

Court refuses to impose 5 pm deadline for delivery of real estate closing proceeds

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Real estate transactions may be scheduled to be completed by a certain time of day, depending on the wording of the Agreement of Purchase and Sale (APS). In some cases, this may mean that the transfer of the property won't be registered until the following day since land registry offices typically close by 5:00 p.m. The real estate lawyers for the buyer and seller often work cooperatively to ensure that the transaction closes the following day as soon as they are in a position to do so, even though not all of the closing documents or proceeds of sale may have been received by the deadline set out in the APS. Sometimes, however, a seller may attempt to rely on a "time is of the essence" clause in the APS and refuse to close.

In *More v. 1362279 Ontario Ltd.*, 2022 ONSC 1363 [not yet on CanLII], the Ontario Superior Court of Justice addressed a dispute arising from a seller's refusal to complete a transaction when the closing funds were not received until the day after the scheduled completion date.

The plaintiffs agreed to purchase three newly-built townhouses in Windsor, Ontario from the defendant, a developer. The townhouses were close together and "checked off all the boxes" for the plaintiffs due to the price and location in Windsor. The plaintiffs each had an identical APS with the defendant and agreed to a completion date of 1 October 2020. No time for completion was specified in the APS.

As closing approached, the plaintiffs grew concerned with the defendant's refusal to cooperate with issues raised by a Tarion inspection and other issues and the plaintiffs requested a short extension of the closing date. This request was refused.

On the closing date, the mortgage funds were received by the plaintiffs' real estate lawyer but there was a delay in delivery of the funds to the seller's lawyer despite the best efforts of the plaintiffs' real estate lawyer. It turned out that the incorrect swift code was provided by the seller's lawyer for the wire transfer. The plaintiffs' lawyer was nevertheless able to deliver the closing funds before 6:00 p.m.

At 5:11 p.m. on 1 October 2020, however, the seller's lawyer wrote to the plaintiffs' lawyer to state that the seller was terminating the agreements due to the failure of the plaintiffs to deliver the closing proceeds by 5:00 p.m. The seller refused to close and attempted to return the funds to the plaintiffs. Litigation ensued.

Summary judgment motions were brought by the parties, with the plaintiffs seeking specific performance and the completion of the transactions. The seller argued that the plaintiffs were in breach of their contracts when they failed to close by 5:00 p.m. on 1 October 2020.

The court found that the seller was not acting in good faith and was not entitled to terminate the transactions before midnight on 1 October 2020.

The evidence filed by the plaintiffs demonstrated that they had carefully planned the purchase of the three adjacent townhouses so that they could move from Brampton and start the next phase of their lives in Windsor. They had made an enormous commitment to do so. The court found that the plaintiffs were ready, willing and able to close the transactions for their new homes.

The court further accepted that the COVID-19 pandemic had "changed the way real estate lawyers process transactions" and that where there are minor delays in delivery of closing funds, the purchase transactions will be honoured where a lawyer has confirmed receipt of funds on the date of closing. The plaintiffs' lender,

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National Bank, had acknowledged delays on the date of closing due to COVID-19 protocols as well as due to the high volume of month-end transactions.

In the court's view, what should have been a minor glitch owing to delays that could have been expected during the pandemic appears to have been "pounced on" by the defendant seller in an unexpected fashion. The failure of the defendant to be flexible in adjusting the closing date reflected a lack of good will.

As a matter of law, the court rejected the seller's argument that because the Teraview System does not permit transfers to be electronically registered past 5:00 p.m., the closing funds must therefore be tendered no later than that time for all transactions. The APS and other closing documents did not specify a 5:00 p.m. deadline.

The motion judge further agreed that during the pandemic the common practice is for lawyers to co-operate to complete the remaining steps for closing as soon as reasonably possible that evening or the next day. It was clear, however, that the seller was motivated not to complete the transactions regardless of the reasons for the delay. While the agreements contained a "time is of the essence" clause, the seller's conduct demonstrated that it was not ready, willing and able to close on the scheduled completion date.

As a result, the plaintiffs were awarded specific performance and an order requiring the seller to complete the transactions. The court left open the possibility that the plaintiffs could also seek equitable damages arising from the delay in completing the transactions caused by the defendant's refusal to close.

The case demonstrates that while an APS often states that time is of the essence, meaning that no extensions of time will be allowed, the courts will ordinarily expect the parties to cooperate and attempt to complete a transaction in good faith, even if that entails registering the transfer of the property shortly after the agreed-upon date. What is generally expected of the parties is that they will have attempted to complete all the steps that were within their control by the scheduled completion date. Delays that were out of their hands should not be pounced on by the other side to terminate the transaction.

Appeal Dismissed

In August 2023, the Court of Appeal dismissed the seller's appeal of the motion judge's summary judgment decision: *More v. 1362279 Ontario Ltd. (Seiko Homes)*, 2023 ONCA 527. Our blog outlining this decision is available [here](#).

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