

Tendering correctly: Preserve your client's rights (and avoid a claim!)

Tendering, in real estate practice, is a strategy real estate lawyers can use to demonstrate a client's willingness and readiness to close a transaction in circumstances where there may be doubts about the other party's ability or willingness to close on time. Done properly, tendering can help to preserve a client's rights in the event of a breach. Done wrong, it can backfire.

The following is an adaptation of a longer article written by Sidney Troister, LSM. The full article, "The Reality of Tendering: Why Real Estate Lawyers Give Fuel For Litigators To Sue Them", includes summaries of the relevant cases in the area and is available at www.practicepro.ca/tendering.

Tendering is all about proving, in the event of a failure to close, who as between the parties was in breach and who was not in breach of the agreement. Much has been written on the mechanics of the perfect tender.

Safeguarding the transaction: the new school rules (sort of)

Thirty or forty years ago, courts favoured strict contract compliance. More recently, courts have looked beyond the technical and have examined what was really occurring in the deal – including motives, good faith, and intention – and have begun looking at tenders not as proof positive of ability to close but as evidence of intention. While the mechanics of tendering have become less important when the big picture is reviewed, it is always better to be perfect and beyond reproach than to have to rely on any law that excuses imperfection.

Tendering has become a bit more complicated with the electronic system. Lawyers cannot be as hands-off with an electronic closing and the couriering of cheques and keys as with a deal that closes in the traditional way. To demonstrate that you have the cheque, keys, or the executed discharge or acknowledgement and direction to register (when you have no intention of letting go

of them) you must attend in person to meet the other side. Telling someone that the money is in your trust account is an invitation to criticism.

The traditional practice of bringing a witness to a tender has become somewhat of an anachronism. Witnesses were once used because the tendering lawyer would also likely be the litigator, making it improper for him or her to be counsel and a witness in the same case. Practice specialization (except in remote areas) has made this conflict increasingly unlikely.

The lawyer tendering without a witness must take notes of what was delivered, what was said and what was exchanged. Use a closing checklist and note deficiencies in any documents at the time. Identify to the other side what is asked for and not delivered.

Safeguarding the transaction: the unspoken side issue

When the circumstances and details of a tender become the subject of litigation, there is often a sidebar issue of solicitor negligence. An opponent may allege a defective tender, or failure by the opposing lawyer to either insist on performance or successfully avoid it.

In other cases, a buyer client wanting out of the deal may fall back on a lawyer's inability to show readiness to close; or a seller may accuse his or her lawyer of letting the defaulting buyer off the hook, either by failing to have a mortgage discharge (or some other document) available, or by taking some step that prejudices the client.

Safeguarding yourself when things are going south

Rule 1: Communicate carefully with opponents and avoid posturing. Beware the implications of declaring an anticipatory breach: if you're wrong, you may put your own client in breach. Know that by insisting on strict compliance with the agreement, you will also be required to strictly comply.

In *Kwon v. Cooper*, [1996] O.J. No. 181, the purchaser advised the vendor's lawyer that he had no money. The vendor's lawyer communicated an intention to stand on the strict terms of the agreement, and required closing on the original date, threatening to sue for damages if the deal did not close. On the closing date, the vendor did not have a discharge of the mortgage. Having insisted on strict compliance, the vendor was precluded from appointing a new day for closing after the

defective tender. The purchaser who could not close got his deposit back.

Rule 2: Know when trouble is coming: the overly technical requisition letter; last minute requests for unreasonable things; cleaning debris; rumours of environmental hazards and therefore environmental clearances; corporate minutes; declarations; etc.

Rule 3: Communicate with your client when you sense trouble is coming. Explain what is being asked of your side, explain what will be needed to tender properly (funds, signed

documents, discharges, cleanup, etc.) and explain the potential consequences of not satisfying the other side's requests.

If there is a private mortgage requiring discharge, explain that you cannot guarantee the cooperation of the private lender to provide an escrowed discharge. Explain that the deal may not close regardless of what you do to appease the other side. Never tell your client that he is assured of either keeping the deposit or getting the deposit back, or that he is entitled to damages for the other party's breach. Recommend bridge financing if a new purchase is at stake.

Rule 4: Never advise a client that the failure of the parties to tender terminates the agreement; it does not. Avoid any step that could lead to an unintended breach and repudiation after the closing date.

Rule 5: If in doubt about strategy, get help and get it early: consult seasoned real estate lawyers and real estate litigators.

Adapted from an article by Sidney Troister

Sidney Troister, LSM is a senior partner in the commercial real estate group at Toronto's **Torkin Manes LLP**.

titleplus

TitlePLUS poll catches media attention:

Canadians use homes as collateral – but know little about fine print in home equity lines of credit

Media across the country jumped on the results of a TitlePLUS-commissioned poll that shows consumers know very little about home equity lines of credit – but use them extensively for a variety of reasons.

The poll and related media campaign are part of a TitlePLUS program to educate consumers about the legal implications of many commonplace transactions, and to encourage them to seek legal advice.

Coverage for the poll results was extensive, reaching an estimated four million Canadians coast to coast. All national newspapers, as well as several radio and television stations across the country conducted interviews with spokesman Ray Leclair, LAWPRO's vice president (acting), Public Affairs as part of their coverage.

According to the Leger poll, more than one third of respondents (36 per cent) have a home equity line of credit (HELOC) and close to 60 per cent think they know all

about HELOCs. However, those polled correctly responded to only 38 per cent of the questions that tested their understanding of this financing mechanism. Moreover, only 12 per cent consulted with a lawyer before signing the agreement. One-in-ten (11 per cent) admitted to not reviewing any documents or seeking advice before signing.

Despite Canadians' confidence in their knowledge about how a secured line of credit works, the majority seemed fuzzy on the details. For example, of those who said they did have a home equity line of credit:

- 57 per cent did not know that when you take out a HELOC the financial institution lending the money puts a mortgage on the borrower's home;
- 58 per cent did not know that taking out a HELOC when they already have a mortgage on their home means that the lending institution places a second mortgage on the home, or modifies the original mortgage to capture all the equity in the home;

- Nearly seven-in-ten (69 per cent) did not know that having a HELOC could negatively affect their credit rating or future loan applications.

Among the many points made by Leclair in interviews following release of the poll results was that consumers – to protect themselves – should seek legal advice before signing on the HELOC dotted line. “Canadians would not buy or sell a home without first consulting a real estate lawyer. Borrowing against it is just as important because a HELOC is a mortgage with similar implications; and in some cases, depending on the fine print, a home equity line of credit can affect a consumer's credit rating, their ability to borrow for other needs, and even their ability to use a credit card going forward,” said Leclair.

For the full text of the media release on this poll, see www.lawpro.ca/news.