

# KEEPING CURRENT

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## Buyer loses \$100,000 deposit after refusing to purchase condominium

By James R.G. Cook

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It is settled law in Ontario that when a buyer fails to complete an agreement of purchase and sale, the seller is entitled to retain the deposit without having to prove any loss. This means that even if the seller makes a greater profit on a subsequent sale transaction, the seller can retain the deposit. A court has the discretion to grant relief from forfeiture as a result of unconscionability or some other circumstances, but these arguments are rarely successful.

The decision of *Keramati v Ko*, [2021 ONSC 3682 \(CanLII\)](#) demonstrates these principles. In the case, the buyer entered into an agreement of purchase and sale to buy a condominium for \$1,410,000. The deposit was \$100,000, or approximately 7% of the total purchase price. The buyer was unable to seller her other property in time to secure sufficient funds to complete the purchase. But rather than requesting an extension to arrange alternate financing, she advised the seller that she could not complete the purchase and that he was free to sell the condominium to someone else. He did so, quickly, and for an additional

\$115,000. The seller incurred carrying costs of approximately \$11,000 while waiting to complete the second sale.

In response to the seller's claim for the \$100,000 deposit, the buyer took the position that the court should grant relief from forfeiture in order to prevent the seller from obtaining an unconscionable windfall by keeping her deposit.

In an [Endorsement](#) released on May 20, 2021, Justice F.L. Myers rejected the buyer's arguments.

The two-part test for assessing relief from forfeiture for a deposit was confirmed by the Ontario Court of Appeal in *Redstone Enterprises Ltd. v. Simple Technology Inc.*, [2017 ONCA 282 \(CanLII\)](#): firstly, the court is to consider whether forfeiture of the deposit is out of all proportional to the damages suffered by the vendor; secondly, the court considers whether it would be unconscionable for the vendor to retain the deposit.

Justice Myers noted that there was nothing unusual about a deposit being

paid in such circumstances. The purpose of a deposit is to bind the buyer to complete the purchase in exchange for the seller taking the property off the market in the interim. A deposit is not intended to be a “pre-estimate” of damages a seller may suffer if the transaction is aborted.

The amount of the deposit in issue, 7% of the purchase price, was not disproportionate, even though the seller would realize a total gain on the sale of \$204,000 given the higher re-sale amount. Had the deposit been much higher, then the buyer may have had a stronger argument.

As to whether the forfeiture of the deposit would be [unconscionable](#), there was no inequality of bargaining power between the parties or a substantially unfair bargain that resulted. The buyer and seller were arm’s length strangers who had negotiated the type of typical real estate agreement concluded hundreds if not thousands of times each day in Ontario. The transaction was just “an ordinary deal with an ordinary forfeiture of an ordinary deposit in the ordinary course.” It was not an exceptional case in which a finding of unconscionability arose on the facts. While the amount of the deposit in issue was large, \$100,000, Justice Myers agreed with other cases which have found that a sizeable figure alone does not approach the level of being “unconscionable”: *Mikhalenia v. Drakhshan*, [2015 ONSC 1048](#).

As a result, the seller was entitled to retain the deposit notwithstanding that he was able to re-sell the condominium to another buyer for a higher price.

As noted in the decision, it is unclear why the buyer did not try to negotiate an extension of the closing date in order to arrange alternate

financing. While there is no obligation on a seller’s part to agree to an extension, it appears that the buyer simply advised the seller that she was going to refuse to close because she couldn’t sell her other property. Had the buyer found a way to complete the purchase with alternate financing, she may have been able to flip the condominium and realize the seller’s eventual profit for herself. Instead, she forfeited the deposit and could have faced a claim for additional damages if the seller had not been able to obtain the same price from another buyer.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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