

Buyers' liability to sellers in aborted real estate transactions – Part 2

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We have previously [addressed](#) a number of circumstances in which buyers unsuccessfully attempted to back out of a binding Agreement of Purchase and Sale (APS) for the purchase of a residential property. This trend has continued in recent months with buyers unsuccessfully arguing that they didn't understand the terms at the time they entered into the APS, or raising other complaints against the seller.

In *Prowse v. Noroozi*, 2021 ONSC 3099 (CanLII), the buyer breached an APS to purchase a home in King City, Ontario, on no less than 10 occasions, most often by failing to pay a scheduled deposit and ultimately by failing to close the transaction on the final agreed-upon date. The buyer conceded that he could not obtain the necessary financing to complete the purchase.

The seller was awarded damages of \$819,571.23 based on the difference between the price that the buyer had agreed to pay in March 2017 (\$2,450,000) and the amount that the seller was able to obtain from another buyer in March 2020 (\$1,600,000.00), and associated costs.

In *Teefy Developments v. Sun*, 2021 ONSC 853 (CanLII), the buyer agreed to purchase a home in Vaughan, Ontario in September 2016, for \$1,539,990.00, with a closing date ultimately set for October 2018. A few weeks before closing, the buyer told the seller that she was unable to obtain mortgage financing. The seller offered to extend closing by a month to no avail.

The buyer argued that she had been pressured or misled into the purchase transaction by a real estate agent. However, she had not named the real estate agent as a party and that, in any event, was not an issue that affected her liability vis-à-vis the seller who played no part in the agent's alleged conduct. In November 2019, the seller sold the property to another buyer for \$1,200,000.00. As a result, the seller's damages were \$189,990 in addition to the \$150,000 in deposits.

In *Joo v. Tran*, 2021 ONCA 107 (CanLII), the buyers entered into an APS to buy a home in Aurora, Ontario for \$2.1 million in April 2017. In paragraph 10 of the standard OREA form of APS, the sellers warranted that the property was free from all encumbrances, save and except for "minor utility easements" and other enumerated exceptions. Schedule A to the APS added a term stating that the sellers would discharge any encumbrances on or before closing. Schedule A did not include the express qualification contained in paragraph 10, which excluded minor utility easements. In May, 2017, the APS was amended to include a building survey showing four easements registered against the property. Three of these were utility easements concerning electricity and telecommunications. A fourth notation was granted to a municipality and concerned water mains, sanitary sewers, and stormwater drains.

Shortly before closing in August 2017, the buyers took the position that the sellers had failed to disclose easements of "material significance". The respondents rejected a requisition to remove the easements, on the basis that the easements were expressly contemplated by paragraph 10 of the APS. The buyers refused to close, arguing that the easements would interfere with their use and enjoyment of the property. The sellers subsequently resold the property at a substantial loss and obtained summary judgment for damages arising from the aborted transaction in the amount of \$430,000.

On appeal, the Court of Appeal agreed with the motions judge. There was no evidence that the easements would actually interfere with the use or enjoyment of the property. There was no legal ability for the seller to obtain a discharge of municipal easements, and it would be absurd for the seller of a residential property to have to remove electricity, water, and sewer services prior to conveying title.

In *Tribute (Grandview) Inc. v. Zhou*, 2021 ONSC 2994 (CanLII), the seller obtained summary judgment against the buyer of a property in Oshawa, Ontario, in the amount of \$319,735.96. The buyer entered into the APS in April 2017 to purchase the property for \$1,099,990, but was unable to close. In response to the seller's claim, the buyer argued that he did not have sufficient time to review the APS before he signed it, that he spoke Mandarin not English, and that he was currently under significant financial constraints. However, on cross-examination, the buyer confirmed that although both he and his real estate broker spoke Mandarin, he did not ask his broker to explain the APS to him. He admitted that this was "careless." The buyer further admitted that when reviewing the APS, the only things he checked were his name, the purchase price and the lot number. He stated that he was confused about the APS but did not ask for an explanation.

The law in Ontario is that a party cannot claim not to have understood an agreement where they failed to read it or request an explanation as to its meaning: *1468025 Ontario Ltd. v. 998614 Ontario Inc.*, 2015 ONSC 7216, at paras. 172-173. The buyer had two days to take the APS to a lawyer to seek legal advice and to obtain mortgage financing, and he could have terminated the APS before the end of the conditional period by giving notice in writing. However, he did not provide such notice and the conditions were deemed waived. He did not take any steps until shortly before closing to indicate that he did not intend to be bound by the APS. A change in personal financial circumstances, while unfortunate, is not a basis to withdraw from a binding contract to purchase a property.

In *Grandfield Homes (Kenton) Ltd. v. Li*, 2021 ONSC 2670 (CanLII), the buyer entered into an APS in May 2017 to buy a new construction five-bedroom freehold luxury home in Toronto for \$3,290,708. The transaction was scheduled to close in February 2019. Shortly before the closing date, the buyer's lawyer sent the seller's lawyer a letter purporting to rescind the APS. The buyer's lawyer alleged that the seller had made a number of misrepresentations inducing the buyer to enter into the APS, that the transaction was unconscionable, that the buyer was unable to understand the APS, and that the buyer was refused the opportunity to obtain independent legal advice. The court found no merit to the buyer's various excuses.

Firstly, there was nothing unconscionable about the real estate transaction. The transaction involved a luxury new build five-bedroom home worth over \$3 million dollars, and the APS was commensurately detailed and complex. The terms therein were standard, reasonable, and widely used in real estate transactions. Secondly, the seller did not preclude the buyer from seeking legal advice, but rather she simply declined the opportunity to do so. Thirdly, the buyer was a businessperson who ran a company and had engaged in previous real estate transactions, and was closer to the "sophisticated end of the spectrum of real estate purchasers." The court disagreed that, because the buyer purportedly lacked proficiency in English, this created an inequality of bargaining power in these circumstances. The buyer had brought her real estate agent with her to a meeting with the seller prior to entering into the APS to make further inquiries about the development in question.

In the court's view, "this was a luxury home new build construction where [the buyer] unfortunately bought into a falling market. I find that she attempted to walk away from the APS primarily for that reason." The seller was entitled to retain the deposit of \$493,606 and to pursue additional damages to be determined at trial.

Although released in the first few months of 2021, the above decisions all stem from aborted transactions in 2017, which coincided with a falling a market. Canadian real estate in 2021 is once again overheated, with [bidding wars for homes in the hottest markets](#) in which average prices having risen by more than [21 per cent in the past year](#). As buyers enter into binding contracts with as much financing as they can qualify for, it would not take a large drop in property values to lead to a similar flood of aborted transaction litigation. A PDF version is available to download [here](#).

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