

# KEEPING CURRENT

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## Buyer fails to tender by withholding full purchase price (*1785192 Ontario Inc. v. Ontario H Limited Partnership*)

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A buyer who wishes to dispute whether a seller has completed their obligations leading up to closing may wish to withhold the full amount of the agreed-upon purchase price. Buyers should be aware, however, that such unilateral conduct may result in their own breach of the agreement of purchase and sale, as demonstrated by the result in *1785192 Ontario Inc. v. Ontario H Limited Partnership*, [2024 ONCA 775](#).

The appellant landlord in the case had leased two commercial properties to the respondent tenant. The tenant agreed to purchase two car dealerships from the landlord in an asset purchase agreement, which included leases enabling the tenant to continue the dealerships on the properties and an option for the tenant to purchase the properties.

The option to purchase included a mechanism setting out the price at which the landlord would be required to sell the properties.

It required the landlord and tenant to each obtain a fair market value appraisal

and the midpoint of the two appraisals would be the price.

In May 2020, the tenant gave notice that it was exercising the option. The landlord accepted and advised that the appraisals should be based on the highest and best use of the properties.

The landlord's appraisal came in at \$31,200,000 based on the assumption that the highest and best use of the properties would have the properties rezoned for the development of a residential condominium complex. The tenant's appraisal came in at \$11,746,000, based on the assumption that the highest and best use was the current zoning with one of the properties developed and the other remaining a dealership. Thus, the midpoint of the two appraisals was \$21,473,000.

The parties disagreed on the validity of each other's appraisals even though they were each compliant with the Canadian Uniform Standards of Professional Appraisal Practice.

On the morning of the scheduled closing date, the landlord advised that it would accept a purchase price of \$21,473,000. The tenant continued to disagree and forwarded the requisite closing documents with only \$11,746,000 (representing the value from its appraisal) to the landlord's lawyer. The tenant unilaterally "reserved" over \$9,727,000 to be held in trust by its lawyer, representing the difference between its tender and the midpoint.

The landlord refused to close on this basis. The tenant then brought an application for specific performance while the landlord brought an application for an order declaring the option to be null and void.

The application judge concluded that the tenant had made sufficient tender on the basis that the mechanism set out in the option allowed each party to obtain an appraisal using reasonable assumptions that were most favourable to that party: [2023 ONSC 7105](#).

On the question of whether the tenant validly tendered to close the transaction, the application judge found that because there was a dispute as to the purchase price, the tenant was justified in tendering the undisputed amount and placing the disputed amount with its lawyer. Specific performance was therefore ordered, requiring the landlord to convey the properties to the tenant in exchange of \$21,472,000, which the application judge determined to be the correct midpoint.

The Court of Appeal [overturned](#) the decision, holding that the application judge erred in concluding that the tenant made a valid tender. In the Court of Appeal's view, the tenant breached the contract and did not make a valid tender since it tendered only part of the purchase price in cash and part to its own lawyer.

There was no legal authority supporting the tenant's position that a buyer can unilaterally withhold a portion of the purchase price where there is a dispute about what the purchase price is. In the case at hand, the purchase price was fixed by the mechanism in the option clause and the landlord was not obligated to accept any less than that amount.

The judge had relied on case law which held that the partial tender was acceptable in instances where a purchaser was dissatisfied with the quality of the property and the disputed amount was paid into court as security. The Court held these cases did not apply to the present matter. If courts permitted purchasers to do so, vendors would be required to convey property despite a substantial portion of the proceeds of sale potentially being held up for years pending litigation. Here, while the tenant placed the difference in price in trust with its solicitor, the funds were later returned to the tenant which used them to purchase other car dealerships.

The Court concluded that the tenant materially breached the contract of purchase and sale by only tendering roughly half of the full purchase price, and that the landlord was not in breach by refusing to convey title as a result.

While there may have been a valid dispute between the methodologies used in the competing appraisals, the tenant failed to establish that the landlord's appraiser had more than "probably deviated" from the appropriate methodology which led to its dramatically different appraisal figure, which was speculative. The Court of Appeal declined to engage in a full review of what constitutes a valid appraisal, as doing so would be contrary to the standard of review.

The Court of Appeal further reviewed the law of options as set out by the Supreme Court in *Mitsui & Co. (Canada) Ltd. v. Royal Bank of Canada*, [1995 CanLII 87 \(SCC\)](#), at paragraph



[27](#), pursuant to which the acceptance of an option must be unconditional, must only be made once, and must be made in accordance with the terms of the option. Having exercised the option without completing the sale transaction properly, the tenant had spent the option, rendering it null and void.

Lastly, the Court of Appeal rejected the tenant's argument for relief from forfeiture. This dispute arose between two commercially sophisticated parties, represented by counsel, who engaged in hardnosed negotiation. If the tenant wanted to protect its position, it could have tendered the full price and litigated the issue afterwards. Instead, it engaged in a strategy to try and obtain the properties at a price substantially below fair market value. The strategy failed and it should not be relieved of the consequences.

This decision highlights the importance of adhering to the specific terms set out in an option clause and the requirements of tender. Where there is disagreement over the purchase price, parties should be prepared to tender the full price and litigate the matter afterwards. To do otherwise may amount to a breach of the agreement and the loss of any options included therewith.

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