



Contract Repudiation

On Seller Default, Buyers Must Either Accept Repudiation or Require Contractual Performance

In the recent case of *Ching v. Pier 27 Toronto Inc.*, 2021 ONCA 551, a retired couple had purchased several residential properties across Canada, including a presidential suite in a condominium under construction on Toronto's waterfront. To secure their rights under the Agreement of Purchase and Sale (the "APS"), they put down \$214,238.85 on deposit and arranged for mortgage approval with CIBC. The APS had provided a tentative occupancy date of November 30, 2010, and confirmed this date could only be extended for a maximum of 24 months, except in the event of an unavoidable delay beyond the vendor's control, such as a strike or particularly bad weather.

The vendor had extended the date of tentative occupancy on several occasions, notifying the purchasers by letter, with the last extension being made to August 20, 2014. In these letters the reasons cited for the delays were construction delays, strikes and extreme weather. In October 2013, the buyers visited the vendor's sales office and placed their initials beside one of the extended occupancy dates, acknowledging receipt of notice of the occupancy date extensions and signing off on one of the extensions in writing. As such, the buyers were aware of the occupancy date extensions but never complained or asserted that APS breach by the vendor in extending the occupancy date. This despite not only losing their mortgage approval in December 2013 and failing to assign the APS to another buyer.

On the scheduled closing date of August 2014, the buyers had insufficient funds to purchase their much sought-after presidential suite and were unable to close their transaction. They elected to sue the builder for breach of the APS contract to recover their deposit, for the increase in the value of the condominium as of the date the APS was terminated, and for punitive damages. While the trial court judge found the builder had breached the APS by extending the occupancy date beyond what the agreement would allow and that there was insufficient evidence of an unavoidable delay to justify such extension, the purchasers nevertheless lost their case as the judge found they had accepted the builder's breach of the APS. In other words, the purchasers were unsuccessful because once the vendor had breached the APS by extending the occupancy date, the buyers should have opted to sue for damages immediately instead of "pressing for performance and bringing the action only when the promised performance fails to materialize." The judge also refused to return the deposit to the buyers on the grounds that it wasn't a windfall for the builder.



The purchasers appealed the decision but the appeals court upheld the ruling of the lower court in favour of the builder. It confirmed that to maintain its rights under a contract, the innocent party must raise its repudiation of the contract with the other party either expressly or by conduct rather than by treating the contract as if it is still in full force and effect. The appeals court also confirmed the trial court decision that the deposit would be forfeited to the builder, stating that a deposit stands for security for contractual performance.

The takeaway from this scenario is clear: if the other party is in breach of contract to your detriment, you should immediately contact De Francesca Law to determine if the breach is repudiatory sufficient to terminate the contract. Failure to do so will lead to the conclusion you have accepted the other party's breach and the contract will remain in full force and effect.

