

Lessons from the Trenches: Tips and Traps for the Wary

Ontario Bar Association's Institute: *Quirky Conveyancing – Tools for the Modern Real Estate Lawyer*

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Time is of the Essence - Again

In 1990, Paul Perell wrote the following introduction to his article “Putting Together The Puzzle Of Time Of The Essence” for *The Canadian Bar Review*:

The law of time of the essence presents conflicting authorities and ancient case law to be revisited and explained in a modern context. There have been advances and reversals in the jurisprudence and some unasked and unanswered questions.¹

Approximately 16 years after his article, Paul Perell, as a Superior Court Judge once again dealt with time of the essence issues in *Shapiro (c.o.b. ISR Ent. in Trust) v. 1086891 Ontario Inc.*² where he referred to *Remedies and the Sale of Land* (2nd ed) (Toronto: Butterworths, 1998) which he co-authored with B.H. Engel.

Recent case law puts the rule perhaps more simply by asserting that a party must be acting in good faith to rely on time of the essence.

The rules of time of essence are, however, not simple and there are still “unasked and unanswered questions.” The case of *Union Eagle Ltd. v. Golden Achievement Ltd.*,³ dealt with one of these issues. The *Union Eagle* case was affirmed in Ontario by *1473587 Ontario Inc. v. Jackson* [2005] O.J. No. 3145. The Privy Council case involved a failed condominium closing or HK\$4.2 M. The

¹ Paul Perell, “Putting Together The Puzzle Of Time Of The Essence”, (1990), 69 Can. Bar Rev. 417.

² [2006] O.J. No. 302 (Ont. S.C.J.) [*Shapiro*].

³ [1997] A.C. 514 (Hong Kong P.C.) [*Union Eagle*]. The principles in this case were referred to in *1473587 Ontario Inc. v. Jackson*, [2005] O.J. No. 710 (Ont. S.C.J.).

seller wanted to end the agreement because it believed the property value had increased significantly. According to Lord Hoffmann “*The only unusual feature was that the purchaser tendered payment of the purchase price ten minutes after the time for completion had passed*”. In fact, the seller sold the condominium six years later for HK\$19.5 M. The seller also retained the deposit of HK\$400,000.00 funds which were forfeited by the seller. Lord Hoffman concluded as follows:

The fact is that the purchaser was late. Any suggestion that relief can be obtained on the ground that he was only slightly late is bound to lead to arguments over how late is too late, which can be resolved only by litigation. For five years the vendor has not known whether he is entitled to resell the flat or not. It has been sterilised by a caution pending a final decision in this case. In his dissenting judgment, Godfrey J.A. said that this case “cries out for the intervention of equity”. Their Lordships think that, on the contrary, it shows the need for a firm restatement of the principle that in cases of rescission of an ordinary contract of sale of land for failure to comply with any essential condition as to time, equity will not intervene.

In the *Jackson* case, 147358 Ontario, known as Loblaw, had entered into an agreement to purchase 12 acres of a 56 acre parcel from the vendors for \$1,800,000.00 based on a price of \$150,000.00 per acre. A deposit of \$75,000.00 was to be paid within five days of the execution of the agreement. The agreement provided that “time in all respects shall be of the essence of this Agreement”. Through inadvertence, Loblaw did not pay the deposit until seven days after the date stipulated in the agreement. The vendors treated the agreement as discharged and negotiated a new agreement with another party to sell the entire parcel. The court found that Loblaw’s late payment of the deposit was a breach of an essential term of the agreement that entitled the vendors to treat the contract as discharged and released the vendors from their obligations. To Rutherford J, “*Certainty and precision is important in language used in documents of business and commerce.*” To him the law applicable to this case was clear “*as it ought to be*”. His discussion was affirmed by the Court of Appeal.

In his annotation to the Court of Appeal *Jackson* decision, Jeffrey Lem, as he then was, wrote, “*What is absolutely certain is that Union Eagle has now officially landed in Canada and future Canadian Courts considering ‘time of the essence’ will no longer be able to do so without a thorough treatment of the rule in Union Eagle.*”⁴

Ironically, however, years later in the case of *Reserve Properties Limited v. 2174689 Ontario Inc.* 2015,⁵ it was Shoppers (after being purchased by Loblaw) which sought to evoke a time of the essence provision to terminate a contract because of a late deposit payment by the purchaser (Sobeys). In the *Reserve* case, the purchase missed the deadline for a \$75,000.00 deposit payment and having missed the payment Shoppers treated the contract at an end.

⁴ *Ibid.*

⁵ 2015 ONSC 3469

In this case, Justice Myers held that taking into consideration all the circumstances, the breach was not fundamental and did not give Shoppers a right to terminate the agreement.

Ready, Willing & Able. Tender and Anticipatory Breach

In order to rely on a time of the essence provision, the party must show that it is ready, willing and able to close on the agreed date. A party may establish this readiness by a tender of the moneys or the documents required to close on the stipulated date. Tender constitutes evidence that the tendering party is ready, willing, and able to close the transaction and entitled to pursue its remedy against the defaulting party. If an agreement does not specify an hour or place for closing, a purchaser could properly tender on a vendor any time before midnight.⁶

Tender is not necessary when a party, by its conduct, has refused performance of the contract. Repudiation from conduct may be implied if a reasonable person would be led to believe that the defaulting party will not perform or will be unable to perform at the stipulated time.

A party seeking to rely on repudiation implied from conduct must show that the party in default has so conducted himself as to lead a reasonable man to believe that he will not perform or will be unable to perform at a stipulated time.⁷

When there is an anticipatory breach the innocent party does not need to tender as it would be merely a “futile gesture”.

A Requisition/Title Insurance/and Time is of the Essence

Thomas v. Carreno⁸

The Purchaser entered into an Agreement of Purchase and Sale (the “**Agreement**”) for a residential property for \$1,500,010 and paid a deposit of \$100,000, in trust, pending completion or other termination of the Agreement. Closing was to take place by 6:00 p.m. on July 8, 2011.

The Purchaser’s lawyer, after discovering the existence of an open building permit, sent the Vendor’s lawyer a requisition letter requisitioning a report from the City of Toronto closing the outstanding building permit.

Although the Vendor’s solicitor took steps to close the permit, he became aware that he would not be successful in closing the open permit before the closing date.

Facsimile letters and telephone calls were exchanged between the two lawyers dealing with the requisitions. Although the Vendor’s solicitor suggested a week’s extension of the closing or closing the transaction with a substantial holdback, the Purchaser’s solicitor made it clear that she

⁶ *Genern Investments Ltd. v. Back et al.*, [1969] 1 O.R. 697-700 (Ont. H.C.J.).

⁷ 9 Hals., 4th ed., p. 376, para. 548.

⁸ 2013 ONCA 566.



was not willing to close the transaction if the building permit remained opened nor were her clients agreeable to an extension of the July 8th closing date.

The Agreement contained what is now considered a typical boiler plate clause which provided that a requisition could be answered by the “*seller obtaining insurance (Title Insurance) in favour of the buyer*”.

As a solution to the open building permit issue, the Vendor’s solicitor contacted Stewart Title which agreed to title insure over the open building permit if the Vendor’s lawyer held back \$100,000 out of the closing proceeds pending the closure of the building permit.

Once the Vendor’s solicitor obtained this commitment to insure from Stewart Title, he faxed a letter to the Purchaser’s solicitor advising her that Stewart Title was prepared to provide title insurance for the Purchaser and insure over the permit issue. The fax was sent at 3:55 p.m.

Although the Purchaser’s solicitor’s fax machine received the fax, the Purchaser’s solicitor thinking that the deal was at an end dealt with other closings. She actually sent a fax at 4:01 p.m. that same day repeating that her client would not accept title while the building permit was open nor would there be an extension of closing and that the Agreement would terminate at 6:00 p.m.

The transaction did not close.

After the Vendor’s solicitor refused to return the \$100,000 deposit, the Purchaser brought an application for the return of the deposit.

One of the issues dealt with by Lederman J. was whether a commitment from Stewart Title to insure over the building permit fell within the Vendor’s obligation “to obtain” title insurance.

Lederman J. concluded that it was sufficient to obtain Stewart Title’s commitment and communicate that commitment to the Purchaser’s solicitor. Although the Purchaser’s solicitor assumed that by 4:00 p.m. nothing further could be done by the Vendor before closing, Lederman J. specifically addressed the role of the Purchaser’s solicitor by saying that “*she had a duty to monitor that situation until the deadline*”.

41. *Both lawyers, being busy with other transactions that were closing, appear to have left this matter to the last minute; however, there was an obligation on both sides to act in good faith and do what was necessary within the time frame set out by the Agreement of Purchase and Sale.*⁹

The Court of Appeal dismissed the appeal and in brief reasons agreed with Lederman J.’s conclusion that the requisition in relation to the building permit could be “*satisfactorily answered*”

⁹ *Ibid.*

by a commitment to provide title insurance as contemplated by the Agreement of Purchase and Sale”.

7. As the application judge found, the vendors were ready to close and in a position to do so prior to 6:00 p.m. until which time the Agreement of Purchase and Sale was still in full force and effect.¹⁰

Reinstate Time of the Essence

When neither party is in a position to close on the closing date either party may reinstate time of the essence by serving a notice upon the other party, fixing a new date which must be reasonable, and stating that time is to be of the essence with respect to the new date.

In *Fancsali et al. v. Brodi et al.*,¹¹ although the parties purported to tender on the closing date, the purchaser did not have the closing funds available and the vendor did not have the requisitioned discharge of mortgage available. Neither side could therefore close or make proper tender. The solicitor for the vendor was then able to obtain the discharge of mortgage and, about 2 months after the original closing date, sent out a notice setting out the new closing date at 5 weeks from the date the notice was sent out. The purchaser took the position that as the original closing date had passed the transaction was at an end and the purchaser was entitled to the return of the deposit.

Rosenberg J. confirmed that when neither party was ready to close on the contractual date for closing, it does not put an end to the contract. Non-compliance with the time is of the essence provision can only be set up as a defence by a party who was himself ready, willing and able to close on the agreed date. In the *Fancsali* case the Court held that as neither party was ready to close on the closing date, either party had the right to send out a notice. The Court held that the notice was sent out within a reasonable time from the closing date and the closing date set out in the notice was reasonable.

The Deal Didn't Close. Neither Party was at Fault.

***Multani Custom Homes Ltd. v. 1426435 Ontario Ltd.*¹²**

Arrell J. introduced his decision as follows:

1. The plaintiff agreed to purchase property owned by the defendant. They entered into an agreement of purchase and sale where clearly time was of the essence. The closing date was extended. For a number of reasons, none of which were the fault of either party, the deal was unable to close on that date. It was able

¹⁰ *Ibid.*

¹¹ (1984), 28 A.C.W.S. 163 (Ont. H.C.).

¹² 2013 ONSC 4712.

to close the next afternoon, however, the defendant had by that time taken the position that the deal was off and refused to close.¹³

The defendant vendor brought a summary judgment application seeking a dismissal of the purchaser's claim.

The transaction did not close because of unforeseen difficulties in securing the mortgage funds on the closing date; there were difficulties with obtaining additional title insurance policies, the courier's office was closed and there were other technical difficulties which led Arrell J. to the conclusion that the failure to close the transaction was a result of a series of events beyond the control of the purchaser.

Although Arrell J. made a finding of fact that the vendor was willing and able to close the transaction on the date set for closing, he questioned the vendor's refusal to close once that date had expired. He stated, "No evidence has been led as to why it would not close the following day" and "there was no evidence that the vendor would have suffered any prejudice in closing the transaction the next day." Were these questions even relevant?

Arrell J. refused to dismiss the plaintiff purchaser's action because there were triable facts that went to the issue of good faith. The Court was required to hear evidence on those issues in order that a finding of fact and credibility can be made on the issue of good faith. In his reasons Arrell J. stated:

16. A vendor is under a duty to act in good faith and to take all reasonable steps to complete the contract. Where a vendor acts contrary to good faith in its performance of the contract, the law precludes the vendor from relying on the "time of the essence" provisions to terminate the contract. *Leung v. Leung* (1990), 75 O.R. (2d) 786 (Ont. Gen. Div.) at para. 43).¹⁴

So the question remains – What is late? What is too late?

The Exclusionary Clause

The general rule is that Courts give effect to exclusionary clauses and to limitation and waiver of liability provisions in a negotiated agreement.

Although at one time Courts would refuse to enforce an exclusion or limitation of liability provision in circumstances where to do so would be unconscionable, unfair, unreasonable or otherwise contrary to public policies, the Supreme Court of Canada in *Tercon Contractors Ltd. v*

¹³ *Ibid.*

¹⁴ *Ibid.*

*British Columbia (Minister of Transportation)*¹⁵ has limited the Courts' refusal to enforce an exclusion of liability provision to unconscionability and public policy.

Entire agreement clauses or limitations of liability clauses in contracts will exclude liability for negligent misrepresentations that were said to have induced one party to enter into the contract.

In *Hayward et al. v. Mellick et al.*¹⁶ the plaintiff sued the defendant for damages for negligent misrepresentation for misrepresenting the amount of workable land that was available on the farm. The listing agreement described the land as amounting to 95 acres containing 65 workable acres. There was no reference in the agreement of purchase and sale to the amount of workable acres. The agreement contained an exclusionary clause. The Trial Judge and the Court of Appeal held that the representation as to the amount of workable land was a negligent misrepresentation and was excluded by exclusionary clause.

Gift/Loan/Sham

A. (A.) v G. (Z.)¹⁷

"It is alleged the mortgage was a sham. What is the meaning of sham?"

The following are findings made by Kruzick J.:

98. ...the lawyer who prepared the mortgage, found himself in a difficult position. He knew the husband, the wife and the father. From this testimony, I conclude he was uncomfortable when he agreed to act for the three parties. Because he knew them and acted for them on other transactions, he was not at ease in dealing with this mortgage; but did so notwithstanding better judgment in hindsight.¹⁸

23. The father maintains he advanced well in excess of \$800,000 to the husband and wife once the old house on their property was demolished for the construction of the new matrimonial home.¹⁹

50. The Father's evidence at trial was that he always intended the mortgage to be repaid and that he was aware he had 10 years to collect on the debt, given the provisions of the *Real Property Limitations Act*, R.S.O. 1990, c. L. 15.²⁰

100. In the end, there are compelling reasons to find the mortgage to be a sham. The evidence does not satisfy me as to common intention. The mortgage was, I

¹⁵ [2010] 1 SCR 69.

¹⁶ 1984 CarswellOnt 98.

¹⁷ 2015 ONSC 4397.

¹⁸ *Ibid.*

¹⁹ *Ibid.*

²⁰ *Ibid.*

find, put in place to trick third party claims, or to recover only from the wife if the marriage failed.²¹

See also *Crepau v. Crepau*²².

The Court held that although the mother signed the gift letter, she did so only to assist her son obtaining the mortgage to facilitate the purchase of the property. Without the gift letter Scotiabank would not advance the funds to close the deal. The court therefore found that the mother did not have the intention to gift the \$30,000.

Fraudulent Conveyances and Certificate of Pending Litigation

The Bank of Nova Scotia v McCallen²³

The following are findings made by Master R.A. Muir:

3. The Property was purchased by Donald and the defendant Rosemary McCallen (“Rosemary”) on July 30, 1999. Title was taken in both of their names as joint tenants. In the fall of 2013 Donald attended a seminar at which he received advice that “anyone who is in any entrepreneurial business should not have title to their house in their own name”. On November 8, 2013, title to the Property was transferred from Donald and Rosemary to Rosemary alone for no consideration.²⁴

8. I accept the defendants’ evidence that the corporation and Donald were current with all creditors at the time of the transfer of the Property. However, there would appear to be ample authority to support a finding of a fraudulent conveyance in circumstances where the defendant’s intention in making a transfer was to put his assets out of reach of future creditors. See *Indcondo Building Corp. v Sloan*, 2014 ONSC 4018 (Ont. S.C.J.) at paragraph 48. The party attacking the transfer need not be a creditor at the time of the transfer.

10. ...the balance of convenience favours the plaintiff. A CPL will protect the asset from being transferred or encumbered while this action proceeds.

²¹ *Ibid.*

²² [2012] ONSC 418.

²³ 2015 ONSC 5438.

²⁴ *Ibid.*

Chai and Dabir²⁵

Specific Performance and the Return of the Deposit

Although the facts indicated that this was an appropriate case to grant specific performance, the purchaser lost her right to claim specific performance by reason of accepting the return of the deposit.

Justice Stinson referred to Justice Perell's article "*Common Law Damages, Specific Performance and Equitable Compensation in an Abortive Contract for the Sale of Land: A Synopsis*" (2011), 37 *Advocates Quarterly* 408 as follows:

A purchaser who demands the return of his or her deposit is electing to end the contract and will not have a claim for specific performance.²⁶

In support of this proposing Justice Perell cites, among other authorities, *MacNaughton v. Stone*, [1949] O.R. 853 (Ont. H.C.), a decision of Chief Justice McRuer. In that case the following explanation was given for this principle (at para. 16):

The request for return of the deposit is not consistent with an intention to treat the contract as valid and subsisting and to bring an action for specific performance if the contract was not performed according to the terms thereof. The plaintiff, having elected to treat the contract as at an end by demanding the return of the deposit, could not by himself revive it when the deposit was not returned.²⁷

²⁵ 2015 ONSC 1327.

²⁶ *Ibid.*

²⁷ *Ibid.*