

# KEEPING CURRENT

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## Court refuses to impose 5 pm deadline for delivery of real estate closing proceeds (*More v. 1362279 Ontario Ltd. (Seiko Homes)*)

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Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes several of Canada's largest banks, public companies including mining, high tech and software companies, real estate enterprises, lenders and investors.

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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). When the APS is silent on the time of closing, midnight may be the deemed deadline. 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. (Seiko Homes)*, [2023 ONCA 527](#), the Ontario Court of Appeal 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 respondent buyers agreed to purchase three newly-built townhouses in Windsor, Ontario from the appellant, a developer. The townhouses were close together and "checked off all the boxes" for the buyers due to the price and location in Windsor. Each transaction had an identical APS with the seller and agreed to a completion date of October 1, 2020. No time for completion was specified in the APS.

As closing approached and real estate prices soared, the buyers grew concerned with the seller's refusal to cooperate with issues raised by a Tarion inspection and other issues and they requested a short extension of the closing date. This request was refused.

On the closing date, the mortgage funds arrived later than expected. The buyers' bank, which was forwarding the mortgage funds, acknowledged that it encountered delays due to a combination of COVID-19 protocols, fewer staff, reduced hours and end-of-month spike in the volume of transactions.

The buyers' lawyer was in receipt of the required funds and certified them on the date of closing. However, when he tried to wire the funds to the seller's lawyer his attempt failed.

Just after 5:00 p.m. on the closing day, the sellers' lawyer faxed a letter to the buyers' lawyer terminating the APS and alleging that the buyers were unable or unwilling to close.

The funds were deposited into the trust account of the seller's lawyer the following morning and a closing date of either October 2 or 6, 2020, were proposed. In the ensuing days, the seller refused to close the transaction and attempted to return the mortgage funds, but not the deposit amounts. Litigation ensued.

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

The motion judge determined that there were no genuine issues for trial. He found that the buyers were always ready, willing, and able to close the transactions while the seller was unwilling to close and acted unreasonably in prematurely terminating the transaction. Accordingly, he granted specific performance to the buyers with costs on a substantial indemnity basis in the amount of \$17,500.

Amongst other findings, the motion judge 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.

In the motion judge'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 seller in an unexpected fashion. The failure of the seller to be flexible in adjusting the closing date reflected a lack of good will.

On appeal, the central issue was whether the motion judge erred in finding that the appellant seller was in anticipatory breach of the APS when it faxed the letter repudiating the transaction just after 5:00 p.m. on the October 1 closing date.

The appellant's first submission was that the motion judge erred in finding that the proper closing time was midnight on October 1, 2020 since the APS contained a the "time is of the essence" clause and the Teraview System does not permit transfers to be electronically registered past 5:00 p.m. on any business day. Therefore, the seller argued, closing funds had to be tendered no later than 5:00 p.m.

The Court of Appeal agreed with the motion judge that the purported 5:00 p.m. deadline was contradicted by the Document Registration Agreement which the seller's lawyer delivered to the buyers' lawyer, which provided that if the APS was silent on the time of closing, the deadline for "release" of funds from escrow would be 6:00 p.m. on closing day.

Further, as the Court of Appeal discussed in *Di Millo v. 2099232 Ontario Inc.*, [2018 ONCA 1051 \(CanLII\)](#), the seller could not rely on the "time is of the essence" clause to claim the APS had a 5:00 pm deadline since there was no specific time set out in the APS. In other words, the "time is of the essence" clause was of limited assistance in interpreting the contract since



the APS was otherwise silent on the deadline to perform the obligations under the contract.

The appellant also took issue with the motion judge's conclusion that it acted unreasonably and in bad faith. However, the Court of Appeal concluded that it was open to the motion judge to find, in the circumstances at issue, that purchase transactions would usually be honoured with the lawyers working together to close the following day despite minor delays in the delivery of closing funds, which the seller "pounced on" in a "totally unexpected fashion".

In the Court of Appeal's view it was not necessary to decide as a matter of law whether a buyer could rely on the fact that their counsel was in receipt of closing funds in order to cure minor delays in delivering the funds to the seller. In this case, since the seller had clearly repudiated the APS before the deadline the innocent parties, namely the buyers, were relieved of the requirement of tender at that point.

As held by the Court of Appeal in *Di Millo*, at paragraph 49, "when a party by words or conduct communicates a decision not to proceed to closing, the other party is released from any obligation to tender in order to prove he was ready, willing and able to close."

The appeal was therefore dismissed.

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 may 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.

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