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Vincent Mercier Speaks to Lexpert on MAE Clauses and Ordinary Course Covenants in the Context of COVID-19

In an article published in the *Lexpert Special Edition: Finance and M&A 2021* (available to subscribers), Davies partner Vincent Mercier shared his insights on the implications of *Fairstone Financial Holdings Inc. v Duo Bank of Canada*, the first Canadian case to consider whether a purchaser could refuse to close a deal in the context of the COVID-19 pandemic.

Vince is representing Shaw Communications Inc. and acting as Canadian M&A counsel to Kansas City Southern in the two largest Canadian M&A transactions announced this year.

The court in *Fairstone* held that the pandemic could not be implied as a material adverse effect and that the seller's response did not breach the ordinary course covenant.

"The judge clearly thought that the purchaser was trying to use the ordinary course of business as a back door" to exit the agreement, said Vince.

Speaking on Cineplex's upcoming case against the United Kingdom's Cineworld, Vince explained that, depending on the facts, the judge will have the latitude to follow either *Fairstone* or *AB Stable VIII LLC v MAPS Hotels and Resorts One LLC*, which allowed the buyer to walk away from the deal.

"People won't want to take it for granted that a court will apply *Fairstone* in all cases," he said, notwithstanding that *Fairstone* was decided in Ontario, where the Cineplex-Cineworld case will also be heard.

The *Lexpert Special Edition: Finance and M&A* profiles the highest-ranked Lexpert lawyers with practices focusing on corporate law and encompassing finance and M&A. This year's edition recognized 49 Davies partners as leaders in the field.