

Buyer beware: no cooling-off period in real estate deals

If you sign an agreement to buy a property and your financial circumstances change, don't think it will be easy to pull out of the contract, says Toronto civil litigator Sarah O'Connor.

"Contrary to popular opinion, there is no cooling-off period when it comes to agreements of purchase and sale for real estate," says O'Connor, who frequently represents buyers and sellers in residential and commercial real estate disputes. "Once the seller accepts your offer, it's a legally binding [contract](#)."

In many residential transactions, there is a period of weeks or months between when a firm offer is accepted, and the deal closes. With massive [declines](#) in employment across the country in recent months due to COVID-19, O'Connor says her firm has seen an uptick in the number of clients inquiring about legal remedies for properties they have agreed to purchase but can no longer afford.

The only way for buyers to protect themselves in a precarious economy is to include conditions in their offer agreements, she says.

"For example, if a buyer makes an offer that's conditional on financing, selling their home or home inspection and one of those conditions can't be met by the closing date, they wouldn't be obligated to follow through with the contract," O'Connor explains.

But in Toronto's competitive housing market, she says buyers frequently sign agreements of purchase and sale without including any conditions.

"If a buyer wants to back out of the agreement, they're liable — either for the full amount in the contract or for any shortfall the seller has when they resell the property to another buyer.

"For example, if you agreed to purchase a \$750,000 home and subsequently pull out, the seller can sue you for breach of contract. The seller has an obligation to mitigate damages by attempting to sell the home to another buyer. But if the best offer they receive is \$650,000, the original buyer will be responsible for the \$100,000 shortfall as well as the seller's legal costs."

Case in point: A couple of years ago, an Ontario couple who backed out of an agreement to purchase a multi-million dollar property was ordered by the [court](#) to pay \$470,000 to make up the difference in the price they agreed to pay and the subsequent price paid by a new buyer, the *Toronto Star* reports.

O'Connor cautions clients against relying on "COVID clauses," which have turned up recently in some legal contracts but have yet to be tested in court.

"It really depends on how the clause is drafted, which is why buyers and sellers need to work with reputable real estate lawyers in these deals," she says. "These types of cases haven't been litigated yet, so it remains to be seen if purchasers will be able to rely on them."

Some buyers wonder if a [force majeure](#) clause would offer protection in these types of cases, but that's not a standard provision in boilerplate real estate purchase agreements, says O'Connor. In general, a *force majeure* clause protects parties from being held to performance when an "Act of God" or specific event outside of their control occurs and prevents their ability to fulfill the contract, she adds.

"It doesn't preclude a party from performing the contract if it was a bad deal. A change in your financial circumstances doesn't necessarily qualify as an event beyond your control," O'Connor says.

To illustrate, she points to one of the most famous cases involving a *force majeure* provision, which occurred in 1962. In that [case](#), the court found the seller of groundnuts to a European buyer in default of the contract after failing to deliver the goods because of the closure of the Suez Canal. The seller attempted to rely on the canal closure as *force majeure*, but the judge ruled that the shipment could have gone around the Cape of Good Hope, which was twice as long and more costly.

There are creative ways buyers and sellers can avoid a legal battle, by working together when faced with financial obstacles, O'Connor says. In a recent case, she represented the buyer of a restaurant who wanted to back out of the deal when the pandemic hit.

"Rather than breaching the contract and facing the potential of litigation, we negotiated with the seller to delay the closing of the deal by two and half months," she says.

The bottom line, O'Connor says, is that buyers should exhaust every avenue available to them before thinking about breaching a legal contract.

"If you have signed an agreement of purchase and sale, but now can't get a mortgage, a loan from relatives or otherwise come up with the money, reach out to the seller as soon as possible," she says.

If the seller decides to sue the buyer for breach of contract, claims can be filed electronically in advance of the courts reopening more broadly in July, O'Connor says.