

Buyer cannot force seller to remove notice registered on title by third party (Brighton Breeze Ltd. v. Noel Property Management Ltd.)

Agreement of Purchase and Sale | Land Title Act | Litigation | Litigation & Dispute Resolution | Ontario | Real Estate

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An agreement of purchase and sale (APS) for a real estate transaction may contain a term allowing a buyer to demand that a seller take steps to resolve defects or encumbrances affecting the property prior to closing, failing which the buyer can terminate the deal. A key factor is whether or not the seller knew about the defect at issue at the time that the APS was entered into, as demonstrated by the Ontario Superior Court of Justice in *Brighton Breeze Ltd. v. Noel Property Management Ltd.*, 2025 ONSC 2377 (CanLII).

In March 2021, the plaintiff agreed to purchase a waterfront property in Brighton, Ontario, from the defendant for \$950,000, with a deposit of \$100,000. The closing date was eventually scheduled for 28 February 2022.

The APS provided the plaintiff with 120 days to conduct due diligence about all aspects of the property. The APS contained an “annulment clause”, which provided the plaintiff with the right to make valid objections to title and the option to terminate the transaction and recover the deposit if the seller was unwilling to remove, remedy or satisfy such objections.

The property was part of a marina owned by the seller that provided seasonal dock slip rentals. One of the property’s neighbours was a condominium corporation with unit owners who had docks on the waterfront of the property that were installed under informal verbal agreements with the seller. There was also a restaurant adjacent to the property that was granted the use of a portion of the two customer docks.

The plaintiff buyer intended to develop a townhouse project on the property with adjoining dock slips for the owners.

In order to qualify for mortgage financing, the plaintiff had to be able to demonstrate that no docks and parking spots were assigned to others who could claim ownership of them. The plaintiff asked the seller for permission to contact the neighbours with boat slips on the property for more information.

The seller offered to cooperate but advised that there were verbal agreements that had been granted to some homeowners and the restaurant concerning docks and parking on the property. The seller proposed sending a letter to the property’s neighbours outlining the plaintiff’s intentions for the property.

Eventually relations deteriorated between the plaintiff and seller due to the parking and dock issues, and even though the transaction had not been completed, the plaintiff wrote to the condominium neighbour and demanded that its unit owners and visitors cease trespassing on the property.

As a result, the condominium registered a notice on title to the property under section 71 of the *Land Titles Act*, claiming an unregistered interest in the property, and commenced an application against the plaintiff and the seller.

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On the 28 February 2022 closing date of the transaction, the seller tendered but the plaintiff refused to waive its demand that the seller remove the notice from title.

In June 2022, the Superior Court of Justice heard the condominium's application and found that it did have parking rights on the property and that the seller had the misfortune of being caught in the crossfire of the dispute between the plaintiff and the condominium.

The condominium removed the notice following the application but by that point the sale had fallen through since the closing date had passed.

The plaintiff pursued an action against the seller alleging that the seller's failure to transfer clear title to it on the date of closing amounted to a breach of the APS. The plaintiff sought specific performance requiring the seller to complete the transaction.

In response to the plaintiff's claim, the seller denied that it rescinded the agreement and stated that it had remained ready and willing to close the transaction if the plaintiff had elected to do so. Since the plaintiff was unwilling to waive its objection to title, the seller took the position that the APS was at an end and offered to return the deposit.

The parties brought dueling motions for summary judgment.

The motion judge noted that there is a distinction in the applicable law between a title defect that existed, with the vendor's knowledge, at the time that the APS was entered into, and one that is discovered thereafter. Rescission will not be readily available to a vendor who entered into an agreement recklessly and with full knowledge of their inability to remove the defect in title: *Business Development Insurance Ltd. v. Caledon Mayfield Estates Inc.*, 2015 ONSC 1978, at paragraph 68.

However, the law does not require a seller to engage in litigation with a third party to remove an objection to title: *Business Development*, at paragraph 74.

In the motion judge's view, the plaintiff's argument was premised on the assertion that the seller was reckless in entering into the APS because it had knowledge of the underlying issues involving parking and the use of docks by the property's neighbours that eventually gave rise to the notice registered by the condominium.

This argument was rejected. The motion judge found that it was the buyer's antagonism of the condominium neighbour that led to the notice being registered, not actual title issues. As of the scheduled closing date, the hearing date for the application had yet to occur and there was nothing that the seller could do to convince the condominium to remove the notice from title. There was also no evidence that the plaintiff requested an extension to the APS before the application was heard.

In the motion judge's view, the condominium's notice was a title defect rather than an encumbrance, as the seller could not compel or rely on any legal right to discharge it. Since it was an objection to title, the seller was allowed to rely on the annulment clause in the APS: *Business Development*, at paragraphs 75, 85. It put the plaintiff to its election and offered, as it was contractually required to do, to return the deposit in full.

The motion judge found that the seller acted reasonably before relying on the annulment clause. At closing, the seller took all steps necessary to put the plaintiff in a position to waive its demand by tendering the closing documents, showing that it was ready and able to complete the transaction. When the closing date came and went without the plaintiff making its election, the seller rightly treated the transaction at an end.

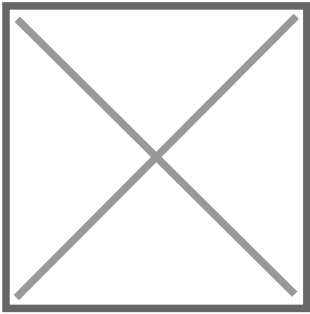
The seller was therefore entitled to rely on the annulment clause to declare the APS null and void.

In the result, the court found that the plaintiff failed to establish grounds for specific performance and was entitled only to its deposit, subject to any claim for costs in favour of the seller that may be awarded for the motions. The plaintiff's claim was otherwise dismissed.

The decision shows that careful consideration should be made by a buyer as to whether to take the position that a seller is required to address any title issues that arise from claims made by third parties. The buyer could have chosen to close the purchase and deal with the neighbour's claims thereafter, or sought an extension of the closing date. Instead, it waited until the court dealt with the neighbour's application and sued the seller for title after the transaction had been terminated. A PDF version is available for download [here](#).

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).

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