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## PRIVATE MORTGAGES:

# Dangerous for Sellers?

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### Abstract

*Private mortgages must be discharged on the closing of a sale transaction and to expect that a purchaser will accept anything else may lead to a failed real estate transaction.*

### Full Article

*Malekmohammadi v. Pirvale*, [2009] O.J. No. 3946, Ont. S.C.J., Perell J., Sept 22/09 deals with a motion for summary judgment for the return of a deposit in a failed real estate transaction. The purchaser sought the return of its \$20,000.00 deposit plus damages including punitive damages.

On September 8, 2008, the purchaser and vendor signed a standard form agreement for the sale of a residential property for a purchase price of \$634,000.00. The scheduled closing date was October 1, 2008. The purchaser paid a \$20,000.00 deposit which was held in the trust account of the defendant realtor brokerage.

The purchaser's lawyer's search of title disclosed a non-institutional mortgage that was registered against title to the property. Under the agreement of purchase and sale, this mortgage was to be discharged from the title of the property.

At the time of closing the mortgage was not discharged. The seller's lawyer offered his undertaking to discharge the mortgage after closing which was not acceptable to the purchaser who instead offered to extend the closing date which offer was not accepted by the seller.

The transaction did not close and the purchaser requested the return of its \$20,000.00 deposit. The purchaser's request was refused by the seller. The seller offered to revive the transaction if the purchaser agreed to pay additional interest. This offer was rejected and the purchaser regarded the transaction as at an end.

The Court reasoned that pursuant to the agreement of purchase and sale, the purchaser was entitled to a title free and clear of the first mortgage and the purchaser was within its rights to refuse to accept an undertaking from the vendors' lawyer to discharge the non-institutional mortgage after closing. The purchaser was also within its rights to end the transaction and to refuse to accept the vendors' offer to revive the transaction at the price of paying interest on the purchase price. Under the agreement of purchase and sale, the seller was obliged to return the deposit and there was no excuse or justification for the seller's failure to do so.



# Private Mortgages

*Continued.../.*

As such, the purchaser was entitled to the return of its deposit plus pre-judgment interest. The purchaser also made a claim for consequential losses, but there was insufficient evidence to substantiate the claim. The purchaser also claimed punitive damages, but the misconduct and breach of contract in this case did not rise to the level that would justify an award of punitive damages.