WHY CAN'T WE CLOSE TODAY?

"THE GOOD, THE BAD AND THE UGLY"

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WHAT IS A CLOSING

The term "closing" has been defined by the courts as referring "to the final steps of the transaction where the consideration is paid, mortgage is secured, deed is delivered or placed in escrow..." re: Crosby's Contract; *Crosby v. Houghton*, [1949] 1 All E.R. (830) ch at page 532. The word completion and closing have been used interchangeably and in some jurisdictions are just referred to as completion, which has been defined as "the exchange of the consideration for all the documentation necessary to vest a marketable title in the purchaser." *Mahoney v. Eve* (1981) 19 R.P.R. 57 at 64.

CLOSING GOING SOUTH WHAT DO I DO???

1. What is the reason for not wanting to close? (Does my client have a bad case of buyer's remorse?)
2. Is the reason reasonable and justified?
3. Do we still have a willing vendor and purchaser?
4. Is either the vendor or purchaser or both being totally unreasonable?
5. Can the problem be fixed with money?
6. Can we close with a holdback?
7. If it is not a money issue, can I rectify or undertake to rectify the problem?
8. Is the other lawyer motivated to cooperate and close or simply being difficult?
9. Try to remove personalities from the process. Find a way to make it work and accomplish what your client wants, namely vacant possession or money.
10. Start making copious notes.
11. Confirm everything in writing.
12. Be very firm and clear with the client with respect to their legal status.

ESSENTIAL ELEMENTS OF PURCHASE CONTRACT

It is axiomatic to say that the construction of the contract is absolutely critical as it governs the relationship between the parties. It is important to remember the essential elements of a contract. These are but a few:

1. Should be in writing.
2. There needs to be an offer and an acceptance.
3. The parties are to be defined.
4. The property which is the subject of the agreement should be properly described.
5. Description of property, price, closing date, conditions precedent.
6. Items included in addition to property title.
7. Adjustments.
8. Time provisions.
9. Tender of documents.
10. Vacant possession.

HOW DO WE DEAL WITH AMBIGUOUS CONTRACTS?

Justice Warner, in *Gates v. Croft* 2009, NSSC 184 provides an excellent summary

... "looking at the text alone is usually not sufficient to achieve the accuracy where meaning is in dispute. Over the years, courts have increasingly recognized that context is crucial to accurate interpretation and, as I indicated, context has two different aspects to it one is the document itself as a whole; the second is the surrounding circumstance. It is important when interpreting a contract that the meaning is not made in isolation, but rather in the context of the whole contract."

IS TIME TRULY OF "THE ESSENCE"?

McNabb v. Smith et al (1981), 124 DLR (3d) 547 (B.C.S.C.) provides an excellent summary if notice is not given in a timely fashion:

"Thus, it does not really matter whether or not she told the Defendants on September 22, 1980 that financing had been arranged. If she did not she was bound to complete. If she did, it was in law a mere courtesy call. Legally speaking, the only thing that would have been important was notice to the Defendants on or before September 22, 1980, telling them financing had not been arranged and she was thus unable to perform her part of the agreement. In that event, both parties would have been released from their commitments. No such notice having been given, the contract remained alive."

Consider also the N.S.C.A. decision in *Meister v. Kodaysi* 2005 N.S.C.A. 15,

"from that point the agreement was no longer subject to financing and the purchaser was at risk. He could no longer rely on lack of financing as a reason for not completing the transaction. The clause did not require the purchaser to prove that he had financing. In order to be relieved of the obligation to complete the deal, he was required to notify the vendor if financing was not arranged. In the absence of such notice, financing was deemed to be arranged."

WAIVER FOR TIME OF ESSENCE

In the case of *Dot Dev. Limited v. Fowler* (1980), 118 D.L.R. (3d) 371 B.C. Supreme Court, the court found that where a vendor who had been critically injured before the closing assured the purchaser that they were willing to complete and proceed on the vendor's recovery, the court held that the vendor gave an implied waiver of compliance with the time of the essence clause and could not refuse to close on the grounds that they did not tender on the contractual closing date.

It was found by a court in *King v. Irvin and Country TPT. Limited* (1973) 40 D.L.R. 3d 641 that if both parties allow the time for closing to go by and one of the parties wishes to reinstate time is of the essence, that party must serve notice on the other party fixing a new date, which must be reasonable and reaffirm that time is of the essence.

FRAUD/COLLATERAL WARRANTY ORAL MISREPRESENTATION/ FRAUD

The Supreme Court of Canada in the case of *Carman Const. Limited v. CPR* (1982), 136 D.L.R. (3d) 193 held that collateral agreements must be viewed carefully by the law and cannot be inconsistent with the terms of the written agreement. The agreement must be strictly proven and satisfy the court that the written document does not express the whole contract of the parties. The Appeal Division of the Nova Scotia Supreme Court in the case of *Sinclair and Rector v. Brady and Mountainview Developments Limited* S.C.A. No. 02608 considered a case where the purchasers alleged misrepresentation and fraud on the part of the vendor and sought to introduce oral evidence of a collateral agreement. The Agreement of Purchase and Sale contained the following provision: "It is agreed that there are no representations, warranties, collateral agreements or conditions affecting this agreement or the property herein described except as specifically expressed herein." The trial judge found that the terms of the agreement were "clear and unambiguous" and found that there was no misrepresentation or fraud on behalf of the vendors.

FRUSTRATION

Dicastri in the Law of Vendor and Purchaser in chapter 11 at page 11-1 states as follows:

"The doctrine is really a device by which the rules as to absolute contracts are reconciled with a specific exception which justice demands. The frustrating event must not of course have been caused by the fault of either party."

It was held in the case of *Some Fine Investments Limited v. Ertolahti* (1991), 107 N.S.R. (2d) (1) T.D. that an agreement was frustrated when a contract which allowed the vendor to remove the barn from the site was subsequently declared to be a heritage site and could not be moved lead to a frustration of the contract. In that case the right to remove the barn was caused by a third party (the government and not the purchasers). Professor Waddans was quoted at page 1212 in Anger and Honsberger Real Property indicated:

"There is no rule of thumb to distinguish the cases. The question is whether the values that favour enforcement of contracts are outweighed by reasons favouring relief. Does the subsequent event affect the performance so radically as to make something fundamentally different from what was agreed."

REPUDIATION/ABANDONMENT

I have had the unfortunate experience of representing at one time a purchaser and another time a seller where they simply refused to close without any valid legal reason. In addition to not wishing to complete the agreement, they felt that they should simply forfeit their deposit or in one case obtain the return of the deposit and consider the matter at an end. The courts have held consistently that a purchaser loses his right for the recovery of his deposit if it is found by the court that the contract has been abandoned. It has been held by the courts that if a purchaser indicates that they are going to close and reserve their right to seek compensation at a later date, it is not a tantamount to repudiation and in that case the buyer is entitled to specific performance. *(Canamed) (Stamford) Ltd. v. Masterwood Doors Ltd.* (2006) 41 R.P.R. (4th) 90.

The matter therefore of either repudiation or abandonment is very much a factual consideration depending upon the reasons advanced by either party to not continue with the agreement.

UNFAIR/UNCONSCIONABLE/HARDSHIP

Perhaps the most difficult area to interpret is the court's consideration of what is unfair or dishonest or will cause a hardship. In arriving at whether or not there has been unfairness, dishonesty or hardship the courts consider all of the surrounding circumstances including the following:

1. Intimidation
2. Duress
3. Mental incapacity, falling short of insanity
4. Age
5. Poverty level
6. Acting with or without a solicitor
7. Obvious inequity, such as value versus price

Justice Warner considered the issue in the case previously referred to of *Gates v. Croft* 2009 N.S.S.C. 184 and concluded that it:

... "was in no way dishonest, oppressive or unfair. I am satisfied that he treated Mr. Croft with honesty and fairness and did not misuse his superior knowledge of real estate to attempt to get an unfair agreement signed."

STATUTE OF FRAUDS

The Statute of Frauds R.N.S. Chapter 442 of the Revised Statutes of Nova Scotia (1989). Section 3 provides as follows:

3. Every estate, or other interest in land not put in writing and signed by the person creating or making the same, or his agent thereunto lawfully authorized by writing, shall have the force of a lease or estate at will only, except a lease not exceeding the term of three years from the making thereof, whereupon the rent reserved amounts to two thirds at least of the annual value of the land demised.

The statute can be avoided if a party seeking to enforce the agreement can establish that there has been part performance. The law is summarized nicely by Dicastri in the Law of Vendor and Purchaser in chapter 4 at page 14 when he conclude that

“The choice is whether the court should undue what has been done or to complete what the parties have left undone. Where the court cannot in fairness and justice undue what is done, then the equitable doctrine of part performance comes into play.”

THE CLOSING DAY - TENDER

Section 6 (e) of the Vendors and Purchasers Act R.S.N.S. 1989 chapter 487 requires the vendor to prepare the Deed and requires the purchaser to bear the responsibility of recording the Deed. In its simplest form then tender performance by the purchaser must tender the funds and any other requirements under the contract and the seller is obligated to concurrently perform all of the conditions and tender those conditions to the purchaser.

WAIVER OF TENDER

It has been held that tender can be waived when, either expressly or by implication:

1. The vendor is unable to provide a clear title.
2. The vendor is unable to perform because they sold the property to a third party.
3. The vendor in advance repudiates the agreement without justification.
4. The vendor has died and it is unclear who is required to perform the contract.
5. The purchaser has refused without justification to tender the necessary payment of money.

REMEDIES WHEN A REFUSAL OR INABILITY TO CLOSE

DAMAGES: WHAT TYPES OF DAMAGES CAN BE CLAIMED?

Nichol v. Myers [1992] N.S.J. No. 123, 111 N.S.R. (2d) 150 (NSCC), Purchaser refused to close because they were unable to obtain financing. Purchaser did not inform Vendor in time. Vendor awarded damages for loss of bargain, realtor and legal fees, interest, and loss of benefits of proceeds less deposit.

Mental Distress

Gourlay v. Osmond, [1991] N.S.J. No. 318, award of damages for mental distress for failure of purchaser to close, *Gourlay* was followed recently, and referred to favourably, in *Van Duren v. Chandler Marine Inc.*, 2010 NSSC 139 where a boat builder negligently constructed a boat. Among other damages, Purchaser was awarded 15K for mental distress.

REMEDIES WHEN A REFUSAL OR INABILITY TO CLOSE

Specific Performance:

Are damages adequate?

United Gulf Developments Ltd., v. Iskandar, 2004 NCA 35. The question of whether damages are an adequate remedy, while it involves the application of a legal standard, is largely a factual inquiry, the determination of which may require a complex examination fo numerous factors, such as the availability of similar land with comparable zoning, services, nearby amenities and permissible density levels, which in turn may require an investigation of the municipal planning strategy....

United Gulf Developments Ltd., v. Iskandar, 2003 NSCA 83 Vendor refused to close and purchaser sued for specific performance. "Application dismissed. There was no arguable issue for trial. There was no evidence that the properties were unique to the extent that their substitute was not readily available".