



APS or, in the alternative, for a significant delay of the closing date. The respondent did not agree to either of these proposals and insisted that the transaction should close. On October 17, 2025, after the purchasers failed to close on October 7, 2025, the respondent terminated the APS and advised that the deposit paid by the purchasers had been forfeited to the respondent.

[3] The applicant seeks to be released from the agreement and for relief from forfeiture of the deposit paid by the purchasers.

[4] For the reasons which follow, the application is dismissed.

### **Positions of the parties**

[5] Given his serious mental health condition (which is not disputed by the respondent), the applicant says that it is unfair, inequitable, unconscionable, and disproportionate to allow the APS to stand and to require him to forfeit the deposit paid to the respondent.

[6] The respondent says that there are several impediments to the applicant's position, including that the APS has already been terminated and that Mr. Shahzad is not a party to this proceeding. In any case, the respondent says that there was nothing unconscionable about the APS (especially as the respondent was completely unaware of the applicant's disability) and that the forfeiture of the deposit is not disproportionate given, among other things, damages it has or will suffer due to the purchasers' failure to close.

### **Discussion**

[7] Although I am inclined to agree that the failure to include Mr. Shahzad as a party to this application is problematic for the success of the application, given that I am able to dispose of this matter on other grounds, I do not propose to address that question.

[8] The application was launched before the closing date and sought to terminate the APS and be relieved of its obligations. The applicant has not abandoned that request for relief, but he did not press this point in his thorough oral submissions, focusing instead on his request to have the deposit returned to him. This change in focus is sensible because, as the respondent argues, the

evidence is clear that the purchasers repudiated the APS and, when they failed to close, the respondent accepted that repudiation and elected to terminate the APS. The parties are therefore relieved of their obligations under the terminated contract save for an assessment of damages resulting from the breach of contract: *Keneric Tractor Sales Ltd v. Langille*, [1987] 2 S.C.R. 440, at para. 24.

[9] To the extent that the applicant's argument might be understood to be that he seeks rescission of the APS, as Lieper J. summarized in *Inamdar v. Zhang*, 2025 ONSC 4210, at para. 12, that equitable remedy is available only where the agreement was "entered under inequitable circumstances, such as duress, undue influence, illegality, fraud, misrepresentation, mistake or frustration." No such circumstances exist here. The purchasers were represented by a real estate agent at the time of the signing of the APS. The applicant was already an experienced buyer of real property for investment and income purposes. There is no suggestion of any kind of dishonesty or negligence on the part of the respondent, and the respondent was completely unaware of any mental health issue that the applicant was suffering. Indeed, it appears that the respondent was completely unaware of any such issue until September 5, 2025 – nearly four years after the date of the APS – when the applicant wrote to the respondent's solicitors to ask that he be released from the APS, or that the closing date be delayed. Rescission is therefore unavailable to the applicant.

[10] As I have said, the applicant's submissions focused on his request to be relieved of the forfeiture of the deposit paid in this case. In so doing, he relies on s. 98 of the *Courts of Justice Act*, R.S.O. 1990, c. C-43. The test for relief from forfeiture under that section has two parts which may be stated as follows where the forfeiture in issue is a deposit: (1) is the deposit disproportionate to the damages suffered; and (2) would it be unconscionable to allow the seller to retain the deposit: *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282, at para. 15.

[11] With respect to the first of these two questions, in my view, the deposit is not out of all proportion to the damages suffered, or to be suffered, by the respondent. On this point, the applicant emphasizes that the respondent has failed to lead any quantifiable evidence of its

damages. Instead, the respondent relies on an affidavit from its president, Ron McMillan, sworn in November 2025, shortly after the termination of the APS. In that affidavit, Mr. McMillan observes as follows:

As a result of the Purchasers' failure to close, Reid's Heritage Homes Ltd has incurred substantial losses, which are still being calculated, including:

- (a) Given the downturn of the housing market in Ontario, the difference between the price under the APS and the price Reid's Heritage Homes Ltd will be able to fetch under a subsequent sale of the Property;
- (b) The costs of re-listing and preparing the Property for sale;
- (c) Legal fees and disbursements incurred by Reid's Heritage Homes Ltd relating to the aborted sale and re-listing of the Property; and
- (d) Carrying costs, such as property taxes, insurance, utilities, maintenance and repairs, and property management fees.

Given my experience with the cost of re-listing properties and the state of the housing market, I expect that the losses will exceed the value of the Deposits.

[12] It is true that the damages suffered by the respondent had not been quantified by the date of Mr. McMillan's affidavit, but his observations about the likelihood of damages – for the reasons he sets out – are completely reasonable. That those damages will exceed the value of the deposit is also a completely reasonable prediction. But even if the respondent were to suffer no damages, or damages which were less than the value of the deposit, as the judgment of Lauwers J.A. in *Redstone* makes plain (at para. 17), that does not demand the conclusion that to allow the respondent to retain the deposit would be unconscionable.

[13] A finding of unconscionability will be made in exceptional cases only (*Redstone*, at para. 25) and may be found upon consideration of “factors such as inequality of bargaining power, a substantially unfair bargain, the relative sophistication of the parties, the existence of *bona fide* negotiations, the nature of the relationship between the parties, the gravity of the breach and the conduct of the parties”: *Redstone*, at para. 30.

[14] Here, the purchasers were free to negotiate the price of the purchase of the unit and the terms of the APS. They had a real estate agent to assist them, and the applicant was an experienced purchaser of real property. The parties to the APS were unknown to each other and the deal was at arm's length. As noted above, the applicant's disability was completely unknown to the respondent until years after the APS was signed. The negotiations were conducted in good faith and the respondent did not engage in any dishonesty.<sup>1</sup>

[15] The purchasers' breach of the agreement was, as the respondent submits, a fundamental breach of the contract. Moreover, the respondent did everything that could be expected of it to avoid such a breach, including by alerting the purchasers to the impending closing date in the months, weeks and days leading up to the closing date, and then by trying to work with Mr. Shahzad to close the deal without the applicant, who had become uncommunicative. None of this supports a finding of unconscionability.

[16] Nor does the fact that the respondent's damages have yet to crystallize. That is because a deposit is a mechanism intended to motivate the purchaser to close the deal. Accordingly, a deposit is generally forfeited where the purchaser fails to do so, and such forfeiture does not depend on proof of damages suffered by the seller: *Redstone*, at para. 20.

[17] Further, I agree with the respondent that there is nothing unusual or unconscionable about the size of the deposit in this case. It was, as I have already noted, 15% of the purchase price of the condominium unit. In *Dar v. The Yards Corporation*, 2019 ONSC 5043, aff'd 2019 ONCA 362, where the deposit at issue was 28% of the purchase price, the court found as follows (at para. 85):

Nothing at all causes the court to find any reason to apply unconscionability to the factors in this case. Simply put there is nothing in the conduct between the parties that is shocking, oppressive or offends the notion of what a caring society would expect in a relationship such as this.

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<sup>1</sup> This fact distinguishes this case from the case relied upon by the applicant, *Naeem v. Bowmanville Lakebreeze West Village Ltd.*, 2024 ONCA 383, where the seller actively misled the purchaser.

[18] Last, although the fact that the applicant developed significant symptoms after the signing of the APS is very unfortunate, it does not render the forfeiture of the deposit unconscionable. In somewhat similar circumstances, in *Mouralian v. Grouleau*, 2022 ONSC 2925, aff'd 2024 ONCA 342, Akbarali J. found (at paras. 22 – 27) that there was no inequality of bargaining power at the time of the signing of the agreement in that case, especially given that the seller had no knowledge of the purchaser's poor mental health at that time. Akbarali J. concluded as follows (at para. 29, emphasis added):

In reality, this litigation arises because the plaintiff, despite her best intentions, encountered some unfortunate circumstances which impacted her ability to sell her other properties and obtain the financing she needed to close the real estate transaction with the defendant. While no doubt the plaintiff has suffered from these circumstances, they do not lead to the conclusion that it would be unconscionable for the defendant to retain the deposit. The deposit is not a windfall for the defendant, because it is not meant to be damages for the failed transaction, but rather, it is security to incentivize purchasers to close the transactions they enter into.

[19] I would adopt this conclusion in the present case.

[20] For all these reasons, the application is dismissed.

[21] As the successful party, the respondent seeks partial indemnity costs and has submitted what I regard to be a reasonable bill of costs. The respondent proposes an award of costs of \$8,020.06. The applicant says that he cannot afford to pay costs and certainly not in that amount.

[22] In all the circumstances of this case, I am satisfied that there is no reason to depart from the convention that the successful party should have its costs. However, partial indemnity costs as a percentage of actual costs may be fixed over a range of percentages, including at a lower percentage than that proposed by the respondent. Further, I accept that any costs award will be difficult for the applicant to satisfy. For all these reasons, I fix the respondent's costs, payable by the applicant, at \$5,000.00, all inclusive.

**Released: February 6, 2026**

**CITATION:** Hussain v. Reid's Heritage Homes Ltd., 2026 ONSC 710  
**COURT FILE NO.:** CV-25-1779  
**DATE:** 2026/02/06

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

SYED FARHAD HUSSAIN

Applicant

– and –

REID'S HERITAGE HOMES LTD.

Respondent

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**REASONS FOR JUDGMENT**

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I.R. Smith J.

**Released: February 6, 2026**