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Are Closing Dates Only Approximate?

A recent Ontario decision examined the important question of whether the duty of good faith between a buyer and seller calls for some flexibility, or whether a seller can insist that a deal closes on the scheduled date, rather than even one day later.

The facts involved a buyer who agreed to purchase a commercial condominium from the seller for $640,000. Both of them were experienced businesspeople, represented by well-qualified lawyers.

The agreement called for four staggered deposits of $10,000 each, followed by another $32,000 due on interim occupancy closing. On the interim occupancy closing, the buyer tendered the $32,000, moved in, and began paying the required occupancy fees. This continued for about a half-year.

From then on, however, matters started to disintegrate; the deal never closed, but rather became what the court called a "poker game".

It began when the seller's lawyer unilaterally wrote to the buyer's lawyer to set the final closing date for June 26th. Although this was permitted by the agreement, the seller did so without any input from the buyer whatsoever, which the buyer argued was highhanded. Upon this date being set, the buyer promptly asked for a two-month extension, which the seller refused.

The buyer made renewed requests for extensions which were likewise rejected, with the seller ultimately insisting on June 26th as the closing date. On that day, the seller tendered its closing documents, but the buyer did not tender its closing documents or the required funds.

The next business day, the buyer's lawyer emailed the seller's lawyer to say that the buyer was prepared to close and would have the funds by the next morning. The buyer's lawyer asked for the seller's direct deposit information to be provided as soon as possible, but the seller's lawyer never responded.

Instead the seller, who considered the deal had collapsed with the non-closing on June 26th, purported to keep the $72,000 that the buyer had paid as a deposit. In response, the buyer sued for specific performance, (*i.e.* to have the court force the seller to complete the contract), and alternatively to have the deposits returned.

The matter went to court, with both buyer and seller claiming that the other owed them a duty of good faith, relying on the principles set out by the Supreme Court of Canada decision in a landmark case called *Bhasin v. Hrynew*.

Specifically, the buyer claimed that without any consultation whatsoever the seller had unilaterally set a closing date, and then refused to grant even the shortest extension. In rebuttal, the seller claimed that it was unreasonable for the buyer to have missed the closing date when the agreement was clear, and in light of the buyer's concession that it had the required closing funds in-hand throughout.

Against this factual background, the court considered whether the duty to act in good faith required the parties to a real estate contract to be flexible in some circumstances on matters such as the closing date. It explained that the scope of the good faith duty was measured by the specific relationship between the parties: Where they had a long-term, ongoing relationship, a level of good faith may require them to show some flexibility and to have obligations beyond the strict letter of the contract. However, where they were commercially-experienced parties to an isolated, one-off transaction, they would be expected to adhere to the strict contractual terms. The overriding test, according to the court, was whether "the conduct would be regarded as commercially unacceptable by reasonable and honest people."

In this case, neither buyer nor seller was entitled to accuse the other of failing to act in good faith, since both had "played their moves carefully and showed each other only their game face." The buyer had been cavalier about the closing date, and had missed it of its own volition. The seller had preferred to stand on its rights to insist the deal go ahead, rather than be flexible. In terms of their respective duties to each other, the court said:

Given the relationship of Vendor and Purchaser in a discreet real estate deal, good faith meant sticking to the contract, not bending the contract – even just a little bit – to one side's will.

Furthermore, the buyer's breach was not a minor technical one: He had missed the closing date by a day, had failed to deliver over $600,000 in closing funds, and had also failed to sign some required documents. This was enough to put an end to the contract.

The next question was whether the buyer's deposits had been forfeited. The buyer argued that it is entitled to relief from forfeiture on the basis that this relief is appropriate where the sum which could potentially be forfeited is out of all proportion to the damage suffered, and it is therefore unconscionable for the seller to retain the money. On this issue, the court concluded as follows. The $72,000 was

made of two kinds of payment. The four staged payments of $10,000 each were clearly intended and designated as "deposits" and in light of the buyer's breach it was reasonable for the seller to keep this amount, especially since it was not a disproportionate estimate of the seller's damages in the context of an aborted $640,000 deal.

However, the final payment of $32,000 was different, in that it was considered closing funds which were paid on interim closing. By way of summary judgment, the court ordered this amount to be returned to the buyer. See *2336574 Ontario Inc. v 1559586 Ontario Inc*., 2016 (ONSC).

Must the Word "Rescind" be Used to Rescind a New Condominium Purchase?

In a brief but important decision called *Yim v. Talon*, the legal issue was simple: In order to rescind a new construction condo purchase, do you have to actually use the word "rescind"?

The buyers had agreed to purchase a condo unit in the Trump Tower in downtown Toronto. For various reasons, they wanted to cancel the deal and have their deposits returned; among their concerns was the fact that a "Hotel Unit Maintenance Agreement" – which they had been given at the last-minute – contained substantially different terms than had been contained in the Disclosure document. Most notably, it had called for much higher fees than they expected.

In support of their right to rescind, they relied on the provisions of the Ontario *Condominium Act, 1998*, which states that in the face of a material change to the Disclosure Statement, a buyer is entitled to rescind the agreement by giving "written notice of rescission" to the vendor within a 10 days of the material change.

Intending to avail themselves of this statutory provision, the buyers promptly provided the developer with a letter expressing their desire to end the deal. It was written by their lawyer, and indicated the buyers' intention to "terminate" the transaction, and requested the immediate return of the deposits.

The vendor argued that the buyers had legal counsel, that the aforementioned letter makes no mention of "rescission" and that it must be assumed that the buyers' lawyer, would know the difference between "rescission" and "termination". Further, that the buyers specifically chose one remedy over the other and the court cannot now read into the notice anything more than is stated on its face.

Nevertheless, in confirming the legal validity of this intended rescission, the court said:

"All that [the Act] requires is that the notice of rescission be in writing and delivered to the declarant or its solicitor. It can also be inferred ... that the notice must contain a ground of material change upon which the rescission is based. Beyond that, there are no requirements as to form. Particularly, it does not explicitly require the parties to use the term rescission."

The court added that in view of the Act's clear consumer-protection focus, there was no benefit to imputing a requirement that the term "rescission" must actually be included in the buyers' notice to the developer. All the Act required was for the buyers to make clear their intention to undo or unmake the contract, and to restore themselves and the developer to their original *status quo*, which would involve the return of the deposit as well. See *Yim v. Talon*, 2016 (ONSC).

Can Title to Your Home be Legally Terminated if You Go On Vacation?

The title is a little bit of an exaggeration, but here are the facts: Back in 1979, a man named Edward and a woman named Heather moved in together (common law) and bought a home, taking title as joint tenants. When the relationship went sour shortly after in 1983, Heather moved out. As far as Edward was concerned, he never heard from her again.

Edward continued to live in the home, and paid all the maintenance costs until he died in 2014. He had no Will. At that point, Edward's survivors realized that title to the home was still held jointly with Heather, so they tried strenuously – but unsuccessfully – to locate her. Their efforts included posting ads to several social media sites, performing a skip trace search, contacting Vital Services and the OPP, and advertising in the *Canada Gazette*.

Eventually, they applied to court to have sole title vested in Edward's Estate.

The uncommon scenario raised the legal issue of whether one joint tenant such as Edward could oust another joint tenant such as Heather by adverse possession during his lifetime, in order to give him full (rather than joint) title. Under common law, this was historically not allowed, but the court ruled that the provisions of section 11 of the *Real Property Limitations Act* permitted that outcome in some circumstances. The law required that for at least the 10-year period immediately preceding the application: (1) that Heather's possession of the home was discontinued during that time; (2) that Edward had actual possession of the home; and (3) that his possession was with the *intent to exclude* Heather.

In this case, the first and second requirements were easily met.

The outcome therefore hinged on whether the third branch of the legal test was satisfied, *i.e.* that Edward's possession of the home was with the express intent to exclude Heather from living there.

The court held that it was. While conceding there was no clear and direct intent by Edward, in its absence the court was prepared to infer a *presumed* intention in this case, given all the circumstances. The court accordingly issued a vesting order declaring Edward's Estate as legal and beneficial owner of the property. See *The Estate of Edward Raymore Post by its Estate Trustee, Brian Thomas Alfred Post v. Heather Ann Hamilton*, 2015 (ONSC).