“TIME IS OF THE ESSENCE”

The expression in one form or another that time is of the essence in respect to any or all obligations in an agreement is a well-known and well understood term. It is found throughout the commercial world and in cases in the courts.

While the phrase “time is of the essence” is found in many different types of contracts, it is not a well understood term and is most applicable to real estate contracts.

In a recent Ontario case, the court upheld a “time is of the essence” clause terminating the real estate transaction at the heart of the dispute because one of the parties missed the timing of a payment. In the Jackson case, Loblaw, a grocery store chain, was interested in purchasing land to build a new and larger supermarket across the street from an existing Loblaw’s location. Loblaw entered into an agreement with the vendors which was drawn up by Loblaw.

The agreement was for the purchase of 12 acres of a 56 acre parcel at $150,000.00 per acre. The agreement provided that Loblaw was to provide a $75,000.00 deposit 5 days after acceptance. Through Loblaw’s inadvertence, the deposit was not paid until 12 days after acceptance. By that time, the vendors had entered into discussions with another grocery store operator to sell the entire 56 acre site for $125,000.00 per acre. Loblaw took the position that its agreement was still valid notwithstanding the late payment of the deposit and the competing grocery store chain took the position that its agreement with the vendors was the only one that was valid.

The court noted that certainty and precision in language is important in the documents used in business and that “time is of the essence” is a well known and understood term. To that end, the court found that the “time is of the essence” words were very precise and made it clear that no relaxation of the time provided for in the agreement would be allowed. When Loblaw failed to make the payment on time, vendors were entitled to treat that failure as an act discharging the agreement and relieving them of the obligation to transfer the land to Loblaw.

The court in the Jackson case made reference to a decision of the English Privy Council arising out of a real estate transaction in Hong Kong. In the Union Eagle case, at issue was the purchase of a $4.2 HK million apartment. The purchase was to take place on or before 5:00 p.m. on September 30, 1991. Clause 12 of the agreement provided that:

\[1\] 1473587 Ontario Inc. v. Jackson, (2005) 74 O.R. (3d) 539 (S.C); Affirmed (2005), 75 O.R. (3d) 44 (C.A)

\[2\] see 1473587 Ontario Inc. v. Jackson, supra

\[3\] Union Eagle Ltd. v. Golden Achievement Ltd., [1997] 2 all ER 215 (P.C.)
If the Purchaser shall fail to comply with any of the terms and conditions of this Agreement the deposit money and any part payment of purchase price so paid shall be absolutely forfeited as and for liquidated damages (and not a penalty) to the Vendor who may (without being obliged to tender Assignment to the Purchaser) rescind this Agreement and either retain the Property the subject of this Agreement or any part or parts thereof or resell the same …

The backdrop of the Union Eagle case was a rapidly rising real estate market. By the time the transaction was to close the property was worth more than it had been sold for. The purchaser missed an appointment to inspect the apartment on the day of closing and the lawyers for the vendor called the purchaser’s lawyers to advise that if the balance of the purchase price was not paid by 5:00 p.m. that day, the contract would be rescinded and the deposit forfeited. The purchaser’s lawyer confirmed that the sale would be completed. A messenger was dispatched to the vendor’s office, but due to rush hour traffic did not arrive at the vendor’s lawyer’s office until 5:10 p.m. At 5:11 p.m. the lawyers for the vendor told the purchaser’s lawyers that the contract would be rescinded and returned with the envelope with the balance of the purchase price. The vendor kept the deposit.

The case was appealed through the courts of Hong Kong all the way to the Privy Council in England (the court of last resort). The court noted that, based on equity and the substance of agreements, it has extensive jurisdiction to force the parties to close the transaction, but will not do so where the parties have expressly stated that such jurisdiction is not to apply by providing that time is of the essence.

This means that parties should consider very carefully whether a “time is of the essence” clause is appropriate for the transaction that is being contemplated. Wherever some flexibility is required, or where the parties anticipate that the timing of the matter contracted for may change, “time is of the essence” should not be used. Parties using this language in their contracts need to be ready to live by the harsh reality of the enforcement.

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