

Claim against jointly-retained real estate lawyer dismissed after party's repudiation of transaction (Precision Forest Industries Ltd v Cox)

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In circumstances where an agreement to complete a real estate transaction fails to close but neither party was in a position to do so, the parties may be required take steps to provide reasonable notice to the other side of a new closing date. During the interim, the agreement may continue to be binding on the parties. Before deciding whether to terminate the transaction, the parties may wish to consider whether they are entitled to do so without breaching the agreement.

In *Precision Forest Industries Ltd v Cox*, 2024 ABCA 137 (CanLII), the Court of Appeal of Alberta upheld a trial judge's finding that the appellant seller (Cox) had repudiated a valid and enforceable real estate agreement with the respondent buyer (Precision). The court also concluded that the parties' jointly retained real estate lawyer did not breach the standard of care expected in the circumstances.

In November 2003, Precision made an offer to buy nine parcels of land from Cox for \$345,500, including a \$50,000 deposit, which was accepted by Cox. The agreement contained certain terms and conditions, including that possession of the property was to be available for Precision at noon on December 10, 2003, but that Precision had until December 15, 2003 to obtain mortgage financing. The agreement provided that time was of the essence.

As of December 10, 2003, Precision had paid the deposit but neither party was able to close the transaction. Precision had not yet finalized the terms of mortgage financing and Cox was not able to tender title documents. The parties had jointly retained a real estate lawyer's services but neither of them provided the lawyer with a copy of the agreement before the scheduled possession date.

The lawyer finally received a copy from Precision's lender on December 31, 2003—three weeks after the possession date. The lawyer then wrote to each of the parties stating that he had received a signed copy of the agreement and the documentation was being prepared. He indicated a "probable" closing date of 30 January 2004.

By mid-March 2004, the transaction had still not been completed and Cox advised the lawyer that he no longer wished to proceed with the sale to Precision.

Precision then sued Cox for breach of the agreement. In response, Cox argued that the agreement was no longer valid and enforceable when he decided not to complete the transaction. He also sued their real estate lawyer for contribution and indemnity.

At trial, the court first considered whether Cox was liable for failing to complete the sale to Precision.

The trial judge relied on the Ontario Court of Appeal decisions in *King v Urban County Transport Ltd.*, 1973 CanLII 740 (ON CA) and *Domicile Developments Inc v MacTavish*, 1999 CanLII 3738 (ON CA), at paragraphs 11 and 12, which affirmed that where an agreement provides that time is of the essence and neither party was

ready to close on the agreed date, the agreement remains in effect and either party may reinstate time of the essence by providing reasonable notice to the other party setting a new date for closing.

Since neither Precision nor Cox were ready, willing and able to close on the specified closing date, their agreement remained in effect and was to be closed within a reasonable period of time. Neither party actually served written notice that time would be of the essence as at a specified date within a reasonable period of time. However, the agreement remained valid and enforceable when it was repudiated by Cox in March 2004. Cox therefore breached the agreement.

Cox argued that the real estate lawyer was liable for purporting to vary the terms of the offer without authority and/or negligently advising him of his rights and obligations.

The trial judge found that neither Precision nor Cox had sought legal advice from the lawyer at the time that they entered into the written agreement and that he was not provided with a copy of the agreement until the end of December 2003. The scope of the lawyer's retainer was therefore limited in accordance with the comments of the Supreme Court of Canada in *Strother v 3464920 Canada Inc.*, 2007 SCC 24 at paragraph 34:

When a lawyer is retained by a client, the scope of the retainer is governed by contract. It is for the parties to determine how many, or how few, services the lawyer is to perform, and other contractual terms of the engagement.

At trial, Cox relied on an expert on the standard of care who opined that the lawyer should have provided advice about an amending agreement or a new agreement. However, the trial judge concluded that since the agreement had remained in force and effect until it was repudiated by Cox, the lawyer was under no obligation to provide such advice to Precision or Cox.

Further, the lawyer's failure to obtain an extension agreement was not an error since the agreement remained valid and enforceable. An extension agreement would not have been required in these circumstances.

Rather, the lawyer was retained to prepare the documentation to close the transaction in accordance with the agreement. He did so. The agreement was in effect, until the date that Cox took the position that he would not proceed with the deal. It was Cox who repudiated a valid and subsisting contract. In the trial judge's view, anything that the lawyer did or failed to do did not result in Cox's decision to repudiate the contract.

The claim against the lawyer was therefore dismissed.

On appeal, the Court of Appeal of Alberta found no error with the trial judge's findings that time was no longer of the essence once the closing date had passed and that the agreement remained in effect such that it would close within a reasonable period of time unless either of the parties formally reinstated time of the essence.

The Court of Appeal also agreed that the lawyer was not liable for breach of the standard of care based on the trial judge's findings as to the limited scope of the lawyer's retainer.

Cox argued that the lawyer should have proposed to the parties that an amended agreement or a new agreement be entered into between the parties. However, the suggestion that the lawyer was obliged to advise Cox about the possibility of reinstating time of essence was not the subject of expert evidence at trial, nor was the question of whether there would have been a breach of any obligation in that regard.

Accordingly, the trial judge did not err in finding that there was no obligation in the circumstances to propose a new or amended agreement as he found on the facts that the agreement remained valid despite the parties not having complied with the initial closing date and that the lawyer was retained only to prepare the closing documents.

The decision shows the tricky circumstances that may arise when a proposed closing date has come and gone and there is no specified term in an agreement to terminate a transaction. Before a party unilaterally decides to refuse to complete a deal, they should assess whether they are legally entitled to do so in the circumstances without consequences. A PDF version is available for download [here](#).

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