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Purchaser cancels deal and gets deposit back

But future buyers who attempt same thing will not be as lucky.

What happens when you sign an offer to buy a new house to be constructed by a builder but change your mind and cancel the deal before the building permit is issued? What happens in that case if the builder ignores your breach of contract, and proceeds to construct the house but doesn't finish it by the scheduled closing date?

Answers to these questions were provided last year by the Ontario Court of Appeal, which decided in favour of the purchaser who wanted his deposit back. Future purchasers who attempt the same thing, however, may not be as lucky.

Back on Feb. 1, 1995, Duncan MacTavish signed an agreement to buy a semi-detached house in Ottawa to be built by Domicile Developments Inc. The purchase price was $450,000 with a $5,000 deposit up front and another $15,000 when the building permit was issued. According to the agreement, the scheduled closing date was Sept. 15, 1995.

On that date the house was to have been fully completed and MacTavish was obligated to close the purchase. Most important from a legal point of view, the agreement provided that "time shall be . . . of the essence." In other words, the time deadlines in the offer were to be strictly adhered to by both parties.

About 10 weeks after signing the offer, the lawyer for MacTavish wrote Domicile to say "our client has no intention of proceeding with the purchase of the property." He then asked for return of the $5,000 deposit. In law an advance breach of contract like this is called anticipatory repudiation.

Domicile rejected the advance breach of the deal by MacTavish, and replied that it would perform its side of the bargain and expect MacTavish to perform his.

Eventually Domicile got a building permit, demanded the further $15,000 deposit (which was not paid) and began to build the house.

Domicile's lawyer wrote to MacTavish's lawyer, again saying that Domicile did not accept MacTavish's repudiation of the deal, and would hold him responsible to complete it or pay damages.

As luck would have it, by the closing date of Sept. 15, 1995, the house wasn't finished and there was no clause in the offer allowing the builder an extension. (Such clauses are obligatory today under the Ontario New Home Warranties Plan Act.)

As a result, on the closing date, both parties were in default: MacTavish had said he wouldn't close, and Domicile hadn't finished the house. It was not until May, 1996 that the house was finally finished.

In the meantime, Ottawa house prices had dropped and the house was sold to one of the shareholders of Domicile for $365,000 - $85,000 less than MacTavish's purchase price. Domicile never gave notice to MacTavish of the new closing date or allowed him one last chance to perform his end of the bargain. The trial was a disaster for MacTavish who was found at fault for breach of contract. Damages of $98,000 were awarded against him, and he promptly appealed.

When the Court of Appeal finally handed down its decision last year, it awarded MacTavish the return of his $5,000 deposit and costs of both the trial and the appeal.

The basis of the decision written for the Court by Justice John Laskin turned on the narrow legal issue of the "time of the essence" clause.

According to the Court, when an agreement contains a "time of the essence" clause and one party breaches the agreement, the innocent party has two options. It can treat the agreement as ended and sue for damages, or it may keep the agreement alive and sue to force the other side to close the deal (specific performance.)

In this case, neither party was ready and able to close on the closing date. Since Domicile did not accept the breach by MacTavish to treat the deal as dead, the deal was still alive - and waiting for someone to say they were ready to close.

By selling to its shareholder, Domicile committed the final breach by failing to demand that MacTavish close before it resold the house. This was a failure to reinstate the "time of the essence" clause, and meant Domicile could no longer hold MacTavish liable. Domicile lost the case and costs as the last party to breach the contract, not the first.

Does this mean that any purchaser who changes his mind can back out of a new home purchase and get his deposit back? The answer is a resounding no.

Today, builder agreements are very sophisticated and allow for lengthy closing date extensions - as much as two years in the case of new condominiums. No builder in today's market will make the same mistakes Domicile did, particularly after this Court of Appeal decision.

Once the new or resale home deal is signed (and the 10-day cooling-off period for new condominiums only has expired) the parties are stuck with the bargain. There are no second chances.

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