

# New Corporations and Real Estate Deposits

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Published on March 8, 2019

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From time to time a purchaser will want to purchase real estate before the corporation that will own the real estate is incorporated. The agreement of purchase and sale might be entered into by an individual “in trust for a corporation to be incorporated without any personal liability”. Does this change what happens to the deposit if the purchaser does not close the transaction?

The simple answer is no.

The Ontario Court of Appeal recently considered this question in the matter of *Benedetto v. 2453912 Ontario Inc.* The purchaser in this case provided a \$100,000.00 deposit. The transaction did not close. The purchaser asked for the deposit to be returned, and the vendor refused.

In determining the matter the Court of Appeal considered the purpose of a deposit. For the Court the risk that a deposit could be forfeited in the event of non-performance provides an incentive to purchaser to complete the purchase transaction. If the transaction fails to close, retaining the deposit also provides the vendor compensation for “lost opportunity in having taken the property off the market in the interim, as well as the loss in bargaining power resulting from the vendor having revealed to the market the price at which the vendor had been willing to sell”.

The Court of Appeal confirmed the general premise that, where a purchaser provides a deposit but fails to close, the deposit is forfeit unless the parties agreed to a different arrangement.

This remains the same even if a purchaser is purchasing “without any personal liability”. Personal liability in pre-incorporation contracts, which include agreements of purchase and sale entered into prior to incorporation, is established by the *Business Corporations Act* (Ontario) (the “OBCA”), and prevails unless either contracted out of or displaced by the adoption of the contract by the corporation subsequent to incorporation. To the Court of Appeal, adding the words “without any personal liability” was insufficient to contract out of the OBCA provisions, or to avoid the presumption at common law that a deposit is forfeit if the purchaser fails to close.

Individuals entering into agreements for the purchase of real property on behalf of corporations to be incorporated should consider other ways to protect the deposit, if this is important to the purchaser. If you are thinking of buying property on behalf of a new corporation you should contact a commercial real estate lawyer before signing the agreement of purchase and sale. Otherwise you might be out of luck if you want to try to get the deposit back if you aren’t able to complete the transaction.

*Matthew Wilson is a real estate and land development lawyer. The content in this blog is intended to provide information about the subject matter and is not intended as legal advice. It is accurate only as of the date it was first published. If you would like further information, or if you require legal advice, please contact the author.*

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