

Buyer breached agreement to purchase home that was destroyed by fire (McDonald v. Lowrie)

Agreement of Purchase and Sale | Breach | Litigation | Litigation & Dispute Resolution | Property

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Often there may be several weeks or months between the signing of a binding Agreement of Purchase and Sale (APS) and the scheduled completion date for the purchase of a property. During this period, the seller retains possession of the property and is generally responsible for maintaining it in the same state that it was in when the buyer agreed to buy it. If substantial damage occurs to the property before closing, the buyer is permitted a reasonable opportunity to assess the damage and may be in a position to terminate the transaction. However, if the buyer does not take proper steps to do so, they may remain obligated to complete the purchase.

These circumstances were illustrated by the decision of the Ontario Superior Court of Justice in *McDonald v. Lowrie*, 2025 ONSC 1397 (CanLII).

In early May 2024, the buyer entered into an agreement of purchase and sale (APS) with the seller to purchase a rural “century home” on a two-acre lot in Tillsonburg, Ontario for \$775,000, with a deposit of \$25,000. The transaction was scheduled to close in August 2024.

The APS was in the standard form of the Ontario Real Estate Association (“OREA”), and included clauses addressing the entire agreement and that time shall be of the essence.

The APS also included a standard “insurance clause” that provided the terms on which the property would remain at the seller’s risk until closing. In the event of “substantial damage,” the buyer would have the option to elect either to terminate the agreement with a refund of the deposit or to take the proceeds of any insurance and complete the sale.

Unfortunately, on 22 May 2024, a fire destroyed the home.

In July 2024, the buyer’s lawyer notified the seller’s lawyer that the insurance clause in the APS was being invoked and requested details of the insurance available to respond to the loss.

In early August 2024, the seller’s lawyer provided a copy of the insurance policy. The seller confirmed the policy was valid and that the insurer was in the process of obtaining quotes in respect of the loss, which were not yet available. The parties agreed to extend the closing date to 28 August 2024, to allow for receipt of more information about the available insurance.

On 26 August 2024, the seller forwarded the insurer’s offer to settle the insurance claim. A contractor had provided a quote of \$973,813.94 to rebuild the house. The seller’s insurer proposed that the seller could either hire a contractor to rebuild the house or take a cash settlement of \$749,375.37, being the rebuild quote less overhead, profit and taxes.

The buyer then requested a one-month extension in order to consider the insurer’s proposal. However, the seller would only agree to a brief extension, as a result of which the parties formally agreed to a new closing deadline of 5:00 p.m. on 30 August 2024.

On 29 August 2024, the buyer’s lawyer raised concerns about the sufficiency of the insurer’s settlement offer and repeated the request for a one-month extension. The seller took the position that the insurer had already given a definite commitment of the amount payable under the policy and that no further extensions of the

closing date would be provided. The seller offered to assign the insurance proceeds to the buyer.

On 30 August 2024, the seller tendered the closing documents and included an assignment of insurance proceeds. While the buyer forwarded the balance of the funds required and a direction authorizing the transfer of the property, the buyer did not register the transfer on title. The seller's lawyer made several inquiries throughout the day as to the status of the registration.

Shortly before the 5:00 p.m. closing deadline, the buyer advised that he would close the transaction if the seller provided a "guarantee" of the minimum insurance proceeds payable for the loss. The closing deadline of 5:00 pm passed without the registration of the transfer.

Later that evening, the buyer's lawyer proposed that the closing date be extended to 3 September 2024, with adjustments to remain as at the closing date of 30 August 2024. The seller did not agree to this request.

On 3 September 2024, the seller's lawyer advised that the buyer had repudiated and terminated the APS due to his insistence on the guarantee of the insurance proceeds. The seller returned the sale proceeds less the \$25,000 deposit, taking the position that the buyer had forfeited the deposit through breach of the APS.

Litigation ensued with the buyer seeking an order of specific performance requiring the seller to complete the transaction. The parties agreed that the seller would not assign, sell, or encumber the property in the interim.

A court application proceeded by way of a written record, with no cross-examinations on affidavits. By the time of the hearing, the parties agreed there were no material facts in dispute and that the court could make the necessary findings based upon the law of contract and governing authorities.

The application judge determined that the issues were subject to previous decisions of the Supreme Court of Canada in *Wile v. Cook*, 1986 CanLII 27 (SCC) and the Court of Appeal for Ontario in *Bilotta v. Booth*, 2020 ONCA 522, paragraphs 17-18, which had addressed the effect of the standard-form APS insurance clause.

The insurance clause means that the property remains at the seller's risk until closing. As explained by the application judge, the insurance clause "alleviates the harshness of the common law" which would otherwise require a buyer to complete a transaction and pay full price for a property that had been damaged. In the event of "substantial damage," a buyer may either take the insurance proceeds and complete the transaction or cancel the agreement and have the deposit returned.

What the insurance clause does not do, however, is specify the amount of insurance or "any guarantee that the insurance money is necessarily collectible": *Wile v. Cook*, at paragraph 143. Accordingly, while a buyer may be permitted reasonable time to obtain and assess the details of potential insurance coverage, it does not provide the right to wait and see if the insurer will pay.

In the application judge's view, the buyer had been provided with sufficient time and details of the insurance coverage and the seller was not required to do anything further. The buyer was aware of the extent of the destruction, the existence of the insurance policy, and the insurer's offer. The closing date was extended to provide an opportunity to receive and consider the insurer's settlement position. If the buyer was concerned that the insurance payout was insufficient or uncertain, then his option was to cancel the agreement and have the deposit returned.

What the buyer was not permitted to do was demand that the seller execute an assignment that guaranteed a minimum of insurance monies to be recovered. This went beyond the APS and amounted to a variation of its terms which the seller was not obliged to accept. The buyer was therefore not "ready, willing and able" to close the APS on its original terms even though he tendered the balance of the purchase funds and a direction authorizing the transfer of the property, which was not registered.

The application was therefore dismissed and the seller will retain the deposit.

The decision shows that a buyer must take care to follow the appropriate steps in a transaction where a property had been substantially damaged in order to be in a position to demand that the transaction be terminated or to request any additional terms. Belatedly introducing new terms that are not accepted by the seller before the closing deadline may amount to breach of the APS. A PDF version is available for download [here](#).

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