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In real estate, time truly is of the essence

Any delay in deposit may nix agreement

If a home purchaser is a little bit late in delivering a deposit cheque, or needs a closing extension of a day or two, will the courts intervene to allow a grace period?

That was the issue that an Ontario court had to decide last year in a case where the purchaser was seven days late in delivering a deposit cheque.

On Sept. 18, 2003, Loblaw Properties Limited signed an agreement with five individual vendors to purchase a parcel of land near Fergus, Ont. for a supermarket.

The agreement called for a deposit of \$75,000 to be paid by Sept. 23. It also contained two clauses stating that "time shall be of the essence" of the agreement.

This type of clause appears in virtually every Ontario agreement of purchase and sale for new and resale homes, and for commercial properties as well.

Through inadvertence by Loblaw, the deposit was not delivered until Sept. 30.

Since the deposit cheque was seven days late, the lawyer for the sellers immediately returned it to Loblaw's lawyers. A few days later the vendors signed a deal with Forecast, which had expressed interest in the property after the Loblaw offer was signed.

Everybody then headed to court to determine which deal was binding: the Loblaw purchase or the Forecast one.

The case was heard by Justice Douglas Rutherford in Toronto last year. He had to determine whether the parties would be held strictly to their bargain, or whether there was a little wiggle room (my phrase, not his) to allow late payment of the deposit based on Loblaw's good faith and inadvertent error.

In order to reach his decision, Rutherford analyzed what is probably the most important common law case in this area: the 1997 decision of the British Privy Council in *Union Eagle Ltd. v. Golden Achievement Ltd.*

In that case, the buyer entered into an agreement in August 1991 to purchase an apartment in Hong Kong for HK\$4.2 million, the equivalent at the time of about \$622,000 Canadian. The buyer paid a deposit of HK\$422,000 to the seller's solicitors.

Completion of the deal was to take place on or before Sept. 30, 1991 at 5 p.m., and time was to be "of the essence" of the agreement.

On the day of closing, the seller's solicitors had warned the purchaser's solicitors that they would insist on strict compliance with the closing deadline, or the seller would terminate the deal and forfeit the deposit.

At the time scheduled for closing, a messenger from the office of the purchaser's solicitors was heading for the office of the seller's solicitors with the balance of the funds, but was stuck in traffic in downtown Hong Kong. He finally arrived at 5:10 p.m., just 10 minutes late.

At 5:11 p.m., the seller's solicitors phoned the purchaser's solicitors and advised that the deal was terminated under the "time of the essence" clause, and they returned the envelope and contents to the messenger.

In the hyper-inflation of the Hong Kong condominium market at the time, the purchaser took the vendor to court to enforce the contract.

The evidence at trial showed there was no intentional delay by the purchaser, there was no specific deadline for registration, and the vendor did not suffer any damages as a result of the 10-minute delay.

In February 1997, the case wound up before the Judicial Committee of the Privy Council, which at the time was the highest court of appeal for the Crown colony.

All five law lords in London agreed with the Hong Kong courts, and sided with the seller's right to terminate due to the 10-minute delay in payment.

The Privy Council said, "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."

Eventually, the owner of the Hong Kong apartment sold it for HK\$19.5 million, or close to \$3 million Canadian a profit of HK\$15 million (\$2.25 million Canadian) as a result of the 10-minute delay.

Applying the *Union Eagle* reasoning to the Loblaw case in Fergus, Justice Rutherford ruled that Loblaw was in breach of the agreement and could not proceed with its purchase. The sellers were entitled to kill the deal when Loblaw's deposit arrived late.

Last July, the Ontario Court of Appeal dismissed Loblaw's appeal in three short paragraphs.

Until the Loblaw Properties case, Ontario courts had been willing to bend the rules in cases like this "where justice requires it," and when the parties were acting in good faith.

Commenting on the case in *The Lawyers Weekly* last month, Toronto lawyers Jeffrey Lem and Brian Clark noted it may be premature to say the law in Canada on "time of the essence" has undergone a "complete 180," but it would not be an overstatement to suggest that Union Eagle has now officially landed in Canada.

In future, Ontario real estate buyers who are slightly late in complying with the terms of the purchase agreement run a substantial risk of being held in breach of contract.

If you have to pay a deposit or the balance of the full purchase price on a specific day, make sure you won't be late.

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