

CITATION: Le v. Calvin Barrhaven Conservancy Inc., 2025 ONSC 1278
COURT FILE NO.: CV-24-97621
DATE: 2025 02 26

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Thuy Bich Ti Le, Applicant

AND:

Calvan Barrhaven Conservancy Inc. , Respondent

BEFORE: C. MacLeod RSJ

APPEARING:

Thuy Bich Ti “Michelle” Le, in person

Charlene Kavanagh, Counsel for the Respondent

HEARD: February 13, 2025

ENDORSEMENT

[1] This is an Application for relief from forfeiture.

[2] The Applicant, was the purchaser under an Agreement of Purchase and Sale for residential property which (together with extras) she had agreed to purchase for \$1,423,408.96. She had paid deposits totalling \$99,810.00. When she failed to close the transaction on the date eventually fixed for closing, she was advised that the deposits would be forfeited, and the Respondent would hold her liable for its losses pursuant to the terms of the Agreement of Purchase and Sale.

[3] The Applicant brings this Application for a return of her deposits. She relies upon the power of the Court to relieve from penalties or forfeiture under s. 98 of the *Courts of Justice Act*. She asks the Court to order the return of the deposits. The Respondent opposes such an order both on the merits but also on the basis that it will shortly be commencing an action and it would be inappropriate to deal with the deposits in isolation from the issues which will be litigated in its claim for damages.

[4] There is no dispute that the Respondent vendor was ready, willing and able to close on the date set for closing (which had been extended at least twice) but the Applicant purchaser was not able to complete the purchase. This is because her financing fell through due to a decision by the bank which she asserts to have been outside of her control. It appears from the affidavit that the bank had an issue with the valuation of the property. In addition, interest rates rose. As a consequence, the bank refused to honour its mortgage commitment. The Applicant was unable to arrange alternative financing. The Respondent vendor was unwilling to agree to a substantial reduction of the purchase price.

[5] Because the Agreement of Purchase and Sale was unconditional by the date set for closing, upon the Applicant advising the Respondent she was unable to close, the Respondent declared her to be in breach of contract. She was advised that the Respondent would be forfeiting the deposits and upon reselling the property would hold her liable for any losses.

[6] I am advised that the property has recently sold for less than the original purchase price and the Respondent will be seeking damages from the Applicant. I am advised that after giving credit for the deposits, there remains a significant claim.

[7] The Applicant contends that the issue with the valuation was the fault of the Respondent which had misrepresented the size of the lot and charged her a premium. The Respondent denies these facts and advises that the premium was charged for a corner lot. The Applicant also alleges she had an alternative purchaser but the Respondent unreasonably refused to consent to an assignment of the Agreement of Purchase and Sale. Clearly there are facts that are in dispute and the Respondent will be advancing a claim for its losses and the forfeiture of the deposit by way of action.

[8] In effect this Application is brought in advance of the action and after the Applicant was advised the Respondent would be pursuing her for damages. In those circumstances it would amount to interim relief from forfeiture in circumstances where the vendor has a *prima facie* right to forfeit the deposit. See *Azzarello v. Shawqi*, 2019 ONCA 820 (CanLII)

[9] Relief from forfeiture is available in certain circumstances. In general this requires that the forfeited deposits are out of proportion to the damages suffered by the other party and it would be unconscionable for the seller to retain the deposit. See *Redstone Enterprises Ltd. v. Simple Technology Inc.*, 2017 ONCA 282 (CanLII).

[10] It is premature to determine if the loss suffered by the seller is more than the sum of the deposits although it appears likely that it will be. On the other hand, if the Applicant has a defence for failing to close, she may defend the anticipated action and if she had a legal basis for refusing to close, she may seek the return of the deposit in the context of that action.

[11] I am not prepared to grant relief from forfeiture on the limited evidence available at this time. I am not prepared to make a finding about disputed allegations of misrepresentation in a s. 98 Application.

[12] I am dismissing the Application for relief from forfeiture but without prejudice to such a claim being advanced as part of a defence and counterclaim if the Respondent proceeds with its threatened action for damages.

[13] In the event that an action is commenced, the affidavit material filed on this Application may be used in the action. It is also possible the Respondent will not commence an action for damages despite its representation that it intends to do so. Perhaps it will conclude that forfeiting the deposit is sufficient compensation and be satisfied with that or perhaps the parties will reach an agreement.

[14] Ordinarily the Respondent should be entitled to costs of the Application but under the circumstances the parties may agree to reserve those costs to the trial judge. I invite the parties to reach agreement failing which I will entertain written costs submissions within the next 30 days.

Justice C. MacLeod

Date: February 26, 2025