

A collapsed real estate deal – Who gets the deposit?

By Vyvyan Tsui & Charles J. Cao



In today's market, it is common for contracts involving the buying and selling of real property to require a 5 - 20% deposit prior to closing. For example, if you were to put forth an offer to buy an apartment for \$500,000, the seller would ask for an initial deposit in the amount of anywhere from \$25,000 to \$100,000. If, after signing the contract, you, as the buyer, are unable or unwilling to complete the transaction as set out in the contract, the deposit would be forfeited to the seller. Recently, however, the Supreme Court of Canada made a decision that reinterpreted the existing contract wording.

In the case of *Tang v. Zhang*, 2012 BCSC214, Mr. Zhang entered into a standard form real estate contract to buy Ms. Tang's and Mr. Tsang's property. Upon acceptance of his offer, Mr. Zhang paid a deposit of \$100,000 to the realty company which holds the deposit in trust until the comple-

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tion date. On the completion date, Mr. Zhang (the Buyer) failed to complete the purchase and the contract was terminated. Ms. Tang and Mr. Tsang (the Sellers) ultimately sold their property to another buyer at a higher price.

Ms. Tang and Mr. Tsang sued Mr. Zhang to keep the deposit. In their view, the Buyer repudiated the contract and the deposit should have been forfeited to the Sellers. In response, Mr. Zhang argued that the Sellers never suffered any damages as the property was in fact sold for a higher price.

Section 12 of the standard contract of purchase and sale states that:

"12. TIME: Time shall be of the essence hereof, and unless the balance of the cash payment is paid and such formal agreement to pay the bal-



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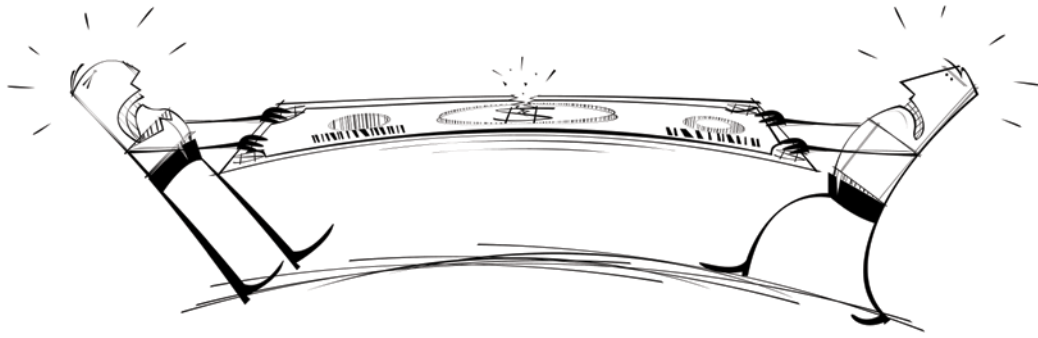
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ance as may be necessary is entered into on or before the Completion Date, the Seller may, at the Seller's option, terminate this Contract, and, in such event the amount paid by the Buyer will be absolutely forfeited to the Seller in accordance with the Real Estate Services Act, on ac-

The proper construction of these contractual terms is this: If the sale does not complete, the deposit is not non-refundable or automatically forfeited to the Seller.

count of damages, without prejudice to the Seller's other remedies."

It may seem like natural justice that a Buyer who breaches a contract for no good reason should have his deposit forfeited as "punish-



ment” or “penalty”. Surprisingly to some, the judge in Tang held that Mr. Zhang was entitled to the full return of his \$100,000 deposit. The proper construction of these contractual terms is this: If the sale does not complete, the deposit is not non-refundable or automatically forfeited to the Seller. Rather, the Seller is only entitled to claim the moneys paid as a deposit on account of its damages. Therefore, if the damages are less than the deposit, the Seller is not entitled to the excess, but it is returned to the Buyer.

It is notable that in this case, the Buyer was lucky enough to have breached the real estate contract in a rising market. If the Sellers had not

in fact sold their property for a better price, the deposit would still have been deducted or absolutely forfeited as damages for the sellers’ loss.

Following the reasoning in Tang v. Zhang, Section 12 of the standard form contract was amended by the BC Real Estate Association to read: “... the amount paid by the Buyer will be non-refundable and absolutely forfeited to the Seller.”

Moral of the story: the usage of different wording in legal contracts may mean the difference of \$100,000 (or more).

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