

Time may not be of the essence when considering specific performance



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In *Fortress Carlyle Peter St Inc v Ricki's Construction and Painting Inc* (2019 ONSC 1507), a recent Ontario Superior Court of Justice decision, Justice Perell outlines when specific performance will be available in a real estate transaction. The decision is a stark reminder of the pitfalls of acting both in bad faith and without diligence in respect of such a transaction.

Facts

In *Fortress Carlyle*, the plaintiff purchaser, Fortress Carlyle Peter St Inc, obtained summary judgment for specific performance of an agreement of purchase and sale against the defendant vendor, Ricki's Construction and Painting Inc. **(1)** The agreement was for a downtown Toronto property municipally known as 120 Peter St, which had been part of the purchaser's land assembly plans for a condominium project. **(2)**

In Summer 2017 the parties signed a letter of intent for the purchase of the property. **(3)** The letter provided that:

- the purchaser would have the right to review the leases encumbering the property; and
- any agreement was conditional on the purchaser being satisfied with the leases. **(4)**

In August 2017 the vendor's lawyer advised the purchaser's lawyer that one tenant occupied certain premises on the property pursuant to an offer to lease, rather than a formal lease. **(5)** The vendor's lawyer had provided the purchaser's lawyer with this offer to lease, **(6)** which provided that the tenant would vacate the premises on 90 days prior written notice, should the landlord decide to demolish the building on the property (the demolition clause). **(7)** The demolition clause was important to the purchaser as it would facilitate its condominium development plans. **(8)**

In September 2017 the parties entered into a standard form agreement of purchase and sale in order to complete the sale of the property. **(9)** This agreement had three notable features:

- It set the closing date for 6:00pm on 13 August 2018. **(10)**
- The vendor represented and warranted that the property was occupied only by those tenants listed on a rent roll and that there was no other documentation relating to these tenancies other than those provided to the purchaser by the vendor on or before 10 August 2017. **(11)**
- The vendor would provide the purchaser with tenant estoppel certificates (known simply as estoppels) or a statutory declaration regarding the same at least five days before closing. **(12)**

On 31 July 2018 the vendor's lawyer advised the purchaser's lawyer that there was only one tenant, 1730474 Ontario Inc (173), occupying the property, and that 173 would be providing an estoppel.**(13)** The next day, the vendor's lawyer gave the vendor an estoppel certificate to be signed.**(14)** This estoppel was consistent with the offer to lease that the vendor's lawyer had previously provided to the purchaser's lawyer. Notably, this estoppel referred to the demolition clause.**(15)**

By 8 August 2018, which was the due date for the estoppel under the agreement of purchase and sale, the purchaser's lawyer had not yet received 173's executed estoppel.**(16)** Until the 13 August 2018 closing date, the purchaser's lawyer persisted in requesting this estoppel from the vendor.**(17)**

On the closing date, the vendor's lawyer forwarded 173's executed estoppel to the purchaser's lawyer. Unbeknownst to the vendor's lawyer, who did not review this estoppel,**(18)** the vendor had materially altered the estoppel such that it was inconsistent with what the vendor's lawyer had represented to the purchaser's lawyer regarding the leases in connection with the property.**(19)** Notably, this estoppel did not refer to the demolition clause.**(20)** The purchaser's lawyer reviewed this estoppel and asked the vendor's lawyer whether the estoppel was accurate, as it did not reflect the offer to lease that the vendor's lawyer had previously supplied to the purchaser's lawyer.**(21)**

Just before 5:00pm on the closing date, the vendor's lawyer forwarded a revised and accurate estoppel.**(22)** Around that time, the purchaser's lawyer advised the vendor's lawyer that the purchaser's law firm was not in funds and accordingly asked to extend closing to the following morning.**(23)** In response, at 6:00pm that day, the vendor's lawyer advised the purchaser's lawyer that the vendor was ready, willing and able to close, and threatened termination of the agreement of purchase and sale should the vendor's lawyer not receive the closing funds at that time.**(24)**

The purchaser's law firm became in funds just after 6:00pm on the closing date.**(25)** Shortly thereafter, the purchaser's lawyer advised the vendor's lawyer that the purchaser was in funds and ready, willing and able to close.**(26)** The vendor's lawyer responded a day later, taking the position that the vendor was entitled to terminate the agreement of purchase and sale and retain the purchaser's deposit due to the alleged failure of the purchaser to pay the purchase price balance by 6:00pm on the closing date.**(27)** The purchaser registered a caution against title to the property the day after the closing date and issued its statement of claim shortly thereafter.**(28)**

Court's analysis

Perell concluded that the purchaser was entitled to specific performance of the agreement of purchase and sale, relying on the following principles in relation to agreements of purchase and sale of land:**(29)**

- In a contract for the sale of land where time is of the essence and a party repudiates or fundamentally breaches the contract, the innocent, non-breaching party must elect to do one of two things:
 - The innocent party may elect to accept the other party's breach and terminate the contract.
 - The innocent party must treat the contract as still existing (eg, by suing for specific performance).
- For an innocent party to treat such an agreement as a repudiation or fundamental breach, time must be of the essence. A party may insist that time is of the essence if only they:
 - have shown themselves to be ready, willing and able to close;
 - were not the cause of the delay or default; and
 - do not subsequently recognise the agreement as still existing.
- For a plaintiff to obtain specific performance of a contract where time is of the essence, the plaintiff must show:
 - that they were ready, willing and able to close on closing;
 - that the default of the defendant was in no way attributable to the plaintiff's fault; and
 - that the plaintiff continued to be ready, willing and able to perform on the contract.
- Where both contracting parties breach the contract, the contract remains alive, with time no longer of the essence. In this situation, either party may restore time of the essence by giving reasonable notice to the other party of a new date for performance.

First, Perell reasoned that the vendor's failure to deliver the estoppel when it was due and the delivery of the altered, false estoppel (which was a deceitful act) had constituted breaches of the agreement of purchase and sale.**(30)** Either breach would have entitled the purchaser to rescind or terminate the agreement of purchase and sale.**(31)** However, the purchaser had kept it alive by persisting in its request for the delivery of the estoppel in the former situation and the delivery of an accurate estoppel in the latter situation.**(32)**

Second, due to the vendor's breaches as well as its late delivery of a suitable estoppel for 173, the vendor could no longer insist on time being of the essence.**(33)** Accordingly, the vendor could not terminate the agreement of purchase and sale for an alleged untimely performance of the purchaser's delivery of closing funds.**(34)** Given the vendor's misconduct, the vendor had not been ready, willing and able to close, nor could the vendor claim that it had not been the cause of delay or default in performing the contract.**(35)**

Perell ultimately granted the purchaser's motion for summary judgment for specific performance of the agreement of purchase and sale, reasoning that the purchaser had acted in good faith and satisfied the preconditions for a claim for specific performance.**(36)** But for the vendor's misconduct, the purchaser would have been ready, willing and able to close on the closing date.**(37)** Alternatively, if both the purchaser and vendor were in breach, the contract would have remained alive with time no longer of the essence and with either party capable of restoring time of the essence by giving the other party reasonable notice of a new date for performance, which the purchaser's lawyer did by requesting that the transaction close the following day.**(38)**

Significance

This decision is a reminder that time may not be used as both a sword and a shield. Put simply, a party to an agreement of purchase and sale cannot insist that time is of the essence if it:

- breaches the agreement;
- does not act in good faith; or
- delays in meeting its performance obligations.

As in this case, provided that the purchaser acts in good faith and provided that the purchaser is ready, willing and able to close or, if both parties are in breach, the purchaser gives reasonable notice of a new date for performance, the purchaser will be granted specific performance.

Perhaps just as importantly, this decision is a reminder that not only will a purchaser that acts in good faith be granted specific performance, but also that they may proceed summarily to obtain judgment by showing that there is no genuine issue requiring a trial.

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Endnotes

(1) *Fortress Carlyle Peter St Inc v Ricki's Construction and Painting Inc* (2019 ONSC 1507), Paragraphs 4-10 for background on the parties.

(2) *Ibid*, Paragraphs 1 and 5.

(3) *Ibid*, Paragraph 26.

(4) *Ibid*.

(5) *Ibid*, Paragraph 28.

(6) *Ibid*.

- (7) *Ibid*, Paragraph 29.
- (8) *Ibid*.
- (9) *Ibid*, Paragraph 30.
- (10) *Ibid*, Paragraph 34.
- (11) *Ibid*.
- (12) *Ibid*.
- (13) *Ibid*, Paragraph 43.
- (14) *Ibid*, Paragraph 42, 44 and 45.
- (15) *Ibid*, Paragraph 45.
- (16) *Ibid*, Paragraph 47.
- (17) *Ibid* (eg, see Paragraphs 48-50).
- (18) *Ibid*, Paragraph 65.
- (19) *Ibid*, Paragraphs 56-57.
- (20) *Ibid*, Paragraph 65.
- (21) *Ibid*, Paragraph 66.
- (22) *Ibid*, Paragraph 74.
- (23) *Ibid*, Paragraph 77-78.
- (24) *Ibid*, Paragraph 87.
- (25) *Ibid*, Paragraph 89.
- (26) *Ibid*, Paragraph 91.
- (27) *Ibid*, Paragraph 95.
- (28) *Ibid*, Paragraphs 11 and 93.
- (29) *Ibid*, Paragraph 18.
- (30) *Ibid*, Paragraph 30.
- (31) *Ibid*.
- (32) *Ibid*.
- (33) *Ibid*, Paragraphs 76 and 105.
- (34) *Ibid*, Paragraph 76.
- (35) *Ibid*, Paragraph 98.
- (36) *Ibid*, Paragraph 105.
- (37) *Ibid*.
- (38) *Ibid*, Paragraphs 106, 107 and 111.

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