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## PERKINS V SHEIKHTAVI, 2019 ONCA 925

Unconditional offers to purchase property are just that – unconditional. In [Perkins v Sheikhtavi](#), 2019 ONCA 925 (“Perkins”),<sup>i</sup> the Ontario Court of Appeal confirmed that the law of frustration will not relieve purchasers from their unconditional offers once they have been accepted by the seller.

### *Unconditional Agreement of Purchase and Sale*

In *Perkins*, the sellers listed their home in the GTA for sale in March 2017. At that time, the real estate market was hot and within days they received a flurry of offers well above asking. The sellers accepted the second highest offer, an unconditional offer to buy for approximately \$1.8 million.

By accepting the purchaser’s unconditional offer the parties reached an agreement of purchase and sale (“APS”).

After acceptance but before closing, the Ontario Government announced the [Fair Housing Plan](#) introducing a suite of policies aimed at cooling off the real estate market in Ontario. Within days, real estate values in the area dropped by approximately 20 percent.

On the day of closing, the purchaser informed the sellers that she could not close because she had failed to sell her own home and could not obtain mortgage financing. The sellers put their property back on the market and sold it for approximately \$1.2 million. They then brought an action for the difference in the selling price and to recoup their carrying costs for the period between closing and the final sale of the property.

Ultimately, the sellers moved for summary judgment for breach of contract. The purchaser opposed on the grounds that the announcement of the Fair Housing Plan frustrated her ability to comply with the APS. She also alleged that the APS contained an implied term that if she was unable to sell her own home, she was free to terminate the APS. The purchaser made this argument despite a clear “entire agreement clause” in the APS.

### *The Doctrine of Frustration*

To ground a defence of frustration, a party must establish that an unforeseen event took place without the fault of either party and that it radically altered the contractual obligations, thereby making it impossible for them to perform their obligations.<sup>ii</sup>

On March 11, 2019, Justice Sutherland found in favour of the sellers and awarded \$619,112 in damages and carrying costs in the amount of \$4,621.05. On May 15, 2019, Justice Sutherland awarded \$13,476.14 in costs.

***Court of Appeal Upholds the Motions Judge***

Loopstra Nixon LLP acted for the sellers on appeal and they were wholly successful when the Court of Appeal unanimously dismissed the purchaser’s appeal.

The Court reaffirmed that a defence of frustration requires an unforeseen supervening event so drastic that it makes performance of the contract “a thing radically different from that which was undertaken by the contract.”<sup>iii</sup> While frustration can apply to real estate transactions, the supervening event must be unforeseen. If the event was contemplated by the parties at the time of contracting and was provided for in the contract, or deliberately omitted from the contract, there is no frustration of contract and the party trying to escape their obligations will fail.

Agreements of purchase and sale, like all contracts, are about the allocation of risk. In this case, the purchaser took a calculated risk by not including a financing condition in her offer. As found in the court below, she did so to make her offer more attractive. The Court of Appeal found that the seller knew property values could go up and by that same token, she knew they could go down. Regardless of the Government’s announcement of the Fair Housing Plan, she elected to take the risk that she could not finance her purchase without first selling her own home. When she failed to close, she became liable for damages.

The Court of Appeal also upheld Justice Sutherland’s finding that the entire agreement clause barred the purchaser’s alleged implied term.<sup>iv</sup>

Lastly, in addition to the costs awarded below, the Court of Appeal awarded more than \$15,000 in legal costs to the sellers.

**Takeaway**

This case is a cautionary tale for home buyers. If you waive conditions, courts are reluctant to help you back out of your agreement and you will likely be liable for the consequences.

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<sup>i</sup> 2019 ONCA 925 [*Perkins*].

<sup>ii</sup> *Bang v Sebastian*, 2018 ONSC 6226 at para 32.

<sup>iii</sup> *Perkins*, *ibid* at para 14 citing *Naylor Group Inc v Ellis-Don Construction Ltd*, 2001 SCC 58, at para 53.

<sup>iv</sup> *Perkins*, *supra* n 1 at para 22.