

Buyer's failure to obtain severance amounted to anticipatory breach of contract (Stayside Corporation v. Cyndric Group)

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

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Agreements for the sale of real estate may sometimes require one of the parties to complete certain steps before the transaction can be completed, such as applying for permits or ensuring that the land can be legally conveyed. Disputes may arise over which party has the obligation to complete such steps and bears the consequences of not doing so.

In *Stayside Corporation Inc. v. Cyndric Group*, 2023 ONSC 4093 (CanLII), the Ontario Superior Court of Justice was faced with a dispute that turned on which of the contracting parties was responsible for the failure to obtain a severance of the land to be sold.

Pursuant to an Agreement of Purchase and Sale (APS) dated 13 August 2014, the seller, Cyndric Group Inc. (Cyndric), agreed to convey 50 acres of a 100-acre property in the Township of Russell, Ontario, to 6773711 Canada Inc. (677), in trust. The purchase price was \$3.5 million with a \$1 deposit and \$1 million due on closing, with the balance of \$2.5 million payable by way of a vendor take back mortgage. The owner of 677 incorporated a second corporation, Stayside Corporation Inc., to take an assignment of 677's rights and obligations under the APS.

Cyndric intended to retain ownership of the remaining 50 acres of land. Accordingly, the transaction could not be completed without a severance of the 50 acres of property under the Ontario *Planning Act*.

The APS included a condition to be satisfied or waived by December 5, 2014, providing the buyer, 677, with the opportunity to confirm that the property was suitable for its intended development.

The buyer also had the right during the conditional period to instruct Cyndric to commence the severance of the 50 acres upon payment of \$5,000. The APS provided that closing was to be completed within 30 days following the waiver of conditions if Cyndric had obtained the severance. Otherwise, closing was to occur 30 days after the severance was obtained.

By December 5, 2014, however, the buyer had not waived the condition nor had it paid \$5,000 for Cyndric to apply for a severance.

Subsequently, and without any formal written amendment to the APS, the parties agreed that 677 would be responsible for the severance of the 50 acres. 677's owner confirmed via email that the APS had been extended to 31 March 2015 and that the property was suitable for their intended development, thereby waiving the condition.

The severance did not take place. In March 2018, Cyndric refused to provide any further extensions for completion of the severance process and took the position that the transaction was terminated.

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Litigation ensued and led to a claim by the buyer to compel the completion of the transaction. The seller brought a motion for summary judgment to dismiss the buyer's claim.

In the motion judge's view, the central issue was whether the buyer had committed an anticipatory breach of the APS by failing to diligently proceed with a severance application, thereby justifying the termination of the APS by Cyndric.

The buyer argued that delay in obtaining a severance was caused by either the failure of Cyndric's owner to provide confirmation that he could bind the corporation or a delay on the part of the municipalities involved with the severance process.

There was evidence filed for the motion that the typical timeline to obtain a severance in the municipality was approximately 90 days from the time that the application is filed. While the parties disputed the reasons why the severance was not obtained, it appeared to the motion judge that the buyer was waiting to see if the municipality would provide water/sewer service to the 50 acres. However, this was not a condition or term of the APS and did not provide the buyer with a reasonable excuse for the delay. A hook up service for water/sewer was not necessary for a severance application.

The motion judge concluded that the court could infer from the terms of the APS and the renegotiation of the original closing date that the severance process would proceed expeditiously, and a four-month window was reasonable for a party to obtain a severance. In that regard, a new date had been set for 31 March 2015. The terms in the APS that "time is of the essence" and that the closing would take place 30 days after the severance and appeal period remained in effect.

The evidence showed that buyer had demonstrated a pattern of delay and a "consistent disregard for a fundamental term of the agreement", which was to move towards a severance in order for the transfer of the 50 acres to proceed. The seller, conversely, repeatedly requested the status of the severance application and extended deadlines for a closing date.

The court referred to the law concerning anticipatory breach outlined by the Court of Appeal in *Spirent Communications of Ottawa Limited v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at paragraph 37, affirming that "an anticipatory breach sufficient to justify the termination of a contract occurs when one party, whether by express language or conduct, repudiates the contract or evinces an intention not to be bound by the contract before performance is due."

In the case at hand, the severance process was fundamental to the closing and was a fundamental term of the APS. The buyer's failure to proceed expeditiously with the severance deprived the defendants of the use of the property and there was a pattern of delay in moving forward with the severance. Without a severance, the APS could not be completed.

Further, not only did the buyer fail to proceed to obtain a severance, they did not provide evidence on the motion that they had access to funds which would be due on closing. In that regard, the buyer's lawyer objected to questions pertaining to the buyer's ability to access funds to close during cross-examinations for the motion.

In the court's view, this amounted to a failure to show that the buyer was at all times ready, willing and able to proceed with the purchase: *DiMillo v. 2099232 Ontario Inc.* 2018 ONCA 1051 (CanLII).

Lastly, on the issue of the buyer's claim for specific performance, there was no evidence of any specific development plans nor did the buyer secure any tenants or subsequent purchases. Merely engaging in land speculation is not enough to meet the criteria of uniqueness required by the case law. The buyer's claim for specific performance requiring Cyndric to complete the sale was rejected and Cyndric was granted an order for summary judgment dismissing the claim.

The decision shows that the terms of an agreement for the purchase and sale of land, and any amendments thereto, should be carefully prepared and reviewed to ensure that each side is aware of their obligations and that any agreed-upon deadlines are met. While courts will generally expect a level of cooperation between the parties, a failure to complete one's obligations in a timely manner may amount to an anticipatory breach of the agreement thereby entitling the other party to terminate the transaction. A PDF version is available to download [here](#).

Appeal Dismissed

In September 2024, the Court of Appeal for Ontario dismissed the buyer's appeal, affirming the motion judge's decision that severance was a condition precedent and that the buyer was not diligent in pursuing the severance, such that the seller Cyndric was entitled to conclude that the buyer had repudiated the APS: *Stayside Corporation Inc. v. Cyndric Group Inc.*, 2024 ONCA 708 (CanLII).

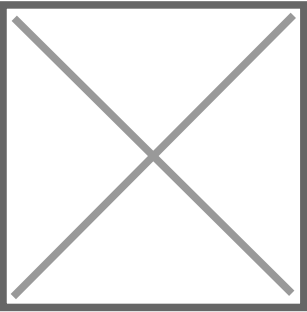
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