

The Doctrine of Merger

By Brian Madigan

The doctrine of merger applies to “executory” contracts. An executory contract is one that is completed at some future time. This applies to real estate transactions since the closing date is specified in the future.



Once that date arrives, and the closing has taken place, the original contract has been “completed”. There are no more outstanding matters. There is no more negotiating. The deal is done and that’s it! So, in a real estate transaction once the Transfer/Deed has been exchanged for the money, the deal is finished.

There are two exceptions to this general rule:

1. new agreements made at the time of closing, and
2. old agreements contained in the original agreement that were clearly “intended” to be in force after the closing.

The usual wording that gives effect to this intention is the phrase “this warranty (or representation) shall not merge, but shall survive the completion of this transaction”. This wording is sufficient to show the intention of the parties.

It is the usual practice to have such clauses reproduced and prepared as separate undertakings and delivered as “new agreements made at the time of closing”. However, this need not be the case, and they do not need to be documented in that fashion to be enforceable.

Let me give you an example. It is January and the pool is closed up for the winter. The offer is signed and the completion date is 31 March, before anyone can check to see whether the pool works. Consider the following clauses in the agreement:

1. The pool will be in good working order on closing
2. The pool will be in good working order on 31 March,

3. The pool will be in good working order on closing and this warranty shall not merge, but shall survive the completion of this transaction,
4. The pool will be in good working order on 31 March, and this warranty shall not merge, but shall survive the completion of this transaction.

In these cases, the doctrine of merger applies and 1 and 2 “merge” on the closing. The contract is finished.

In 3 and 4, the intention is clear, the clause continues, but in both cases, it’s really only effective up until the day of closing or 31 March. Naturally, some better wording would be helpful. If the clause read 31 May, then the purchaser would have an enforceable agreement if the pool was not working on 31 May.

After this article was published, the following questions were posed, and the reply that was published is as follows:

Question #1. In your example 4, does this mean that the purchaser must inspect and test swimming pool on March 31 whether it is in good working condition or not? For example, if the pool was tested on April 1 and found defective, can the purchaser request the seller to repair?

Question #2. If the closing is March 31, can the purchaser put in a clause saying "good working condition of pool on June 1?"

Question #3. I don't understand the word of "this warranty shall survive the completion of this transaction".

Question #4. Does this mean that the warranty will be effective until the closing date?

REPLIES:

1. Yes, the warranty only goes until 31 March. If it is defective at that time, then there is a remedy. If it is not tested until 1 April, it is probably too late. It could be argued that the test was done on 1 April, but the conclusion is that not only was it not working on 1 April, it was not working on 31 March either. This becomes a question of “evidence”. The right itself exists only as of 31 March.

2. This is the solution, but, you also have to add the words “this warranty shall not merge but shall survive the closing of this transaction”. This should work out well since it allows a reasonable time to actually complete the test in the later spring.
3. We are now back to your original question. The doctrine of merger says that the final bargain was struck by the parties on the closing date. No more negotiating after that point. With an executory contract there are really “two kicks at the can”, the agreement and the closing. If you failed to include something by the closing date, then it is too late. The deal has been closed. The doctrine of merger brings closure to the transaction. The original agreement comes to an end; it has been fulfilled, completed and satisfied. The closing in effect operates as a release of the original agreement. It is almost like the original agreement never existed. An “exception” to this rule is a stated “intention” in the agreement of purchase and sale that something is to happen after the deal has closed. The “best evidence” of this intention is to include a clause with those magic words.
4. Yes, it will be effective until closing, but, more than that, it will continue to be effective until the date specified. So, in your example, it continues to be effective until 1 June. The ordinary wording made it effective until the closing date and when you added the clause “this warranty shall not merge on the closing of this transaction, but shall survive the closing of this transaction”, then this covered off the period 1 April to 1 June.

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