

### **Strict Interpretation**

One can have sympathy for Judges who are faced with making decisions which can lead to hardship or large losses due to events beyond the protagonists' control. A Court, in this circumstance, will sometimes bend the strict rule of law to provide a more equitable decision. There is a Latin maxim which every law student learns of *de minimus non curat lex*, which loosely interpreted means the court will not look at minor imperfections.

Opposed to this point of view is the opinion that, especially when it comes to commercial matters, there should be certainty in the application of the law and that the Court must enforce provisions strictly, even if the breach is minor.

I thought that I would review two cases of interest which have recently been reported which portray some unfortunate events.

#### **The \$25,000 per second Traffic Jam**

Most real estate agreements contain the clause that "time is of the essence". The inclusion of this clause in an agreement allows the parties to insist upon strict performance of all time limited obligations in the agreement. To what extent will a Court enforce this provision to the letter?

There was a case of *Union Eagle Ltd. v. Golden Achievement Ltd.* decided in the Hong Kong courts in 1997 which will give pause even to the most obsessive-compulsive lawyer. Union Eagle had agreed to buy a condominium in Hong Kong from Golden Achievement for \$4.2 million. The contract had a standard time of the essence clause and provided that closing was to take place on or before 5:00 p.m. on a certain date. On the closing date, the purchaser's lawyer's clerk left the office with all of the closing documents and cheques but got caught in traffic. A call was made to the vendor's solicitor before 5:00 pm advising them that the clerk would be a bit late. At 5:10 p.m. the clerk appeared in the vendor's lawyer's office who immediately noted that the purchaser was in default for being late and terminated the contract on the basis of "time of the essence".

There was no issue of any prejudice or loss which the vendor would have suffered by closing 10 minutes late and there was no evidence of any intentional delay or bad faith on the part of the purchaser. However, there was greed. Between the date that the condominium was sold and the closing date, prices had skyrocketed and the vendor decided to rely upon this technicality to its benefit. Not surprisingly, the parties litigated this matter and it went to the highest court of appeal being the English Privy Council. At all levels the Court agreed that so long as the vendor was innocent and did not cause the purchaser to default that it was entitled to rely upon the time of the essence clause and walk away from the deal, even based on a 10 minute delay.

What brings this case closer to home is a decision of the Ontario Court of Appeal with respect to a deposit which was paid late under an agreement of purchase and sale. In this case, (*1473587 Ontario Limited v. Jackson*) the purchaser was a few days late in paying a deposit which was due under the agreement. As in the Union Eagle case there was no evidence that the parties were trying to take advantage of each other, but as in the Union Eagle case the vendor decided not to forgive the purchaser's delay and terminated the agreement. The Court, at trial, applied the reasoning of the Union Eagle case that there was no necessity for parties to show loss or bad faith in insisting upon strict performance of their rights under the contract. This Court decision was upheld by the Ontario Court of Appeal.

So although the Ontario Courts have not ruled on a 10 minute delay, there is certainly grounds for real estate lawyers to be very nervous when it comes to the deadlines in an agreement and clients should be aware of the risks of even minor breaches when dealing with contracts which have time of the essence provisions.

As a side note, to show that some things are worth fighting for, when the Union Eagle condominium was finally sold 6 years after the original closing, the vendor received \$19.5 million Hong Kong Dollars, for a profit of \$15.3 million. One case comment in the Hong Kong law journal subtitled his paper "How to make \$15,000,000.00 in 600 seconds" which as you may guess is \$25,000 a second.

Given these decisions, please have some understanding the next time you pass by a haggard looking, nervous, obsessive real estate lawyer.

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