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TIME IS OF THE ESSENCE (OR IS IT?):

A Tale of the Revival of a Failed Real Estate Transaction

By Cindy Yi

Justice Perell, writing for the Ontario Superior Court of Justice, released a decision a couple of weeks ago that not only provided an in-depth summary and a minute-by-minute account of how the case unraveled, but included a well-thought out analysis on the legal principles that are at play in a failed real estate transaction in Fortress Carlyle Peter St Inc. v Ricki's Construction and Painting Inc., 2019 ONSC 1507 (ONSC).

By way of a brief overview, this case involved a motion for summary judgment brought by Fortress Carlyle Peter St. Inc ("Fortress"), the plaintiff and purchaser, for specific performance under an Agreement of Purchase and Sale entered into with Ricki's Construction and Painting Inc. ("Ricki's"), the defendant and the seller of land municipally known as 120 Peter St, and a cross-motion by Ricki's dismissing Fortress's action.

The outcome of this case was notable insofar as the remedy of specific performance is not typically granted in most cases and is only available provided that there is clear evidence the property is so unique that its substitute would not be readily available.

Spoilers: Justice Perell found that 120 Peter St. in this case was such a critical part to Fortress's development plans that he awarded Fortress with specific performance instead of an award for damages.

More interestingly, this case illustrated the importance and connectedness of the principles "time of the essence" and good faith in the performance of a contract, and can be distilled into the following points for future reference:

First, acting in good faith is an assumed precondition in the performance of a contract. If you have not acted in good faith, you can be barred from claiming that time is of the essence and from pointing the finger at the other party when something goes awry. In this case, Ricki's tried to assert the deal was dead and that it was entitled to keep Fortress's deposit when confirmation of Fortress's closing funds arrived a mere 19 minutes past an agreed upon deadline of 6:00 pm on closing day.

Cindy Yi
Corporate & Commercial
416.748.4777
cyi@loonix.com

Cindy is a business lawyer with a focus on Commercial Real Estate and Commercial Banking.

Loopstra Nixon LLP
Woodbine Place
135 Queen's Plate Drive
Suite 600, Toronto, Ontario
M9W 6V7
www.loopstranixon.com

Justice Perell found that Ricki's extremely late delivery of a proper estoppel certificate (one hour before the scheduled 6:00 pm closing) was a breach of contract by Ricki's, that it was evidence of not acting in good faith, and therefore, Ricki's lost the ability to insist on time being of the essence.

The rule surrounding the insistence of time being of the essence is as follows: a party must show itself to be ready, desirous, prompt, and eager to carry out the agreement and to have not been the cause of the delay or default in performing the contract. Ricki's failed to meet both of these preconditions. This was mistake #1.

Second, if there is a breach of contract by both parties, the contract remains alive with time no longer of the essence, but time of the essence can be restored by either party by giving reasonable notice to the other of a new date for performance. Justice Perell stated that even if he found that the late confirmation of closing funds was a breach of contract on Fortress's part (which he did not find), that did not mean the deal was dead. It only meant time was no longer of the essence, while remaining capable of being restored. Here, Fortress tried to restore time of the essence by suggesting the following day as a new closing date.

Third, where one party restores time of the essence and fixes a new reasonable date for closing, and the other party refuses to close, this becomes a further breach of contract. Justice Perell found it was reasonable for Fortress to fix the next day as a new closing date, and Ricki's mistake #2? Refusing to close the transaction on the following date.

All of which can be summarized generally as per the old adage "two wrongs don't make a right (especially if you were the cause of the first wrong)".

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