

Sellers not allowed to rely on “escape clause” to accept a better offer

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In some cases, sellers may wish to ‘hedge their bets’ by accepting a conditional offer that contains a term allowing them to continue to market the property for sale until the deal is firm. Such terms are a matter of negotiation between the buyer and seller, but the seller must comply with any obligations to allow the first buyer the opportunity to complete the purchase.

Grayson v. Creasy, 2021 ONSC 7637 (CanLII) involved a failed real estate transaction in Peterborough, Ontario between the applicant buyers and the respondent sellers which contained a term allowing the sellers to continue to market the property.

In January 2021, the applicants saw that the respondents’ home was for sale. They were looking for a larger home to accommodate their growing family, and the property met their wish list, as it was a larger house in the same neighbourhood and school district, and even had a backyard pool.

On 26 January 2021, the applicants made an offer to purchase the property for \$530,000, and the parties entered into an Agreement of Purchase and Sale (“APS”) with a closing date of 19 March 2021.

At the time the APS was entered into, the applicants were represented by a lawyer. The respondents relied upon their realtor for assistance.

The standard OREA form of APS was used with three additional conditions. The first condition gave the applicants the option of voiding the APS if they were unable to obtain mortgage financing. The second condition gave the applicants the option of voiding the APS if they were unable to obtain a satisfactory air quality test.

The third condition, which the court described as an “escape clause,” permitted the respondents to continue marketing the property for sale after signing the APS, pursuant to the following term:

Provided further that the Sellers may continue to offer the property for sale and, in the event that the seller receives another Offer satisfactory to the Seller, the Seller may so notify the Buyer in writing by delivery to the Buyer personally or in accordance with any other provisions for the delivery of notice in this Agreement of Purchase and Sale or any Schedules thereto. The Buyer shall have 24 hours from the giving of such notice to waive this condition by notice in writing delivered to the seller personally or in accordance with any other provisions for the delivery of notice in this Agreement of Purchase and Sale or any Schedules thereto, failing which this Offer shall be null and void, and the Buyer’s deposit shall be returned in full without deduction.

Essentially, the “escape clause” allowed the respondents to continue to look for a better offer, on terms set out therein, until the applicants waived the conditions in the APS.

It turned out that the respondents did indeed receive a second—and significantly better—offer to buy the property for \$703,000. What was at issue, however, was whether they had to provide the applicants with the opportunity to complete the transaction.

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On 7 February 2021, the respondents entered into an agreement with the second buyer, with a closing date of 19 March 2021. This agreement was conditional on the respondents being released from the APS with the first buyers, the applicants.

On 8 February 2021, at 9:00 p.m., the respondents sent the applicants an email which stated that they were “going with a different offer.” The respondents also forwarded their realtor’s email, in which their realtor advised that they were “obligated to provide notice informing him/them they have 24 hrs notice from not [sic] to remove condition and firm or walk away from the deal.”

Appended to the realtor’s email was a “Notice to Remove Condition(s)” which advised the applicants that they had until 8:00 p.m. on 9 February 2021 to remove “Any and all Conditions”.

The applicants were in fact willing to waive the conditions if another buyer made a better offer to purchase. To ensure there was no margin for error, the applicants signed an advance copy of the Notice of Fulfillment of the mortgage financing and air quality test conditions. The applicants served the Notice of Fulfillment on the respondents’ realtor via email at 4:52 p.m.

Given their concerns about the second offer, the applicants followed up with the respondents directly via email several times to confirm they had received the Notice of Fulfillment. The applicants’ lawyer sent another email that evening asking that the respondents confirm receipt. No response was received to these queries.

After the 24-hour window expired, the respondents told the applicants that the APS was null and void because they had only waived the mortgage and air quality conditions. In the respondents’ view, because the applicants had failed to waive the “escape clause,” they were free to proceed with their sale of the property to the second purchaser, which they did.

Litigation ensued. While the applicants allowed the respondents to complete the sale to the second buyer, they claimed damages as a result of the respondents’ breach of the APS. The matter was heard by way of application in October 2021.

In the Reasons for Decision, the court noted that at first blush, one might be inclined to agree with the respondents’ position since the applicants had waived the mortgage and air quality conditions but not the escape clause. However, the court determined that this view could not be sustained once one looked beyond the wording of the escape clause and ‘applied common sense’.

In that regard, the escape clause was included for the benefit of the respondents. Its purpose was to allow them to continue marketing the property and, if they received a better offer, it forced the applicants to firm up their conditional offer within 24 hours of being notified, failing which the respondents could go with the new offer.

In the court’s view, once the respondents triggered the escape clause, if the applicants waived the mortgage and air quality conditions within 24 hours, the APS became firm and binding on both parties. The purpose of the escape clause was to force the applicants’ hand and its purpose was fulfilled once the other two conditions were fulfilled. The respondents agreed to the original offer, then “lit the fuse” when they received a better offer. The applicants, however, were not required to expressly waive the escape clause nor were they required to agree to pay the amount offered by the second buyer.

In the court’s view, the respondents’ interpretation of the contract was untenable and there was no difficulty in concluding that they breached the APS.

Given that the applicants lost the benefit of the performance of the APS, they were entitled to damages. The court determined that damages should be assessed as at the 19 March 2021, which was the original closing date set out in the APS.

As the second buyer offered to pay \$173,000 more for the property on 7 February 2021, the court determined this figure to be the proper starting point for the measure of damages. Had the APS not been breached, the applicants would have paid \$530,000 for a home that was apparently worth \$703,000.

The court was not satisfied, however, that there was sufficient evidence in the record regarding the applicants’ duty to mitigate their damages. Disappointed buyers seeking damages are “required to mitigate by making diligent efforts to find a substitute property”: *Southcott Estates Inc. v. Toronto Catholic District School Board*, 2012 SCC 51 (CanLII), [2012] 2 SCR 675, at para 30.

On the issue of mitigation, the applicants claimed that they had not been able to find another property which offered the same value. There was no documentation to support this assertion, however, and the court was left with a number of questions regarding mitigation, including whether the applicants eventually sold their home to purchase another property, and whether their home appreciated in value during the interim.

Gardiner Roberts

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

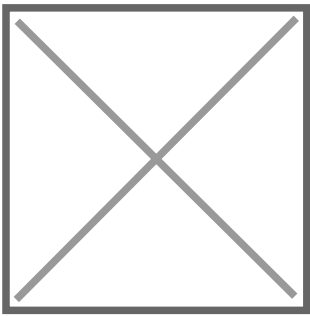
As a result, the court directed that a reference be conducted for the sole purpose of calculating the applicants’ damages.

The case demonstrates that an accepted offer may contain an “escape clause” that allows a seller the opportunity to look for another offer, which may be useful if there is a concern that the first offer contains conditions that may not be fulfilled by the buyer. Sellers must carefully adhere to the requirements of such terms, however, or they may face an action for specific performance to complete the first agreement and/or damages. A PDF version is available to download [here](#).

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

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Author



James R.G. Cook

Partner

416.865.6628

jcook@grllp.com