

In B.C.'s hot real estate market, vendors often try to back out of a sale for fear of losing equity

# When a seller gets cold feet

Over the last two years, there has been a significant increase in the number of claims made by purchasers of real estate as a result of vendors refusing to complete contracts for the purchase and sale of land. While the underlying facts of these claims are somewhat different, the one overriding theme in each claim is British Columbia's hot real estate market. Due to the rapidly rising land values being experienced in British Columbia, some vendors, after entering into a contract of purchase and sale, are realizing that they could have sold their property for more money had they waited. In this situation, some vendors have decided not to close, in hopes of re-listing the property for more money.

Where a purchaser is faced with a vendor who refuses to complete the sale of real property, it is important for the purchaser to be aware of his or her rights and to obtain prompt legal advice in order to preserve any claim to the property.

## Some vendors hope to relist for more money

### Case study

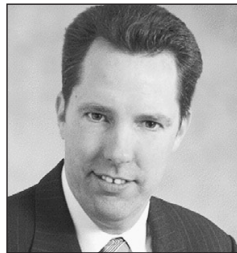
An example of a case where a vendor refused to complete a sale transaction is the recent **British Columbia Supreme Court** decision in *Van Dyk and Van Dyk v. Durno*. The basic facts of the case were that just prior to the closing date, the vendor advised the purchasers that she was not going to complete the sale of her property on the basis that the purchasers had taken unfair advantage of the vendor. In particular, the vendor argued that the contract

of purchase and sale was void as it was not fully understood by the vendor and because the price was so low that it was substantially unfair. In light of the vendor's decision, the purchasers commenced legal proceedings in the Supreme Court of British Columbia for an order requiring that the vendor complete the contract of purchase and sale.

After reviewing all of the evidence, the court found that the vendor had been involved in several previous real estate transactions in the past and did understand the nature of the documents she had signed. The vendor had admitted that she was aware that she was not obligated to sell the property and that she did not feel she was in an inferior bargaining position at the time that she entered into the contract of purchase and sale. The court also found as a fact that the price at which the vendor had agreed to sell the property was not substantially under the actual value of the property. Based on these findings of fact, the court concluded that the contract of purchase and sale was, in fact, a valid contract.

Once the court determined that the contract was valid, it then had to consider whether the purchasers were entitled to an order for specific performance, damages or both. Although, in many cases, an order of specific performance, requiring that the vendor actually complete

the contract by selling the property to the purchaser, would be preferable to the purchaser, the courts have consistently held that specific performance is not automatically available in every real estate case. Before a court grants an order for specific performance, it "must be satisfied that the property in question is sufficiently 'unique' that an appropriate substitute is not readily available and, further, that damages would be an inadequate remedy." In determining whether or not a property is unique, judges will consider all aspects of the property, including both subjective and objec-



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tive factors which may render the property unique to the purchaser. For example, factors such as view, size, sunlight and location are all possible considerations in uniqueness. It is also important to understand that specific performance and damages are not mutually exclusive. Where the court awards specific performance of a contract, it also retains the ability to award additional damages intended to put the purchaser in the same position as he or she would have been had the vendor completed the transfer of the property as required. Where the court determines that a property is not sufficiently unique to warrant an award of specific performance, the court will substitute an award of damages in place of the performance of the contract of purchase and sale.

### Ruling

The court in *Van Dyk v. Durno* referred to the fundamental test for the availability of specific performance, as detailed by the Supreme Court of Canada, and found that the purchasers were able to establish uniqueness of the condominium based on criteria they had set for property they wanted to acquire. In particular, the property was found to be unique as it was a two-bedroom corner unit in a concrete building that was in need of some repair. The purchasers were able to show the court that there were almost no other similar properties available in the lower Lonsdale area in which they wanted

to live. In addition, the purchasers were able to establish that they suffered additional damages due to the vendor's failure to complete the transaction. As a result, the court in *Van Dyk v. Durno* granted the purchasers an award of damages in addition to the order for specific performance of the contract.

The *Van Dyk* case is really just an example of the growing number of cases in British Columbia where vendors are failing to or refusing to close a real estate transaction as a result of our rising real estate market. Although there is no guarantee that a court will award specific performance in any particular case, if you are a purchaser of property and the vendor refuses to close, there are a number of steps you will need to take in order to preserve your claim to the property:

1. ensure that you show the vendor that you are ready, willing and able to complete the purchase and sale on the closing date;
2. immediately commence legal proceedings in the Supreme Court of British Columbia and at the same time file a Certificate of Pending Litigation against title to the subject property. Prompt commencement of legal proceedings will avoid a defence based on delay or prejudice to the vendor and the filing of a Certificate of Pending Litigation will ensure that the vendor does not sell the property to a third party before a determination can be made in the legal proceedings;
3. compile any evidence that is available regarding the uniqueness of the property; and
4. proceed with the legal proceedings in an expeditious manner in order to obtain an order requiring the purchaser to perform his or her obligations pursuant to the contract of purchase and sale.

Although most vendors who enter into a contract of purchase and sale will fulfil their contractual obligations, it is important for purchasers to understand, should they have to, that they may have the ability to seek an order requiring the vendor to complete the real estate transaction. ♦

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