

Buyers lose right to recover deposit after seller breaches agreement

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After an Agreement of Purchase and Sale (APS) is signed and a deposit is paid it may be weeks or months before the scheduled completion date. In the case of new properties under construction, it could be years. During that time, the APS generally remains a binding legal agreement and a buyer is not entitled to the return of the deposit unless the seller breaches the APS. One way the APS may be breached by the seller is by extending the completion date without a contractual right to do so.

A buyer who wishes to take advantage of a seller's breach of the APS and seek the return of the deposit must indicate that they intend to do so within a reasonable time, or else they will remain bound to complete the transaction.

In *Ching v. Pier 27 Toronto Inc.*, 2021 ONCA 551 (CanLII), the buyers entered into an APS in 2008 for the purchase of a condominium under construction in Toronto and paid a deposit totalling \$214,238.85. The APS provided that time was of the essence. The original completion date was going to be in 2010 but the seller extended the date eight times between 2010 and 2014 for various reasons including construction delays, strikes and bad weather. None of these reasons were permitted under the APS. However, the buyers never complained.

In December 2013, the buyers' intended lender cancelled their mortgage approval and they unsuccessfully attempted to assign the APS to another buyer.

On 27 June 2014, the seller once again changed the completion date from July 30 to 20 August 2014. The buyers did not complain and July 30 came and went.

On 7 August 2014, however, the buyers' lawyer wrote to the seller's lawyer and stated that it was incumbent on the seller to permit rescission of the APS due to the numerous unpermitted extensions of the completion date. The seller's lawyer replied that the buyers did not have the right to terminate the APS.

The buyers did not take possession of the property on 20 August 2014, and the transaction did not close. Without mortgage financing, the buyers had no funds to complete the purchase of the unit.

The seller was ultimately able to re-sell the unit for a profit of \$93,000 over the amount the buyers had agreed to pay. However, litigation ensued between the buyers and the seller over whether the seller was entitled to retain the deposit.

In July 2021, the Ontario Court of Appeal confirmed that it was.

A breach or "repudiation" of an APS before the scheduled completion date does not, in itself, terminate the contract. If the innocent (non-repudiating) party does not accept the repudiation, then the repudiation has no legal effect: para. 32, citing *Brown v. Belleville (City)*, 2013 ONCA 148 (CanLII), at para. 42.

Essentially, the innocent party must agree to accept the repudiation. If the innocent party accepts the repudiation, then the contract is terminated or "disaffirmed". If the innocent party treats the contract as subsisting, then the contract is affirmed: para. 33, citing *Guarantee Co. of North America v. Gordon Capital Corp.*, 1999 CanLII 664 (SCC), at para. 40.

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In the case at hand, there was no question that the seller had repeatedly breached the APS by unilaterally extending the completion date. Each time the seller committed an act that amounted to repudiation, the buyers were entitled to affirm the APS or accept the repudiation. The last breach by the seller occurred on 27 June 2014, when it changed the completion date from July 30 to 20 August 2014.

However, what the buyers did on and shortly after 27 June 2014, was key. In that regard, the buyers had to promptly make an election whether to accept the repudiation or go forward with the purchase notwithstanding the seller's breach (at para. 34, citing *Brown v. Belleville (City)*, at para. 45):

The election to disaffirm the contract must be clearly and unequivocally communicated to the repudiating party within a reasonable time. Communication of the election to disaffirm or terminate the contract may be accomplished directly, by either oral or written words, or may be inferred from the conduct of the innocent party in the particular circumstances of the case.

This means that on 27 June 2014, or within a reasonable time thereafter, the buyers had to communicate to the seller that they accepted the buyer's repudiation of the APS and wanted the deposit returned. Instead, the buyers sought to assign the APS and requested permission to allow prospective purchasers to inspect the unit. The former 30 July 2014, completion date came and went without complaint.

Even the letter from the buyers' lawyer of 7 August 2014, did not clearly and unequivocally communicate their acceptance of the seller's repudiation. Rather, the letter sought permission to rescind the APS, which was denied.

A further technical factor that worked against the buyers was that as of the 30 July 2014 closing date *neither* party was able to close. The buyer didn't have the funds and the seller wasn't ready. Time remained of the essence and the applicable law was that either party could set a new date for closing of the APS by providing reasonable notice to the other. The seller did so.

The Court of Appeal found that the buyers "did nothing for too long," and that they had thereby affirmed the seller's breach of the APS. The buyers were accordingly obliged to complete the purchase on 20 August 2014, and their failure to do so entitled the seller to retain the deposit notwithstanding that the property was re-sold at a profit.

In the unusual circumstances of the case, the Court of Appeal decided that the parties would bear their own legal costs of both the trial and the appeal.

As demonstrated by the decision, parties to an APS should carefully monitor the status of their legal obligations during the time before the completion date. If there are grounds to take the position that the other side has breached or repudiated the APS, then an election must be quickly made to accept the repudiation and terminate the transaction, or carry on notwithstanding the breach. Even doing nothing—for too long—may amount to taking a legally binding position that cannot be changed thereafter. A PDF version is available to download [here](#).

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