

# ANTICIPATORY REPUDIATION IN REAL ESTATE DEALS: CAN YOU TERMINATE IF THE OTHER PARTY WILL BREACH THE AGREEMENT OF PURCHASE AND SALE?

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Agreements of purchase and sale ("**APS**") in real estate transactions typically state what happens when a party breaches its terms. However, they are often silent about what happens when a party suspects or is told that the other party will breach its terms in the future. Is the innocent party excused from its obligations under the APS? Or must it carry on with the transaction despite its knowledge of an impending breach? This bulletin addresses these questions and the related rights and obligations of the innocent party facing a future breach.

## Elements of Anticipatory Breach

In Ontario, a party is only excused from performance if the anticipated breach is so serious that it amounts to anticipatory repudiation of the APS. Anticipatory repudiation occurs where a party to an APS gives notice before an obligation is due that it intends to breach that obligation. The breach must be so serious that the breaching party is said to "repudiate" (*i.e.* renounce or no longer be bound by) the APS.<sup>[1]</sup> The breach must amount to "a substantial failure of performance" or deprive the other party of "substantially the whole benefit" of the APS.<sup>[2]</sup>

The notice communicating repudiation must be clear.<sup>[3]</sup> In a recent Ontario case, a letter from the purchasers to the vendors stating that they were having trouble selling their own property and proposing that the purchased property be relisted for sale was not the type of clear and unequivocal declaration necessary to repudiate.<sup>[4]</sup>

The test for whether a party has repudiated the APS is objective. The question is whether a reasonable person would find that the breaching party no longer intends to be bound by the APS.<sup>[5]</sup>

## Anticipatory Repudiation in Ontario Real Estate Transactions

Ontario courts have provided guidance as to what types of breaches of an APS amount to anticipatory repudiation, including the following:

- The vendor unilaterally changed the dimensions of the lots from those set out in the draft plan of subdivision that was attached as a schedule to the APS and ignored repeated complaints from the purchaser;<sup>[6]</sup>
- The vendor refused to close unless the purchasers agreed to add new conditions to the APS;<sup>[7]</sup>
- The vendors said they were unable to close because they did not have a signed resolution authorizing a share transfer that was required to carry out the closing;<sup>[8]</sup>
- The purchasers failed to pay the deposit and never responded when the vendor's lawyer inquired about when the deposit would be paid;<sup>[9]</sup>
- The vendor improperly refused to close based on the incorrect claim that the purchaser misrepresented that the property was zoned commercial instead of residential, when in fact no such misrepresentation was ever made;<sup>[10]</sup> and
- The purchasers repeatedly requested extensions of the closing date. Although they never specifically stated that they would be unable to close, a reasonable person would have understood that they could not close on the closing date because they did not have financing.<sup>[11]</sup>

Although these cases provide guidance, whether a particular breach amounts to repudiation will depend on the facts of each case.

### **Options for the Innocent Party**

Anticipatory repudiation does not end the APS. Instead, it gives the innocent party a choice between two options: (i) accept the termination of the APS; or (ii) reject the termination and continue with the sale transaction.<sup>[12]</sup>

If the innocent party chooses to accept the termination of the APS, neither party has any further obligation under the APS (e.g. there is no need to tender). The innocent party may immediately bring a damages claim against the breaching party. However, specific performance is not available. Acceptance of termination is irrevocable once it is communicated.

If the innocent party chooses to reject termination and continue with the APS, it must fulfill all of its own obligations under the APS. It can sue for damages immediately or wait until the other party actually breaches its obligations before suing.<sup>[13]</sup> The innocent party may opt instead to seek an order for specific performance of the APS.

### **Damages Claims Available to the Innocent Party**

If the innocent party is the purchaser, it can seek the return of any deposit as well as damages for costs associated with the failed sale transaction (e.g. real estate lawyer's fees). It may also be possible to recover

damages for the difference between the purchase price in the APS and a higher price that was paid by another purchaser after the APS was terminated.<sup>[14]</sup>

If the innocent party is the vendor, it is presumptively entitled to retain the deposit. However, the court may order the return of the deposit if the deposit is disproportionate to the damages actually sustained and it would be unconscionable for the vendor to retain it.<sup>[15]</sup> The vendor can also seek damages for carrying costs (e.g. mortgage interest, property taxes, utilities, condominium fees, etc.) and costs of the failed transaction. Additionally, it can seek damages for the difference between the purchase price in the APS and any lower price that was paid by another purchaser after the APS was terminated.<sup>[16]</sup> A clause providing that the plaintiff may retain the deposit as liquidated damages does not necessarily prevent the vendor from seeking damages that exceed deposit amount.<sup>[17]</sup>

### **Risks of Incorrectly Claiming Anticipatory Breach**

Parties can inadvertently repudiate an APS. This often occurs where a party believes it no longer needs to perform its obligations because it mistakenly believes that the other party has already repudiated the APS. If a party repudiates the APS, it can be liable to pay damages to innocent party, even if the repudiation was inadvertent.

In the 2017 case *Nicolaou v. Sobhani*, a purchaser accidentally repudiated the APS because he mistakenly believed the vendors had already repudiated the APS. The purchaser claimed that the vendor had misrepresented the lot size in the multiple listing service and also could not convey clear title on closing. The purchaser wrote to the vendor claiming that the APS was "null and void" due to the vendor's alleged breaches and demanded the return of the deposit. The vendor's lawyer denied the alleged breaches and noted that the purchaser's letter was itself an anticipatory repudiation of the APS. The court agreed with the vendor's lawyer. The lot size was correctly described in the APS and plenty of time remained for the plaintiff to obtain clear title. As such, it was the purchaser (not the vendor) who had (inadvertently) repudiated the APS.<sup>[18]</sup>

Similarly, in *Lawrie v. Gentry Developments Inc.*, the vendor incorrectly claimed that the APS required that the sale transaction close before 4:30 p.m. on the closing date, instead of at any time on the closing date. The purchaser advised that it was delayed and may not be able to close until after 4:30 p.m. The vendor refused to grant any time extension and advised that the deed would not be available after 4:30 p.m. The court held that the vendor's refusal to close after 4:30 p.m. was an anticipatory repudiation of the APS, despite the fact that the vendor apparently believed that it was not required to close after 4:30 p.m.<sup>[19]</sup>

Further, in *377447 Ontario Ltd. v. Saadat*, the parties failed to close on the closing date set out in an APS. The vendor's lawyer wrote to the purchaser's lawyer claiming that the plaintiff's failure to close relieved the vendor of any obligation to complete the sale. Attached to the letter was a new APS with different terms. The court

held that the parties had previously entered into an oral agreement to extend the closing date such that the plaintiff had no obligation to close on the date set out in the APS. In fact, the vendor's lawyer had inadvertently repudiated the APS through its letter to the purchaser's lawyer.<sup>[20]</sup>

These accidental repudiation cases show that it is always safest to treat the APS as continuing if you are uncertain whether the other party's conduct amounts to a repudiation of the APS. Treating the APS as continuing will avoid any risk of a party inadvertently repudiating the APS itself.

### **Best Practices When Faced With Potential Repudiation**

If a purchaser or vendor intends to claim that the other party has repudiated the APS, it should ensure that it has received clear, unequivocal notice in writing from the other side that it intends to breach the APS. A statement that the party cannot or will not close, that the APS is "null and void", or a demand for the return of a deposit would likely be considered clear, unequivocal notice. However, even these clear statements may not amount to repudiation in every case (see, for example, *377447 Ontario Ltd. v. Saadat* above).

If the purchaser or vendor has received clear notice of a serious future breach, consider whether specific performance is desired. If so, the innocent party must reject the termination and treat the APS as continuing. Terminating the APS will end any right to seek specific performance. Moreover, it is possible that the breaching party may ultimately choose to proceed with the transaction.

If the innocent party rejects termination and treats the APS as continuing, it must actually be in a position to close and fulfill its other obligations under the APS. If the innocent party may be unable to close, it may be a better choice to accept the termination of the APS and sue for damages.

Regardless of whether the innocent party elects to terminate the APS or treat it as continuing, it must state its choice clearly to the breaching party in writing. The communication should clearly state that: (i) it is clear the breaching party has no intention of completing the transaction; (ii) the breaching party's letter or conduct constitutes anticipatory breach; (iii) whether the innocent party accepts or rejects the breach; (iv) if the APS is terminated, a statement that tender is no longer necessary; (v) the deposit is forfeited (if the innocent party is the vendor) or should be returned immediately (if the innocent party is the purchaser); and (vi) the innocent party reserves its rights to seek damages and costs.

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[1] *Spirent Communications of Ottawa Ltd. v. Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at para. 37 [Spirent]; *Pompeani v. Bonik Inc.*, 1997 CarswellOnt 3744 (C.A.) at paras. 39-41 [Pompeani]; *Potter v. New Brunswick (Legal Aid Services Commission)*, 2015 SCC 10 at para. 149 [Potter].

[2] *Potter* at para. 145; *Spirent* at para. 37.

[3] *Kalis v. Pepper*, 2015 ONSC 453 at para. 12 [Kalis].

[4] *Kalis* at para. 17.

[5] *Spirent* at para. 37.

[6] *Pompeani* at para. 35.

[7] *Kirshenblatt v. Kriss*, 2012 ONSC 6568 at para. 24 [Kriss].

[8] *801Assets Inc. v. 605446 Ontario Ltd.*, 2016 ONSC 2772 at paras. 51 and 81.

[9] *Ruffolo v. McCalla*, 1989 CarswellOnt 2469 at paras. 8, 9, and 18 (D.C.).

[10] *Hatami v. 1237144 Ontario Inc.*, 2018 CarswellOnt 1740 at para. 52 (Sup. Ct. J.).

[11] *Valemont Development Corp. v. Royal Bank*, 1996 CarswellOnt 1738 at para. 8 (Ct. J. (Gen. Div.)).

[12] *Semelhago v. Paramadevan*, 1996 CarswellOnt 2737 at para. 15 (S.C.C.); *Domicile Developments Inc. v. MacTavish*, 1999 CarswellOnt 1622 at para. 9 (C.A.) [*Domicile CA*].

[13] *Domicile CA* at para. 9.

[14] *Lawrie v. Gentry Developments Inc.*, 1989 CarswellOnt 552 at para. 38 (H.C.) [*Lawrie*]. The innocent purchaser was not awarded an amount for the increase in property value in *Kriss*, although it is unclear whether any such damages were sought in that case.

[15] *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 at para. 10; *Varajao v. Azish*, 2015 ONCA 218 at para. 11.

[16] *Domicile Developments Inc. v. MacTavish*, 1998 CarswellOnt 133 at para. 47 (Sup. Ct. J.), overturned on appeal on other grounds in *Domicile CA*.

[17] *Raymer v. Stratton Woods Holdings Ltd.*, 1988 CarswellOnt 105 at para. 16 (C.A.).

[18] 2017 ONSC 7602.

[19] *Lawrie* at paras. 29 and 35.

[20] 2008 CarswellOnt 4328 (Sup. Ct. J.).

### **A Cautionary Note**

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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