THE REALITY OF TENDERING
WHY REAL ESTATE LAWYERS GIVE FUEL FOR LITIGATORS TO SUE THEM

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Safeguarding the transaction-the old school rules

Much has been written about tendering and the hows and whys of doing it.

Even every law student knows that it is about proving that the client is ready, willing and able to close a transaction. It all goes to proving who, as between the parties, is in breach and who was not in breach of the agreement. Much has been written on the mechanics of the perfect tender. Articles that explain what you should tender, where, and on whom are attached. I could not have written better articles and they are attached for your reference.

Safeguarding the transaction-the new school rules, sort of

There has been an evolution in the law associated with tendering. Thirty or forty years ago, courts tended toward strict compliance with contracts. More recently, courts have looked beyond the technical and examined what was really occurring in the deal, motives, good faith, and intention and have been prepared to look at the tender, not as proof positive of ability to close but as evidence of intention to close. The mechanics of tendering have become less important or are excused when the big picture is reviewed. Having said that, it is always better to be perfect and beyond reproach than to have to rely on any law that excuses perfection.

Tendering has become a bit more complicated with the electronic system. Put a little differently, you cannot be as hands off with an electronic closing and the couriering of cheques and keys as with a deal that closes normally.

If you have to show that you have the cheque or keys or the executed discharge or acknowledgement and direction to register, but have no intention of actually letting go of them, you have to attend and meet the other side directly. Telling someone that the money is in your trust account is an open invitation to criticism.

Traditionally, you were advised to take a witness to a tender. It has become somewhat of an anachronism, in my view. In the old days, you took a witness because the assumption was that you would also be the litigator and that it would be improper for you to be counsel and a witness in the same case. Today, that becomes increasingly unlikely, except perhaps in more remote places in the province where lawyers do everything.

Always take notes of what was delivered and said and what you gave. Go through your closing checklist carefully and make notes on it of what has been given or received 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

While it seems like a fairly mechanical procedure to be used to evidence that one party is prepared to complete the transaction and the other is not, typically, its real value disappears on

the cross finger pointing of alleged breaches of contract. Frequently, while the main event of litigation focuses on the parties, there is a sidebar issue of solicitor negligence arising from allegations of defective tender or failure by the lawyer to adequately protect the client's rights to either insist on performance or avoid having to perform. Stated differently, the lawyer's alleged failure to strictly comply becomes the hook for a litigator to point the finger of fault at someone other than his or her own client for not closing.

In some cases, the client wants out of the deal but his lawyer's inability to have everything required to show readiness to close becomes the client's fall back position when the court finds him in breach. "If my lawyer had tendered properly, I could have gotten out of the deal."

Similarly, the selling lawyer whose client is insisting on performance of the contract may be accused of letting the defaulting buyer off the hook by failing to have discharges of mortgages available or some document available that the buyer is expecting or by taking some step that prejudices the client.

All this means that when the client's sue each other for recovery of the deposit or forfeiture of it, breach of contract, and damages, register certificates of pending litigation to tie up the land and apply pressure on the owner, etc., appreciate that somewhere in the pleadings will be allegations of the party's (i.e. the party's lawyer's) failure to tender properly which gives the alleging party the right to success in the action.

Safeguarding yourself-when things are going south

Rule No. 1: Be very careful about what you write to the other side and especially about posturing. Be mindful of the effect of declaring an anticipatory breach because if it isn't anticipatory breach, you may have put your own client in breach. Be careful of insisting on strict compliance with the agreement because if you insist on it, then you may be required in turn 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 lawyer wrote that it would stand on the strict terms of the agreement, would require closing on the date in the agreement and would sue for damages if the deal did not close. On the closing date, the vendor did not have a discharge of the mortgage. Since the vendor insisted on strict compliance, he precluded himself from appointing a new day for closing after a defective tender. The purchaser who could not close got his deposit back.

Rule No. 2: Have a sense of trouble coming: the overly technical requisition letter, the last minute requests for unreasonable things: cleaning debris, rumours of environmental hazards and therefore environmental clearances, corporate minutes, declarations, etc.

Rule No. 3: Communicate with your client when you sense trouble is coming. Tell your client that trouble may be coming and what is being asked of you and of your client. Tell your client what you will need in order to tender properly including funds, signed documents, discharges, clean up, etc. Tell your client the consequences of not satisfying the other side's request. If there is a private mortgage to be discharged, tell your client that you cannot control or guarantee the cooperation of the private lender to provide an escrowed discharge. Tell your client you smell 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 breach by the other side. More likely, tell your client that if the deal does not close, your client can expect to have to sue or be sued and litigation is never a sure

thing. And if a new purchase depends on a sale happening, tell them to work with their bank on bridge financing if possible.

Rule No. 4: Never advise a client that the failure of the parties to tender terminates the agreement. It does not. Take great care in taking steps that could lead to an unintended breach and repudiation after the closing date.

Rule No. 5: If in doubt about strategy or drafting letters to the other side to protect your client or yourself, get help and get it early. Who can give you help? Seasoned real estate lawyers and knowledgeable real estate litigators.

Some legal principles gleaned from the cases.

There have been a number of cases over the years which are precedent for certain principles associated with tender. Like most cases, the principles derive from facts that justify a particular result. Certainly, in the early stages, these principles can be used (but not necessarily relied on) to put forth a position. While they may stand for a certain proposition, a court will use them if they fit the result desired or reject those that don't get the court to the desired conclusion. None should be treated as black and white, hard letter, cast in stone law to which every court will be unquestionably bound. As a result, NEVER TELL A CLIENT THAT THIS IS THE LAW. At best, it is some law that may justify an action or strategy being taken.

Appreciate that older cases were more hard line and technical. They have in some respects been overtaken by cases where good faith and reasonable conduct prevail.

Never be cavalier based on what you regard as the law.

What is Tender?

- By tendering, the innocent party shows his or her readiness and willingness to carry out the contract, that he or she is not the cause of the delay or default, and that there has been no waiver (*Cooper v. Mysak* (1986), 54 O.R. (2d) 346 (Div. Ct.)).

- The plaintiff must show that he or she was ready, willing, and able to close on the date fixed for closing, that the default was not attributable to the plaintiff's fault, and that he or she continues to be ready to close at the date of trial (*O'Neil et al. v. Arnew* (1976) 16 O.R. (2d) 549 (H.C.J.)).

- Being able to become ready does not make a party "ready, willing, and able" (*Zender v. Ball* (1974), 5 O.R. (2d) 747 (H.C.J.)).

- A purchaser is required to do everything in its power to place itself in a proper position to close (*Canadian Market Place Ltd. v. Fallowfield*, [1976] 71 D.L.R. (3d) 341 (Ont. H.C.J.)).

When Should One Tender?

- Tender should be made on closing day, unless there are extenuating circumstances (*Leung v. Leung* (1990), 75 O.R. (2d) 786 (Ont. Ct. (Gen. Div.)).

- Tender may be performed at the local Registry Office after it has closed, "as long as the priority of the registration of documents can be preserved by prompt registration at the next available time" (*Watchfield Developments Inc. v. Oxford Elgin Developments Limited* (1992), 25 R.P.R. (2d) 236 (Ont. Gen. Div.)).

- Tender is not required from an innocent party when the other party has clearly repudiated the agreement (*2054476 Ontario Inc. v. 514052 Ontario Ltd.*, [2009] O.J. No. 279 (S.C.J.) and *Bethco v. Clareco Canada Ltd.* (1985), 22 D.L.R. (4th) 481).

- When there is anticipatory breach, the innocent party need not wait until the date for performance before commencing proceedings for damages or in the alternative for specific performance of the agreement (*Roy v. Kloepfer Wholesale Hardware and Automotive Co. Ltd.*, [1952] 2 S.C.R. 465)

- No tender is needed where the other party has indicated, through his/her/its behaviour, that he/she/it will be unable to complete the transaction (*Botos v. Collier et al.* (1984), 5 O.A.C. 356 (C.A.)).

Imperfect Tender

- Tender does not have to be perfect; if the errors were errors of machinery only they must be adapted to give effect to the true bargain as collected from the contract as a whole (*Leung v. Leung* (1990), 75 O.R. (2d) 786 (Ont. Ct. (Gen. Div.), *Cameron v. Kotowski*, [1998] O.J. No. 6448 (O.C.J.)).

- A vendor is under a duty to act in good faith and to take all reasonable steps to complete the contract. This duty extends to being flexible in cases involving minor omissions or defects (*Leung v. Leung* (1990), 75 O.R. (2d) 786 (Ont. Ct. (Gen. Div.)).

- It would be unfair to permit a party to rely on the inadequacy of a tender where the other party had made it plain they were unwilling or unable to close (*Mastercraft Construction Corp. v. Baker* (1978), 19 O.R. (2d) 652).

- However, there are limits to the number of imperfections allowed (*Kwok v. Griffiths*, 1996 Carswell BC 104).

- Curable imperfections in tender will not get in the way of tender achieving its evidentiary purposes (*Leung v. Leung* (1990), 75 O.R. (2d) 786 (Ont. Ct. (Gen. Div.)).

- The party being tendered upon cannot necessarily rely upon many lesser tendering defects to take advantage of its own default in failing to close on time (*Kiefert et al. v. Morrison* (1975), 11 O.R. (2d) 731 (H.C.J.)).

What to Tender

- The vendor must produce an executed mortgage discharge in registrable form rather than merely giving an undertaking to discharge (*Bunn v. Lock* (1987), 46 R.P.R. 296 (Ont. C.A.))

- It is better to tender a certified cheque upon the vendor itself, unless there is a clause in the purchase agreement allowing tender on a party's lawyer (*Luizinho v. Bruno* (1977), 17 O.R. (2nd) 546 (Ont. C.A.)

- Abatement: the purchaser should communicate quantum of abatement being sought and willingness to close transaction by placing the abatement in escrow (*Kingsberg Developments v. K Mart Canada* (1982), 40 O.R. (2d) 348 (H.C.)).

- Abatement: If there is reasonable difficulty in quantifying the abatement, and the vendor is in a better position to do so but is not proceeding in good faith, the purchaser may be excused from such quantification (*Vulcan Packaging Inc. v. Capital Ventures Group Inc.* (1990), 9 R.P.R. (2d) 32 (Ont. C.A.)).

- Where no funds were tendered at closing, the court was willing to accept evidence that a purchaser had the necessary funds to complete the transaction based upon a letter from the purchaser's bank confirming that the purchaser was in funds (*2054476 Ontario Inc. v. 514052 Ontario Ltd.*, [2009] O.J. No. 279 (Ont. S.C.J.)).

- The tendering of some evidence that a purchaser's solicitor was in funds, or the tendering of banking or other documents from the purchaser showing that the sufficient funds were in place may be sufficient to constitute valid tender of funds (*Cameron v. Kotowski*, [1998] O.J. No. 6448 (Ont. Ct. Gen. Div.)).

When No One Tenders-Time of the Essence is gone

- The way out of a stalemate is to restore time of the essence (by serving notice upon the other party fixing a new, reasonable date for closing) (*King v. Urban & Country Ltd.* (1974) 1 O.R. (2d) 449 (C.A.)).

- A party who is not ready to close on the agreed date and subsequently terminates the transaction without having set a new closing date and without having reinstated time of the essence will itself breach or repudiate the agreement. (*King v. Urban & Country Ltd.* (1974) 1 O.R. (2d) 449 (C.A.))

- When time is of the essence and neither party is ready to close on the agreed date, the agreement remains in effect.

- Either party may reinstate time of the essence by setting a new date for closing and providing reasonable notice to the other party. (*Domicile Developments Inc. v. MacTavish*, 1999 CanLII 3738 (ON C.A.) quoted in *2054476 Ontario Inc. v. 514052 Ontario Limited*, 2009 CanLII 2037 (ON S.C.)).

- Never advise a client that the failure of the parties to tender terminates the agreement. It does not. Take great care in taking steps that could lead to an unintended breach after the closing date. (*King v. Urban & Country Ltd.* (1974) 1 O.R. (2d) 449 (C.A.))