

Magic Words in Real Estate - “Time Is of the Essence” and “Tender”

by

Harry Herskowitz of DelZotto, Zorzi LLP*

PART I - TIME IS OF THE ESSENCE

In the leading case of *1473587 Ontario Inc. v. Jackson (2005) 29 R.P.R. (4th)* (the “**Jackson Case**”), the Ontario Court of Appeal confirmed, in the context of an agreement of purchase and sale involving real estate that contained an express provision making time of the essence, that the failure to comply with a time-sensitive or time-related obligation may be viewed as a fundamental breach of contract, entitling the non-defaulting party to rescind the contract and treat the breach as discharging or relieving the non-defaulting party from further performance, so long as the non-defaulting party did not, through words or conduct, either:

- a) contribute to the delay or the default of the other party;
- b) waive the default, or extend the time provision that was breached;
- c) lead the defaulting party to believe that the contract was still in existence (or continued to subsist and be binding on both parties) after the breach was committed;
or
- d) act in bad faith, or abuse his or her position (relative to the delay or the default of the other party) so as to unfairly injure or prejudice the rights of the defaulting party.

Even if the time requirement was missed by only a few days, the courts will generally not invoke their equitable jurisdiction to intervene, in an effort to relieve the defaulting party from the hardship of rescission, absent a lack of good faith on the part of the non-defaulting party, because of the difficulty in answering the question of “how late is too late”? In the case of *Union Eagle Ltd. v. Golden Achievements Ltd. (1997) A.C. 514*, which was referred to with approval by the trial judge in the Jackson Case, the Privy Council confirmed that applying different standards depending on the degree of lateness would invariably lead to confusion, litigation and uncertainty in the law. Late is late, regardless of whether the breach is by 1 day or 1 week. Each party, by contracting to abide by a time of the essence provision, should clearly understand that time will be strictly enforced.

PART II - TENDER

In the context of a real estate transaction, the term “tender” is not used to describe a person’s considerate, solicitous or caring nature, but rather is intended to describe the act of showing or proving that one is ready, willing and able to perform his or her contractual obligations, by producing all documents and/or funds required by the contract on the closing date. The purpose of tender is to confirm, as objectively as one can, that the tenderer is not the defaulting party, and therefore is eligible for all of the legal and equitable remedies available as a consequence of the other party’s breach of contract.

In an eReg environment, a vendor of real estate can effect a tender by preparing the draft transfer for the purchaser, signing same for completeness (but not signing to release same for registration), and messaging the transfer to the purchaser's solicitor (or to the latter's designated agent or law clerk, in accordance with the provisions of the governing Document Registration Agreement), and by also delivering to the purchaser's solicitor (on or before the day of closing) the keys to the property, along with all requisite closing documents contemplated by the contract, including any required mortgage discharge statements (for those outstanding mortgages in favour of financial institutions that are not being assumed, but which are to be discharged on or shortly after closing), as well the vendor's executed direction re: funds [so that all or a portion of the closing funds can be made payable directly to the outstanding mortgagees in order to discharge the outstanding mortgages not being assumed on closing], along with the vendor's solicitor's executed undertaking to discharge all such outstanding mortgages. Where there are non-institutional mortgages outstanding that are not to be assumed on closing (sometimes called private mortgages), then the vendor's solicitor must obtain an executed eReg authorization from the private mortgagee, authorizing the vendor's solicitor or the mortgagee's own solicitor to electronically register a discharge of such mortgage forthwith upon the receipt by such solicitor of certified funds sufficient to discharge said outstanding mortgage (ie. in accordance with the mortgage discharge statement), and such eReg authorization should likewise be delivered to the purchaser's solicitor on or before closing, to prove that such mortgage will be discharged once the purchaser remits the entire outstanding balance of the purchase price owing, subject to the adjustments outlined in the statement of adjustments. Once the purchaser's solicitor has received copies of all of the requisite non-title closing documents, keys and the messaged transfer on or before the scheduled closing date, the vendor has then done all he or she can do to prove that the vendor was ready, willing and able to complete the transaction, as and when scheduled, and has effected a proper tender upon the purchaser's solicitor.

* excerpts from Harry Herskowitz' paper and presentation for the Ontario Bar Association's program entitled "Magic Words in Real Estate" - March 26th, 2007