

Unpaid Deposits



By Brian Madigan LL.B.

What happens if the purchaser doesn't pay the deposit? Can the vendor get out of the deal? Can the vendor simply sell the property to someone else?

The law on this subject somewhat favours the defaulting purchaser.

The Courts look at the failure to provide the deposit as required as a simple breach of contract, and the remedies afforded to the vendor are the same as any other breach.

The common deposit requirements are (one or more of the following):

- 1) herewith,
- 2) upon acceptance, or
- 3) upon the happening of a certain event.

The choice is up to the purchaser, at least at the time of submission of the Offer. The vendor can, of course, propose an acceptable alternative.

In many cases, the vendor will negotiate an increased deposit and also specify that the deposit cheque must be certified. These are all common provisions.

So, you might have a purchaser offer a \$5,000 deposit upon acceptance. The vendor signs back the Offer as a \$15,000 deposit, certified cheques, \$5,000 upon acceptance and a further \$10,000 upon waiver of the "financing condition".

What happens if the purchaser never pays either deposit? Actually, nothing! Yes, indeed the purchaser is in default, but this is treated as a simple breach of contract. It does not permit the vendor to sell the property immediately to a third party with impunity.

Many real estate agents will talk about "24 hours" to get the deposit cheque. That was a reference in the *Real Estate and Business Brokers Act* prior to the recent amendments. The similar provisions now provide for "five days". This is the period of time that the brokerage firm has to deposit the cheque in its trust account after it has been received. Neither the old provision nor the new provisions deal with the contractual obligations between the two parties to the contract. They simply deal with the regulation of the procedural obligations of real estate brokerages. So, all of this talk about 24 hours or 5 days etc. is just a "red herring".

Now, back to the parties. Let's assume that the purchaser is somewhat devious right from the outset. The purchaser might initially suggest that he personally attend at the offices of the listing brokerage and deliver his cheque. Remember that the banks were closed the night that the deal was struck. However, he never bothers. Both agents inquire as to the whereabouts of the certified deposit cheque and he simply claims that he delivered it. He claims to have a receipt issued by the receptionist evidencing its delivery. Easily a week passes. The financing condition is waived. He is now obligated to provide a further \$10,000 deposit. Same routine, this cheque fails to appear, but again he claims to have a receipt. Two further weeks pass as the purchaser looks for his receipt. Another week can easily pass while the purchaser claims to have his bank trace its records to determine whether the deposit funds have left his account. As you can appreciate this long, tall story could go on for a month or two before anyone could properly prove with utmost certainty that the purchaser's claim that he paid the deposit was untrue.

What are the rights of the parties in the interim period? Actually, they are just the same as if the deposit was paid. The purchaser is entitled to specific performance of the contract, and the same is true of the vendor. Just because the deposit was not paid does not mean that the deal is off or the contract never arose or is unenforceable.

Since most real estate closings take place within 90 days of the negotiated agreement, this is fairly short period of time, and far too soon to make an application to Court to obtain a declaration that the contract is terminated. So, even once this fact is evident, the vendor is left without a reasonable remedy. He is stuck and just has to wait until closing date, hoping that the purchaser will complete the transaction. Obviously, the purchaser must pay the entire purchase price on closing. There's no credit for unpaid deposits.

Due to the fact that this is a relatively rare occurrence, neither the legal profession nor the real estate profession have addressed this matter in their precedents for real estate sales, agreements and conveyancing.

If you were particularly concerned about a particular purchaser not paying, why not consider including the following paragraph in the agreement:

The purchaser shall provide the deposit by cash or certified cheque or banker's draft within 24 hours of the obligation arising under the terms of this agreement. The term "upon acceptance" shall be construed to mean "immediately, but no later than 24 hours following acceptance", and should a further deposit be required upon the happening of a certain event, then such further deposit must be made immediately, but no later than 24 hours after the happening of such event.

The vendor shall have the right to terminate this agreement in the

event that:

- 1) the purchaser fails to provide the deposit or the further deposit,***
- 2) the purchaser's deposit cheque(s) cannot be certified, or***
- 3) the purchaser's deposit cheque(s) is dishonoured by the bank***

by giving 24 hours notice in writing to the purchaser, the purchaser's agent or the purchaser's solicitor, and upon such termination, this agreement shall become null and void and any deposit moneys so paid shall be returned in full to the purchaser without interest and without deduction.

The above clause would solve the problem of the **cavalier purchaser** and the **rogue deposit**.

The agreement would clearly specify that the purchaser has 24 hours to come up with the deposit. If it's not paid, then the vendor can simply unilaterally terminate the agreement upon 24 hours notice using a condition subsequent clause in the agreement.

It might be wise if such a clause were included in the standard form precedents for agreements of purchase and sale as this would eliminate the problem and provide the right remedy to the vendor.

Just about everyone agrees that the vendor should be able to sell to a third party without a Court Order in such circumstances.

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