

Buyer entitled to recover deposit where neither side was ready to complete transaction (Nieuwenhuis v. FRP Inc.)

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In disputes arising from an incomplete real estate transaction, the courts will generally focus on which party is responsible for breaching the terms of their agreement. In some cases, however, neither party will have been ready to complete the transaction on the scheduled closing date. The resolution of their dispute will then turn on what steps the parties took after the closing date, if any.

In *Nieuwenhuis v. FRP Inc.*, 2025 ONSC 4275 (CanLII), litigation between the parties arose after the incomplete sale of a property in Bowmanville, Ontario.

In June 2017, the potential buyer contacted the owners and inquired if they were interested in selling the property. The owners advised that they would consider doing so, depending on the price. The parties then agreed to the terms of a letter of intent which specified a purchase price of \$3 million, and a term that permitted the sellers to continue to reside in the property for two years after the completion of the sale.

Because the buyer had not retained legal counsel, the parties agreed that the sellers' lawyer would prepare an Agreement of Purchase and Sale (APS), based on the letter of intent. The parties met at the offices of the sellers' lawyer in August 2017 and executed the APS. The APS required a deposit of \$175,000 payable to the sellers' lawyer and was scheduled to close on September 29, 2017.

The APS was conditional for three banking days upon the approval of its terms by the sellers' lawyer. The approval condition stated that unless notice was given that the condition had been fulfilled, the APS would be null and void. No notice of fulfilment or waiver of the condition was ever provided.

The APS was also conditional on the parties entering into a lease agreement entitling the sellers to the exclusive use, occupation and enjoyment of the residence located on the property for a period of two years following closing.

A term in the APS entitled "Time Limits" provided that time shall be of the essence unless extended or abridged by an agreement in writing signed by the parties or their lawyers.

On September 17, 2017, the parties agreed to extend the closing to October 6, 2017.

In an email dated October 3, 2017, the lawyer for the buyer requested that the sellers agree to a vendor take back mortgage (VTB). The sellers' lawyer responded the following day to decline this request. The buyer's lawyer then suggested a 30 to 60-day extension to allow the buyer to arrange financing. The buyer's lawyer also noted that the APS was conditional on a residential lease being signed and that some time would be required to negotiate the terms of the lease satisfactory to both parties. A lease had not been prepared.

The transaction did not close on October 6, 2017. Neither party tendered. No amendment to extend the closing date was signed. In one email, the buyer's lawyer inquired, "Is there actually a live agreement between these guys?"

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On October 23, 2017, the buyer's lawyer wrote to the sellers with some suggestions for terms that would allow the transaction to continue. He also suggested that if terms could not be agreed upon, they could accept that an impasse had been reached and the deposit returned. The sellers' lawyer said that he would review the matter with them and advise.

While the parties met occasionally to discuss the transaction, in September 2018, the buyer requested the return of the deposit. Emails were exchanged between the lawyers about whether the deposit would continue to be held in trust by the lawyers or paid into court. No agreement was reached. A new APS was prepared in 2018 but never signed.

In November 2020, the sellers sold the property to another buyer for \$1.3 million.

In the litigation that ensued, the parties moved for summary judgment against each other. The buyer sought the return of the deposit while the sellers sought damages for the buyer's failure to complete the transaction for the agreed-upon price.

The sellers argued that the reason for the buyer failing to close the transaction was its inability to obtain financing.

In contrast, the buyer's position was that the APS had become null and void because the extended completion date, October 6, 2017, passed with neither party tendering. The buyer also contended that the APS was subject to a lawyer approval and a leasing condition, neither of which were ever fulfilled or waived.

With regard to the lawyer approval condition, the motion judge noted that it was for the benefit of the sellers and although there was no formal written waiver of the approval condition given, it was implicitly given when the parties agreed on September 17 to extend the closing to October 6, 2017. In that regard, it made no sense for the sellers to sign an amendment to the APS to extend the closing date if it was null and void.

With regard to the lease condition, however, it was important to both parties since the sellers needed to be able to reside in the property and the buyer needed to develop a plan to clean it up. The lease condition was never satisfied.

Importantly, the motion judge found that as of the extended date for completion of the transaction in October 2017, neither party was in a position to complete the transaction. The sellers had not prepared a transfer, the buyer did not have sufficient funds, and neither party had prepared a draft lease. Neither party tendered. While emails were exchanged about extending the closing date, there was no written agreement doing so.

The motion judge referred to similar circumstances addressed in *Malka v. Racz*, 2022 ONSC 1362 (CanLII), where neither party was ready, willing and able to complete the transaction on the closing date and neither party tendered nor took steps to restore time of the essence. In that case, the court held that neither party was entitled to enforce the agreement:

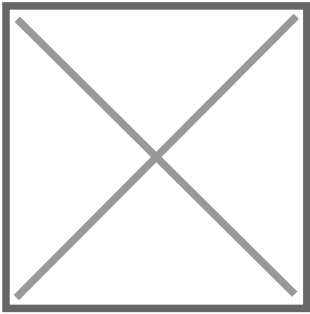
In circumstances in which there has been mutual breaches of the agreement of purchase and sale and neither party is in a position to close on the date fixed for closing with time of the essence, and neither party restores time of the essence, the agreement is treated as abandoned and the purchaser is entitled to a return of the deposit. This law is the law applicable to the circumstances of the immediate case.

The motion judge concluded that this passage was equally applicable to the case at hand and that the APS was abandoned and became null and void. Accordingly, the sellers were not entitled to damages because the buyer did not breach the contract. The buyer was entitled to the return of the deposit.

The case affirms that if a party to an APS wishes to reinstate a new date for completing a transaction, they must serve notice to the other party, fixing a new reasonable date for closing with time being of the essence: *King v. Urban & Country Transport Ltd.*, 1973 CanLII 740 (ON CA). The failure to do so will generally result in the APS being at an end and the deposit returned to the buyer. 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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