

Specific performance ordered in cottage purchase dispute (Coffey v. High)

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In cases where a seller has breached an agreement to transfer title to a property, a buyer may seek an order requiring that the transaction be completed, known as specific performance, rather than merely suing for damages. The Ontario Superior Court of Justice decision in *Coffey v. High*, 2024 ONSC 420 (Can LII), demonstrates the circumstances in which such an order may be obtained.

The plaintiffs (the Coffeys) and the defendants (the Highs) owned cottages near each other on a lake near Chatsworth, Ontario for some time. During the Covid pandemic, cottages were in very high demand and the Coffeys were looking to purchase a second one on the lake.

In May 2021, the Highs decided to sell their cottage to the Coffeys. The circumstances of the transactions were as follows.

On May 25, 2021, Mr. Coffey sent Mr. High an email with an unsigned Agreement of Purchase and Sale (APS) attached with the purchase price being \$450,000. The email indicated that Mrs. Coffey would come over to the Highs' cottage that evening with a printed copy of the APS.

The APS was in the standard Ontario Real Estate Association (OREA) form but the parties did not have a licenced real estate agent involved. Mr. High had signed the APS electronically but he was not present when Mrs. Coffey brought the printed copy to be signed by Mrs. High.

In the final version of the APS, the purchase price was changed by hand to \$475,000, which was initialled by all parties. The APS also provided that a deposit of \$10,000 was to be delivered by the Coffeys to the "Vendor's lawyer in trust" within 24 hours of the offer being accepted. However, at the time of signing, the Highs had not yet retained a lawyer.

On June 1, 2021, within 24 hours of receiving the name of the Highs' real estate lawyer, the Coffeys had the deposit funds wired to her. Texts and emails exchanged between the parties and their lawyers over the ensuing weeks did not contain any suggestion that Mr. High was having second thoughts about selling the cottage to the Coffeys.

In November 2021, more than five months later, the Coffeys received a letter from a litigation lawyer stating that the Highs were relying on alleged breaches of the APS and were taking the position that it was void. The deposit was returned.

In anticipation of the breach of the APS, the Coffeys commenced an action seeking specific performance and brought a motion for summary judgment.

For the motion, the Highs took the position that the APS was invalid because it was backdated and signed in June 2021 rather than on May 25, 2021.

The motion judge referred to the general law of contracts that requires offer and acceptance to be communicated to the offering party: *Covenoho v. HomeLife Response Realty Inc.*, 2022 ONSC 5877 (CanLII) (Div. Ct.), citing *The Law of Contracts* (Sixth Edition) S.M. Waddams.

In a real estate transaction, there must be a meeting of the mind (*consensus ad idem*) between the parties on the essential terms of identification of the parties, the property, and the price: *UBS Securities Canada, Inc. v. Sands Brothers Canada, Ltd.*, 2009 ONCA 328; *McKenzie v. Walsh*, 1920 CanLII 72 (SCC).

All of these criteria were present notwithstanding the dispute over the timing of the amendments to the APS.

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Mrs. High's evidence was that when Mrs. Coffey came over to their cottage with the printed APS in hand, the purchase price in the document was \$450,000. After some discussion at their cottage, the purchase price was amended to \$475,000, and Mrs. Coffey crossed out the typed text and wrote, by hand, an amended purchase price of \$475,000.

There was no dispute that the Highs and Mrs. Coffey initialed the change, but the Highs later claimed that Mr. Coffey backdated his signature sometime later.

The motion judge found that even if Mrs. High's version of events was true, the APS was valid under the rules of offer and acceptance. In this version, the Coffeys made the offer to purchase the property at \$450,000. The Highs implicitly did not accept it but countered it with their offer to sell the property for \$475,000 – they initialed the amendment. That amended offer was accepted *after* the amendment was made. It was of no consequence that Mr. Coffey did not sign the amendment *before* the Highs did.

Once the change was initialed by all the parties, it was accepted and there was a valid agreement in respect of the purchase and sale of the cottage.

The Highs also argued that the handwritten amendment to the APS was a violation of the OREA's Terms of Use because Mrs. Coffey was not authorized to "amend" the OREA form.

With respect to this argument, the motion judge held that whether or not Mrs. Coffey was licensed to use a pre-printed OREA form had no impact on the validity of the contract. The rules around the use of the forms imposed by OREA seemed to be intended to limit OREA's liability for any unlicensed use rather than suggesting that the unlicensed use of its forms would invalidate an otherwise valid agreement entered into by parties using the form. In any event, the APS was drafted by the Coffeys' lawyer, who was in fact licensed to use the form. Minor revisions to the price and date by an unlicensed user of the form would not nullify the APS or expose OREA to liability.

The motion judge further rejected the Highs' argument that they were entitled to treat the APS as if at an end when they did not receive the deposit within the 24 hours agreed to. Even if there was some dispute over whether the Coffeys could have paid the deposit before the Highs had retained a lawyer to accept it, the Highs had not elected to accept the Coffeys' purported repudiation of the APS.

In that regard, assuming that the Coffeys' failure to pay the deposit within the initial 24 hours was a fundamental breach, then the Highs had to elect whether to accept the repudiation and terminate the APS or continue with the transaction: *1473587 Ontario Inc. v. Jackson*, 2005 CanLII 4578 (ONSC), aff'd 2005 CanLII 26121 (ONCA). By their conduct over the ensuing months, the Highs exhibited an intention to proceed with the transaction.

In the motion judge's view, the Highs were trying to "play fast and loose", using their position unfairly in relying on a purported breach of the APS five months after the purported breach. Having accepted the deposit, and acting as if the contract was still in full force and effect at the time of the breach, the Highs were not entitled to treat the contract as at an end five months later.

Lastly, the motion judge rejected the argument that the sale price was either unconscionable or improvident. Although Mrs. High did not learn about the sale of the cottage until two days before the APS was signed, she still agreed to it. There was no genuine issue in respect of inequality of bargaining power between the parties and even if the sale price was below market value, parties are free to make a bad bargain: *Black v. Wilcox*, 1976 CanLII 555 (ON CA), 12 O.R. (2d) 759 (C.A.).

In the result, the court ordered that the cottage sale be completed. From the Coffeys' standpoint, the property was uniquely situated on a peninsula and there was no available substitute that was similarly situated with waterfront on two sides rather than the usual frontage. Specific performance was therefore an appropriate remedy rather than damages: *Matthew Brady Self Storage Corporation v. InStorage Limited Partnership*, 2014 ONCA 858 (CanLII), at paragraph 40.

The case is a cogent example of sellers being held to their bargain notwithstanding having second thoughts after entering into an agreement to sell property. A PDF version is available for download [here](#).

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