.C.S.C. 508.

[1] http://www.cnbc.com/id/42649998/America_s_Most_Stressful_Jobs_2011?slide=2
[2] http://money.ca.msn.com/savings-debt/gallery/gallery.aspx?cp-documentid=24387229&page=8

› BUYER BREACHES:

Hassel v. Khoshgoo[63]

- The real estate commission that the sellers incurred, as a result of having to resell their property, where the original sale was made without the services of a real estate agent.
- The additional mortgage charges the sellers were forced to incur in the purchase of their new property, as they had originally planned to use the proceeds from the sale of their former property to pay for their new property.
- The wasted notary public fees incurred by the sellers as a result of the breach.

Gagne v. McCarthy[64]

- The prorated cost of insurance, utilities and property taxes incurred by the seller, in having to find a new buyer, and the hold onto the property in the meantime.
- The cost of the seller's efforts in maintaining the property while trying to resell, such as shovelling snow, mowing the lawn, and tending to the garden.
- The additional interest and carrying costs on the mortgage that the seller was forced to maintain on the property while trying to resell it.

An interesting issue that has surfaced recently is whether awarding damages for mental distress, in regard to a breach of contract, is appropriate in the failure to complete real estate transaction cases. For example, in *Gagne*, the costs incurred by the seller for anxiety medication, due to the stress that the breach put on her, were denied because they were deemed to be too remote and not within the reasonable contemplation of the parties. This is the general view taken by the courts towards damages for mental distress in breach of contract cases. The court will typically only vary from this in unusual or exceptional circumstances. However, in *Gulston v. Aldred*,[65] the court awarded the seller $20,000 in damages for mental distress where the buyer breached the purchase contract. In this case, the court stated that the buyer, "*knew or ought to have known* that his breach would cause the *seller to suffer stress and be distressed as a result*."[66]

It is too soon to determine whether the *Gulston* case has set a new standard in the realm of damages for mental distress (for breach of contract). It could simply be one of the unusual or exceptional cases that the courts have been sympathetic towards. Licensees should note that in both the *Gagne* and *Gulston* cases, the respective courts applied the same test for the recovery of damages; however, they reached opposite results.

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63 *Hassel v. Khoshgoo,* 2010 B.C.S.C. 233.
64 *Gagne v. McCarthy,* 2010 B.C.S.C. 493.
65 *Gulston v. Aldred*, 2011 B.C.S.C. 1051.
66 *Ibid.*, at para. 16.

The Take-Aways

As both a buyer's and a seller's agent, there are some valuable points to keep in mind:

1. Your client may come to you for advice on how to proceed in the event that the other party breaches the purchase contract. It is important for you to recommend that your client obtain legal advice. Furthermore, you should contact the Real Estate Errors and Omissions Insurance Corporation to obtain advice on how you should proceed.
2. From a licensee's perspective, breaches of contract between the parties are matters that should be dealt with by the parties and their legal advisors. Such issues can be extremely stressful for the parties. When such issues arise, you might find yourself being approached by emotional clients looking for answers. It is important to avoid the temptation to comfort the client or ease his or her concerns by giving legal advice, as this is outside of your area of expertise. Remain calm and neutral in the matter. To eliminate any unwarranted suggestions from either side that you have acted out of your professional scope, you should ensure that you take and keep detailed notes of what actions you, and others, take with respect to the transaction.
3. In the event that the buyer fails to complete the transaction and the parties cannot agree as to how the deposit should be dealt with, licensees should be aware that releasing the deposit to the seller, without the written consent of the buyer, is prohibited under the *Real Estate Services Act*. Further, a seller should receive legal advice before claiming a deposit as this act may restrict the seller's remedies for damages. Recall that any money held or received by the brokerage, in respect of a trade in real estate is held by the brokerage as a stakeholder, and not as an agent for one of the parties in the transaction. To avoid the risk of liability in this scenario, your brokerage should consider making an application under section 33 of the *Real Estate Services Act* to obtain a court order for payment of the money into court. The parties can then litigate entitlement to the deposit between themselves.
4. When acting for a seller in a transaction where the buyer fails to complete, if the seller intends on seeking damages as a result of the breach, he or she should get legal advice to relist the property and complete the resale in a reasonable manner. If this is done, he or she should be able to recover the deficiency between the contract price and the eventual resale price, if any.
    - To ensure the resale price is the highest obtainable, the seller should document the resale process. As the seller's agent, you can assist by keeping detailed notes of any open houses, showings, negotiations, and price reductions so that a court can understand how and why a particular price was reached.

resources

LINKS

- ***Ling Yoe* (Re), 2011 CanLII 43767 (BC REC) Professional Misconduct of the *Real Estate Services Act*, Real Estate Council of British Columbia,** at www.canlii.org/eliisa/highlight.do?text=breach+of+contract&language=en&searchTitle=British+Columbia+-+Real+Estate+Council+of+British+Columbia&path=/en/bc/bcrec/doc/2011/2011canlii43767/2011canlii43767.html
- ***Kung* (Re), 2011 CanLII 43768 (BC REC) Professional Misconduct of the *Real Estate Services Act*, Real Estate Council of British Columbia,** at www.canlii.org/eliisa/highlight.do?text=breach+of+contract&language=en&searchTitle=British+Columbia+-+Real+Estate+Council+of+British+Columbia&path=/en/bc/bcrec/doc/2011/2011canlii43768/2011canlii43768.html