

No “waiver by conduct” of financing condition in agreement of purchase and sale

Agreement of Purchase and Sale | Condominium | Litigation | Litigation & Dispute Resolution | Real Estate

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With the cooling of the real estate markets, buyers may be in a position to negotiate a limited time period to have a home inspection, arrange financing, or complete other due diligence before the agreement becomes firm and binding. The precise wording of any conditions included in an Agreement of Purchase and Sale (APS) is particularly important, as written notice of the fulfillment of any conditions may be required by a stated deadline, failing which the agreement becomes null and void. Buyers should not assume that communications with a seller during the conditional period will extend the deadline. Similarly, sellers should not assume that conditions have been fulfilled unless the required notice has been delivered.

In *Kwan v. LSN Investments Inc.*, 2022 ONSC 3174 (CanLII), the plaintiff buyers signed an APS dated 6 March 2020, to purchase a condominium in Toronto for \$1,310,000, with a \$60,000 deposit. The scheduled completion date was 29 May 2020.

The APS was conditional upon the buyers arranging financing within 15 business days and for their lawyer’s satisfactory review of the condominium’s status certificate. The two conditions stated that they were expressly included for the sole benefit of the buyers and the APS required all notices relating to the conditions to be made in writing.

The buyers required mortgage financing to complete the purchase. However, their proposed mortgage lender required that they sell another rental property before it would provide financing for the new purchase. The buyers listed their rental property for sale but were unable to do so within the 15-day conditional financing period.

Further, while the buyers’ lawyer received a copy of the condominium’s status certificate, no written notice of the fulfillment of the status certificate condition was delivered to the seller.

Instead, the 15-day deadline for the financing condition in the APS—falling on 27 March 2020—came and went without any communication from the buyers to the seller about whether they were waiving the two conditions in the APS.

The buyers’ evidence was that they had decided not to go through with the transaction and told their real estate agent to request a release but that he failed to do so because he was overwhelmed with personal matters and COVID-19 disruptions. The seller’s evidence was that they emailed the two real estate agents involved in the transaction asking whether the financing condition had been waived but received no response.

On 8 May 2020, the buyers’ real estate agent finally told the seller’s agent that the buyers could not get financing and that the deal was gone. However, the seller refused to return the deposit and took the position that the conditions were waived due to the buyers’ failure to communicate that they had not waived the conditions for the 44 days after 27 March 2020.

Essentially the seller argued that the buyers’ “radio silence” about the status of the APS meant that it became firm and binding when the conditional period expired. They instructed their real estate lawyer to tender on the scheduled completion day and refused to return the deposit. In August 2020, they re-sold the condominium.

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Litigation ensued with the buyers seeking the return of the deposit and the seller seeking damages for the aborted transaction. The seller took the position that there had been a “waiver by conduct” by the buyers of the two conditions in the APS even though no written notice of waiver or fulfilment of the conditions had ever been delivered.

In [Reasons for Decision](#) released following a motion for summary judgment brought by the buyers, the court found that there was no merit to the seller’s argument that the plaintiffs’ conduct waived the conditions in the agreement.

The court referred to the express terms of the APS which required that written notice of the fulfillment or waiver of the financing condition be provided. The evidence established that the parties understood how the conditions operated and that there was never a notice in writing waiving the conditions. While the parties understood that the agreement might be consensually revived—after it became null and void—that never occurred because the plaintiffs were unable to revive the agreement without having financing.

The seller argued that the conduct of the plaintiffs established waiver because they were unfairly tying up the condominium beyond 27 March 2020, when they did not promptly proffer a release. However, the court found that what had occurred was precisely in accordance with the parties’ bargain as set out in the APS. The conditions in the APS were for the exclusive benefit of the buyers who had contracted for the right to waive or not. For waiver to occur, they must be shown to have intentionally forgone their rights to have the agreement treated as null and void and they must have clearly communicated their intention to forgo their contract rights: *Technicore Underground Inc. v. Toronto (City)*, 2012 ONCA 597 (CanLII), at para. 63.

In the case at hand, the evidence was that the buyers did not intend to forgo their rights to terminate the APS. Their delay in communicating their waiver was not a clear communication of an intention to waive their rights. Since the communication was prescribed in time and as to the manner of requiring notice in writing, the delay, if it communicated anything, was that the buyers were out of time to waive the two conditions in the APS. When the conditional period expired without express waiver of the conditions, the APS became null and void and the buyers were entitled to the return of the deposit.

The seller further argued that the condominium was tied up due to the actions of the buyers and that it had suffered damages as a result. However, the court found that there was no merit to this position since the seller was at liberty to put the condominium back on the market as soon as the buyers failed to fulfill the conditions. Instead of doing so, the seller focused on trying to force the completion of the sale on the buyers.

The court found that no misrepresentations were made by the buyers or their agent. As a result, summary judgment was granted to the buyers and the seller was required to return the deposit. The court did not address ongoing third party claims by the seller against its real estate agent and lawyer relating to the transaction as these claims were not dependent upon the determination of the dispute between the buyers and seller.

The decision shows that due care should be taken by each side in a transaction regarding conditions in an APS. Silence should not be taken as acceptance or waiver of conditions where express written notice is required. A PDF version is available to download [here](#).

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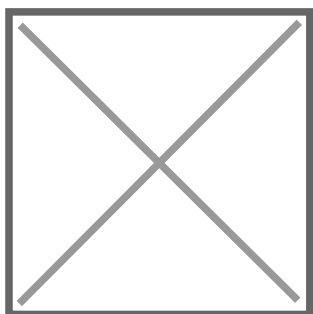
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