

Requisition deadline for present legal use of property clarified by Court of Appeal

Litigation | Litigation & Dispute Resolution

7 March 2022

The Ontario Real Estate Association's standard form of residential Agreement of Purchase and Sale (APS) contains a paragraph that sets a deadline for a buyer to investigate and verify the present legal use of a property before closing. This paragraph describes what is defined as the "requisition date" but the formula for calculating the date is confusingly described, which has resulted in uncertainty amongst real estate lawyers and even motion judges.

A recent decision of the Ontario Court of Appeal clarified the procedure that is to be followed for determining the requisition deadline in the standard form APS: *2651171 Ontario Inc. v. Brey*, **2022 ONCA 148 (CanLII)**.

In the case, the appellant buyer made a written offer to purchase the respondent's property in Ottawa for \$1,610,000. The listing had described the property as a fourplex with two 1-bedroom units and two 3-bedroom units. The APS described the property as a residential fourplex. The scheduled completion date was 1 October 2019.

All conditions in the APS were waived by the buyer on 26 July 2019.

On 26 September 2019, the buyer's real estate lawyer received a compliance report from the City of Ottawa that could not confirm the lawful use of the property as a fourplex. The report also noted that a previous owner had not arranged for all required inspections relating to a building permit issued for the construction of a rear addition.

The buyer's lawyer wrote to the seller's lawyer on the same day requisitioning a copy of permits and final inspections from the City to confirm that the property's use could lawfully be continued as a fourplex, as well as inspection reports relating to the rear addition.

The seller declined to respond, taking the position that the objections were made beyond the "requisition date" in paragraph 8 of the APS. As a result, the transaction did not close.

After the seller resold the property for a lower price, litigation ensued between the parties, with the buyer seeking return of the deposit and the seller seeking damages arising from the failed transaction. The parties brought dueling summary judgment motions, which were decided in favour of the seller.

On appeal, the primary issue was the motion judge's application of paragraph 8 in the APS, which stated as follows:

8. TITLE SEARCH: Buyer shall be allowed until 6:00 p.m. on the 16 day of September, 2019 (Requisition Date) to examine the title to the property at Buyer's own expense and until the earlier of: (i) thirty days from the later of the Requisition Date or the date on which the conditions in this Agreement are fulfilled or otherwise waived or; (ii) five days prior to completion, to satisfy Buyer that there are no outstanding work orders or deficiency notices affecting the property, and that its present use (Residential Fourplex) may be lawfully continued and that the principal building may be insured against risk of fire.

The motion judge had calculated 26 August 2019 to be deadline for the buyer to make any objections regarding the legal use of the property as a fourplex and any outstanding inspections under paragraph 8. The motion judge calculated this date by rejecting the first date provided for under part (i) of the formula in the

Requisition deadline for present legal use of property clarified by Court of Appeal

paragraph (October 16-or 30 days after the "requisition date" of the 16th day of September), to avoid a commercial absurdity. The motion judge reasoned that it would be absurd to interpret paragraph 8 as setting a deadline for the buyer to raise objections that was later than the completion date since by that time title would be transferred.

In doing so, the motion judge relied on principles of contractual interpretation directed by the Court of Appeal in *Ventas, Inc. v. Sunrise Senior Living Real Estate Investment Trust*, 2007 ONCA 205, 85 O.R. (3d) 254, at para. 24, namely that a commercial contract should be interpreted "as a whole, in a manner that gives meaning to all of its terms and avoids an interpretation that would render one or more of its terms ineffective".

The Court of Appeal determined that there was nothing commercially absurd about using 16 October 2019, as one of the dates in the formula when paragraph 8 was viewed in its entirety, since this date was merely one factor to consider in overall formula set out in the paragraph to determine the requisition deadline.

In that regard, paragraph 8 of the APS provides for a choice between the earlier of two dates which are calculated in parts (i) and (ii) in the remainder of the paragraph.

In part (i) of paragraph 8, it is necessary to ascertain "the later" of two dates, specifically 30 days from the requisition date stated therein (being 16 September 2019 - so the operative date was 16 October 2019) or 30 days from the buyer's waiver (which occurred on 26 July 2019 - so the operative date was 26 August 2019). Under part (i), therefore, the "later" date was 16 October 2019.

Next, pursuant to part (ii) of paragraph 8, the operative date is "five days prior to completion". As the scheduled completion date in the APS was 1 October 2019, the operative date in part (ii) was 26 September 2019.

Since 26 September 2019, was earlier than 19 October 2019, and was prior to the scheduled completion date of 1 October 2019, the correct deadline for making off-title requisitions was 26 September 2019.

As explained by the Court of Appeal, paragraph 8 did not yield any commercial absurdity when read in its entirety. The formula set out in the paragraph must be carefully followed in its entirety notwithstanding how awkwardly it may be worded.

The buyer had therefore made a valid requisition on 26 September 2019, within the deadline provided in paragraph 8 of the APS.

The buyer's requisition itself raised a legitimate objection as to whether the continued use of the property as a fourplex was legal: *Brar v. Smith*, 2014 ONSC 5030, at para. 47; *1418885 Ontario Ltd. v. 2193139*, 2017 ONSC 3632, at paras. 31-37, rev'd on other grounds, 2018 ONCA 54, at paras. 8-9.

In the circumstances, the present use of the property as a fourplex was not a peripheral issue. The buyer wished to rent out the property as a commercial investment. The seller described the property in the listing and the APS as a fourplex. The uncontroverted evidence was that the property could not be lawfully used as a fourplex in its present state.

In response to the requisition, the seller had the option to "remove, remedy or satisfy" the buyer's valid objection. The seller did not do so. The buyer was therefore allowed to treat the APS as at an end. The Court of Appeal allowed the buyer's appeal and order the return of the deposit.

The decision shows that the formula for calculating the deadline for requisitions in paragraph 8 of an APS must be carefully followed. However, disputes will likely continue to arise until the wording in the standard form of APS is amended.

For more information please contact: **James Cook** at 416.865.6628 or jcook@grllp.com

(This blog is provided for educational purposes only, and does not necessarily reflect the views of Gardiner Roberts LLP).



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com

Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com



Bay Adelaide Centre — East Tower
22 Adelaide Street West, Suite 3600
Toronto, ON M5H 4E3

Phone: 416.865.6600
Fax: 416.865.6636
contactGR@grllp.com