TAB 2

Preparing for Tender

2

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Safeguarding Real Estate Transactions –
Mitigating the Risk of Litigation
November 14, 2007

The Law Society of Upper Canada | Barreau du Haut-Canada

Continuing Legal Education

PREPARING FOR TENDER

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WHAT IS TENDER?

Tender constitutes evidence that the tendering party is capable of, and prepared to, close a transaction and entitled to pursue its remedy against a defaulting party. One commentator describes it as follows:

> Tender is the act of offering to perform one's contract obligations. 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. By tendering, the innocent party shows that it is acting in good faith.[1]

The term "ready, willing and able" is customarily used in conjunction with a party's ability to tender consequent to the opposing party's default. The phrase describes "a party's actions undertaken to evidence his or her readiness, desire and ability to carry out the contract in accordance with its terms (and to correspondingly prove that such party is not the cause of any delay or default in respect of the completion of the agreement)."[2]

A purchaser may establish this readiness by a tender of the moneys or documents required to close on the stipulated date. A vendor will have to be able to convey title to the land in question, will have to hand over the keys, and will have to

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[1] Perell, Paul and Engell, Bruce. Remedies and the Sale of Land, (Butterworths, Markhan: 1998) at page 48

[2] Harry Herskowtiz and Jennifer Atkins, "A Review of "Time of the Essence" and "Ready, Willing & Able to Perform" from the Vendor's Perspective", *OBA Magic Words in Real Estate, 2007* at page 2

have completed all of the contractual documents such as proof of payment of outstanding property tax arrears (or credit in the statement of adjustments) and discharges to all outstanding mortgages that are not being assumed.[3]

Agreements of Purchase and Sale tend to be fairly standard and include standard terms such as "time shall be of the essence". While this term may often be taken for granted, it is nonetheless important. A great deal law has resulted from the interpretation and application of the phrase "time is of the essence."

Where an agreement stipulates, as it usually will, that time is to be of the essence, tender must be made within the stated time frame which will be a time on the scheduled closing day. If an agreement does not specify an hour or place for closing, a purchaser could properly tender on a vendor any time before midnight.[4]

ANTICIPATORY BREACH

An anticipatory breach as defined by Fridman, "occurs when a party, by express language or conduct, or as a matter of implication from what he has said or done, repudiates his contractual obligations before they fall due."[5] Not all contract breaches discharge the innocent party from further contractual obligations. Our discussion of anticipatory breaches for the purpose of this paper focuses on contractual breaches that go to the heart of the contract and are sufficiently serious as to amount to a repudiation. Repudiation is the legal description for conduct demonstrating that a party has

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[3] *Ibid* at page 9
[4] *Genern Investments Ltd. v. Back et al.*, [1969] 1 O.R. 697-700 (Ont. H.C.J.).
[5] G.H.L. Fridman, The Law of Contract in Canada, 4th ed. (Toronto: Carswell, 1999) at 638

absolutely renounced its contractual obligations and allows the non-offending party to avail itself of whatever appropriate remedy.[6]

In defining anticipatory breach, Justice Osborne in *Pompeani v. Bonik Inc.*,[7] referred to Denning M.R. in *Cehave N.V. v. Bremer Handelsgesellschaft m.b.H., The Hansa Nord:*[8]

> Where one party before the day when he is obliged to perform his part, declares in advance that he will not perform it when the day comes, or by his conduct evinces an intention not to perform it, the other may elect to treat his declaration or conduct as a breach going to the root of the matter and to treat himself as discharged from further performance ...

Where it is clear that one party to an agreement will not be fullfiling the contract in accordance with its terms, the Courts have held that the formality of tendering would be futile or meaningless in such a situation. "The law does not require a nugatory and meaningless ritual to be carried out."[9] (Justice) Paul Perell states:

> Tender... is not itself a prerequisite. Despite the absence of any tender, the court may be satisfied that the innocent party is entitled to invoke time of the essence. Tender is also not required from a party when the other party has clearly repudiated the agreement; numerous cases have held that the law does not require what would be a meaningless or futile gesture. [10]

The legal rule invoked when an anticipatory breach occurs is that the innocent party may elect to either accept or reject the repudiation with each action's attendant consequences. This circumstance was addressed by the Ontario Court of Appeal in *Domicile Developments Inc. v. MacTavish*[11] where Laskin J.A. stated:

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[6] *Supra* note 1 at page 32
[7] (1997), 13 R.P.R. (3d) 1 (Ont. C.A.).
[8] (1975), 1 Q.B. 44, at pp. 59.
[9] *Stewart v. Ambrosino* (1977) 16 O.R. (2d) 221 (C.A.)
[10] *Supra* note 1 at page 48
[11] [1999] O.J. No. 1998 at para. 9

> In April 1995, MacTavish stated that he did not intend to close the transaction. His conduct amounted to an anticipatory repudiation of the agreement. On being notified of MacTavish's anticipatory repudiation, Domicile, the innocent party, had a choice: it could "accept" or reject the repudiation. Had Domicile "accepted" the repudiation it would have been discharged from closing the transaction and could have sued for damages for breach of contract. Domicile, however, rejected the repudiation and therefore the agreement remained in effect... Because Domicile's rejection of MacTavish's anticipatory repudiation kept the agreement alive, time remained of the essence. A time is of the essence provision means that on the closing date an innocent party may treat the contract as ended and sue the defaulting party for damages or it may keep the contract alive and sue for specific performance or damages.

Put another way, an innocent party is not obliged to bring an action immediately. That party may press for performance and commence litigation when the promised performance fails to materialize.[12] Inversely, once a party indicates an intention to repudiate, the innocent party may act immediately.

The case law tends to suggest that actual notice of acceptance or adoption by the innocent party of a repudiation is not necessary, and that acceptance may be reasonably inferred from all the circumstances as proved. However, once acceptance of a breach has been communicated, the acceptance is irrevocable and the innocent party cannot then change its mind and insist on performance.[13]

In *Kloepfer Wholesale Hardware and Automotive Co. v. Roy*[14] the Supreme Court of Canada found that an anticipatory breach had occurred by a party to a contract repudiating it prior to performance being due. On December 5, 1949, the vendor of certain lands in Toronto expressed his intention to the purchaser to repudiate the contract. The deal was set to close on January 29, 1950. On January 17, 1950, the

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[12] S. M. Waddams The Law of Contracts, Fourth Edition (Toronto: Canada Law Book Inc, 1999) at page 621

[13] *Ibid* at page 454

[14] [1952] 2 S.C.R. 465

purchaser issued a Statement of Claim. The vendor argued that the issuance of the claim prior to the set close of the agreement signified the purchaser's intention to treat the agreement as at an end.

The Court found that the argument of the vendor overlooked the Court's power to make a declaratory judgment. The agreement was good and binding and where an anticipatory breach occurs, the non-offending party need not carry on to the point of tender to avail itself of whatever remedies would then be available. The Court quotes Laidlaw J.A. in *Roberto v. Bumb*:[15]

> "I think that a court of equity would not permit an appellant to avoid the contract merely because the action was started prematurely, nor would the respondent be thus deprived of his equitable right to a decree of specific performance, if he were otherwise entitled to it."

It is clear that a party can accept a repudiation and sue immediately for damages. However, there may also be good reason to not accept the repudiation and carry on with the contract. Initially, it may not be certain that the conduct in question amounts to repudiation and whether a Court will subsequently find an anticipatory breach. Secondly, the reasons given for the repudiation, such as unavailability of financing or a change in the market may well be a bluff or disappear. In such a case the innocent party is well advised to assert pressure while other factor might arise that influence the offending party to reconsider. Third, the purchaser may want to wait for a default on closing to sue for specific performance.[16] Inevitably, the evidentiary record will be stronger in subsequent litigation if the defaulting party, who might otherwise protest the allegation of default, fails to complete the transaction.

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[15] [1943] O.R. 299

[16] Silvana D'Alimonte, "Anticipatory Breaches and What to do About Them" *The Law Society of Upper Canada Special Lectures 2002 Real Property Law* at page 4

Caution must be given however, for the party that elects the course to refuse repudiation. In *Domicile Developments* the Court stated that "in order to take advantage of a time of the essence provision, the innocent party must itself be "ready, desirous, prompt and eager to carry out the agreement." Accordingly, the Court held that because the vendor who was seeking to take advantage of the "time of the essence" clause had not completed the house that was to be sold to the defaulting purchaser, neither party was ready to close. The result was that the "innocent" vendor's action for damages was dismissed.

The lesson to be learned from Domicile Developments is that if a party chooses to keep the agreement alive after an anticipatory breach, there is an obligation to ensure that party is ready willing and able to close on time. One cannot rest on the fact that the opposite party likely won't close.

In *Kwon v. Cooper*[17], the Court of Appeal dealt with a real estate transaction in which time was again of the essence. The vendor who faced an anticipatory breach was again denied a remedy. The Court, in a short endorsement held that a Vendor, who the day before closing insisted on strict compliance with the terms of the contract, could not do so. Here, the purchaser was not ready to close on the closing date. The vendor, in a letter delivered the day before closing, said that he would rely on the terms of the contract requiring closing the following day. When the agreement did not close the vendor sued for damages. The Court held however, that on the closing date, the vendor also was not ready, willing and able to close because he did not have a discharge of the existing first mortgage or the guarantee required by the agreement of

[17] [1996] O.J. No. 181, leave to S.C.C. refused: [1996] S.C.C.A No. 142

purchase and sale. The result was that even though the purchaser had anticipatorily breached the contract, the vendor having refused to accept the breach, found itself in a position where it could not claim damages because of the position that it took. As a result the action failed.

The lesson to be learned from Kwon is that counsel needs to carefully consider his client's position before writing the kind of letter that was sent in that case. If your client is not in a position to perform it's obligation, it would be imprudent to reject an anticipatory breach of the agreement.

In *DeFranco v. Khatri*[18] the purchaser sought specific performance of an agreement for the sale of a home. The vendors had expressed their interest to repudiate the agreement and a willingness to pay damages. With this knowledge the purchasers still went ahead and sold their previous home. The vendors refused to close and the purchasers did not tender on closing. After the failed closing date the purchasers looked at other homes but could not find something with a similar design, location and price.

The Court awarded specific performance on the basis of the vendor's anticipatory breach despite the vendors' argument that the purchasers were not ready to close as they had not tendered. S.E. Pepall J. stated:

> Here, the plaintiffs were ready willing and able to [complete the transaction] and, in my view, were acting in good faith. In the face of the defendants' repudiation there was no need to tender. The fact that the solicitor was not in funds is not determinative.[19]

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[18] [2005] O.J. No. 1890 (Sup. Crt. Jus.)
[19] *Ibid.* at paragraph 27

Anticipatory breaches may be either express or implied. Where a contractual party states, before performance of the contract an intention to not fulfill his/her obligation there is an express renunciation. Otherwise, repudiation may be implied where the conduct of the party would lead a reasonable person to conclude that that party no longer intends to be bound by the provisions of the contract.[20]

THE OBLIGATION TO ACT IN GOOD FAITH

Actions frequently arise with regard to an Agreement of Purchase and Sale where one party wishes to escape their obligation. "It is typical of the situation that has occurred frequently in a falling market where the purchaser attempts to avoid closing a transaction that has become uneconomic."[21]

There is a clear jurisprudential history in Ontario of good faith behaviour availing parties to a transaction to appropriate remedies where minor problems exist at the time of tender. As one commentator notes:

> the doctrine of "good faith bargaining" or "fair dealing" has been utilized by the judiciary to address minor technical breaches and to prevent strict reliance on non-essential terms of the Contract, in an effort to alleviate hardship to one of the contracting parties, particularly in those circumstances where the party insistent upon strict adherence is not significantly prejudiced, or where there has been a lack of good faith or bona fides on the part of the non-defaulting party who is purporting to rescind the Contract as a consequence of the other party's breach or default[22]

Traditionally, there has been an overarching obligation of the part of both sides to the transaction to act in good faith in respect of the completion of the transaction. Generally speaking, the Court will not countenance a party to a transaction's bad faith,

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[20] *Supra* note 12 at page 620
[21] *Victorian Homes (Ontario) Inc. v. DeFreitas* (Ont. Ct. (Gen. Div.)) [1991] O.J. No. 324
[22] *Supra* note 2 at page 3

or surreptitious attempts to alleviate themselves of contractual responsibilities through underhanded dealing at the time of tender.

In Morgan (In Trust) v. Lucky Dog Ltd.[23] the issue of good faith in the context of an anticipatory breach arose. In awarding specific performance, the Court found that the vendor had acted in bad faith in manufacturing a situation in which closing the sale at the agreed date would be an unattractive option for the purchaser.

> [T]he vendor, by the conduct of its representatives, was disentitled from relying on the failure to close on July 31st, 1981 and, in refusing to close on August 4th, 1981, wrongfully repudiated its obligations under the agreement. It is my assessment on all of the evidence that the failure to close the transaction on July 31st, 1981 was the effectuation of the very result which the vendor's representatives deliberately orchestrated and strove to accomplish... and was the successful implementation of a stratagem which they intended and expected would throw the purchaser into disarray and--to use Mr. Yarmon's phrase (Ex. 86)--would make it "quite likely" that the purchaser would either wish to delay closing beyond July 31st (a request which they were expressly instructed to refuse) or to ask for its deposit back and terminate the sale (a request which would accomplish the objective they knew their principal desired). In these circumstances, the law precludes the vendor from relying on the provision making time of the essence of the agreement and from taking advantage of the existence of a state of affairs which it itself produced particularly where, as here, it is acting contrary to good faith in its performance of the contract.

In *Leung v. Leung*,[24] a vendor acting unreasonably and in bad faith was unable to rely on a "time of the essence" clause where the vendor had a minor technical problem with tender that could be easily remedied while closing was in escrow. "It is clear that the exercise of the power of rescission by a vendor of land must not be arbitrary, capricious or unreasonable. Much less can he act in bad faith."

The solicitors for the parties met at the Toronto Registry Office an hour before it was set to close. The plaintiff's solicitors provided a cheque for the closing funds and a

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[23] [1987] O.J. No. 647 (H.C.J.)
[24] [1990] O.J. No. 2276 (Ont. Gen. Div.)

copy of a second mortgage that was required under the agreement. When the second mortgage was presented for registration, it was rejected as not in registrable form because of a minor mistake. The plaintiff's solicitor advised that the second mortgage could be corrected within a few hours and suggested that the transaction be closed in escrow with registration the following day. After obtaining instructions, the vendors' solicitor rejected the suggestion and terminated the contract. The second mortgage was in registrable form by 18:00. The plaintiff was successful in a suit for specific performance of the agreement.

Leung v. Leung demonstrates that "a vendor is under a duty to act in good faith and to take all reasonable steps to complete the contract." Further, the case provides some useful rules by which parties to a real estate transaction must play:

> Where a vendor acted contrary to good faith in his performance of the contract, the law precludes him from relying on the "time of the essence" provision to terminate the contract…
>
> The duty to act in good faith to complete the contract extends to cases involving minor omissions or defects…
>
> No requirements of precision should be imposed on a party whose tendered performance include minor but easily corrected errors.[25]

In their text (Justice) Paul Perell and Bruce Engell address the interplay between good faith and the timing of tender.

> Where tender is made, the details of the particular contract will define what is required. Modern cases seem to be accepting less than perfect tender and recognize that apparent difficulties can be sorted out if the parties act in good faith. There is a line of authority holding that absent specific language, tender

[25] Barry J. Reiter, R.C.B. Risk and Bradley N. McLellan, Real Estate Law, 3rd ed., p. 790, cited in *Leung v. Leung*:

> may be made up to midnight on the day set for closing that is even after the close of the registry office.[26]

In *Lawrie v. Gentry Developments Inc*[27] an anticipatory breach was found where the vendor stated that he would refuse to accept tender after 4:30 p.m. on the day of closing. Although the purchaser's ability to tender was in question, the Court held that his tendering between 4:30 and midnight was not necessary for a remedy as any such tendering would be futile. The purchaser was awarded the return of his deposit as well as much larger sum representing the value that the house had increased since the day of closing.

Lawrie v. Gentry Developments Inc. isn't explicitly influenced by the existence of good or bad faith though the undertones are impossible to miss. The judge makes clear that the lawyer for the vendor left his office prior to 3:45 p.m. the day of closing, was unreachable by telephone and had nobody in his office that could be of any assistance to the purchaser's solicitor. The judge also suggests the vendor was unreasonable for not extending the closing by a few days to allow the purchaser to travel to California for his mother's funeral:

> With full knowledge the purchasers could close the transaction on the next business day, without bothering to check to see if it had been lied to about Lawrie having gone to California to bury his mother, without concern for the fact -- indeed, perhaps because of the fact it held the purchasers' deposit of $17,500 and that the house had increased in value by $10,000 since the purchasers had agreed to buy it, the vendor refused to close the transaction at any time after May 30th. The vendor took the position the deal was at an end and that it was entitled to keep the deposit. The purchasers began an action for specific performance. They were, in my view, entitled to that relief.[28]

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[26] *Supra* note 1 at 48
[27] [1989] O.J. No. 3230 (H.C.J.)
[28] *Ibid* at paragraph 36

There are some recent cases worthy of note that draw into question the Courts' deference given to good faith negotiations as well as their determination of what in fact constitutes good faith.

In *DeFranco v. Khatri*, discussed above, the purchaser was found to have been acting in good faith despite his stern unwillingness to discuss the breaking of the contract in exchange for damages with the vendor who came pleading to his door.

In *1473587 Ontario Inc. et al. v. Jackson et al.*[29] by an inadvertence, the purchaser was seven days late in delivering the deposit. Within those seven days the vendor had found a new purchaser and entered into second agreement, treating the first as repudiated as time was of the essence.

The issue went to Court to determine whether the parties would be held strictly to their bargain or whether there was a little give to accommodate the first purchaser's good faith and inadvertent error.

In reaching his decision Rutherford J. looked at the seminal Privy Council decision in *Union Eagle Ltd. v. Golden Achievement Ltd.*[30] where, he stated, "the holding of parties to their bargain in this respect perhaps met its zenith." In *Union Eagle*, the purchaser of a Hong Kong flat was to close at 5:00 p.m. on September 30, 1991. Due to rush hour traffic, the cheque for tender arrived at 5:10 p.m. and the vendor treated the agreement as terminated under the "time of the essence" clause. There was no intentional delay by the purchaser, there was no specific deadline for

[29] 74 O.R. (3d) 539 (Sup. Crt. Jus.)
[30] [1997] A.C. 514

registration and the vendor did not suffer any damages as a result of the 10 minute delay. Regardless, the Privy Council held that the parties should be bound to the agreement they had made.

Following this reasoning, Rutherford J. held that regardless of any inadvertence or good faith, the first purchaser was late to tender which entitled the vendor to treat it as repudiated. Rutherford J. Stated at paragraph 22

> Mr. Horst suggested that perhaps the Vendors were not acting in good faith in not immediately asserting their right to treat the contract as discharged and then discussing the possibility of a sale of the entire property with Forecast. While it may seem unfair, or perhaps more accurately, unfortunate to Loblaw that another purchaser with an inclination to do business came along precisely at the time Loblaw fell into breach of the deposit provision, it was through no fault, guile, deception or subterfuge on the part of the Vendors. The Vendors' solicitor returned the six-day overdue cheque the same day he received it, telling Loblaw that the Vendors did not agree to accept the late deposit. That the Vendors discussed and subsequently came to an agreement with Forecast based on the early advice received that the first agreement was no longer binding does not, in my view, come anywhere near using their position unfairly or playing fast and loose with Loblaw. Loblaw was told that its cheque wou ld not be accepted the same day two of the defendant Vendors first met with Forecast and the cheque was actually sent back to Loblaw several days before Forecast and the Vendors executed the second agreement.

In his recent article entitled "It's About Time"[31] Reuben Rosenblatt comments on Rutherford J.'s decision:

> In their annotation to the Court of Appeal decision of *Jackson*, Jeffrey Lem and Brian Clark question whether Canadian authorities will embrace the strict approach to "time of the essence", as adapted by *Jackson*, or favour a softer, more progressive approach where doctrines of "good faith" and "fair dealing" prevent strict technical loopholes from frustrating honestly entered into transactions.
>
> It may be a bit premature to say that the time of the essence pendulum has crested with Jackson, and is now on the return arc to or at least towards the strict Steedman standard. As aforesaid, the Court of Appeal endorsement of Union Eagle in Jackson was indirect at best, and there appears to still remaina decidedly pro-good faith camp within the bench at the Ontario Court of Appeal.

[31] Reuben Rosenblatt, "It's About Time" 2007

One such case, perhaps contemplated by the above statement is *Doherty v. Southgate Township*[32] in which the Ontario Court of Appeal demonstrates their regard for, and the importance of good faith in relation to the obligation to tender. In *Doherty*, the vendor municipality tried to have the sale of a former fire hall voided by its own failure to give public notice of the proposed sale.

Part of the agreement in *Doherty* was that the township was obliged to pursue a zoning by-law amendment and obtain the requisite municipal approvals thereto which would allow the fire hall to be rezoned as a housing complex. The town did nothing to advance the by-law ammendment and the purchaser agreed to extend the closing date. The town again failed to do anything in regard to the zoning by-law and the transaction did not close. Upon a suit by the purchaser for specific performance, the municipality took the position that public notice, which was never given, is required for this kind of sale. The issue of public notice had not been raised before this point.

The Court of Appeal looked at the actions of each party within the rubric of good faith and sided with the purchaser despite there being a by-law requiring that public notice be given. The Court stated:

> Southgate's position in this litigation with respect to the public notice is a disingenuous attempt to take advantage of its own failure. Significantly, Southgate's decision not to complete the sale on March 5, 2004, was based on its unwillingness to proceed with the zoning amendment called for in the agreement of purchase and sale and not on the fact that it had not given the public notice required by s. 268(3)(c)... Southgate did not raise the notice issue as a reason for not closing and first raised it in its statement of defence in an attempt to extricate itself from an action for breach of contract.
>
> While it may be said that Doherty should have been aware of Southgate's obligation to give notice and its failure to do so, there is no evidence to suggest that he did not act in good faith throughout. Doherty, through his lawyer, took

[32] (2006) 46 R.P.R. (4th) 30

> steps necessary to prepare for a closing of the sale and Southgate's actions would have led him to believe that Southgate had fulfilled all of the statutory requirements necessary to complete the transaction.[33]

THE LITIGATION PERSPECTIVE

Where there is a concern that a transaction may become problematic, or that the opposing party may be acting in a manner that suggests that a "trap" or a last minute failure to close, counsel are advised to start considering the evidentiary record well in advance of the closing. Letters or emails confirming conversations will be of great assistance at a trial that is going to take place a year or more down the road. Similarly, correspondence setting out the opposing party's failure to respond to phone calls is helpful. The better the record is documented, the easier it is for counsel at trial.

As we have set out above, it is also important to carefully consider the client's position. The failure to do so can lead to a result as happened in *Kwon v Cooper*, where an innocent party was deprived of a remedy because of the position that it took on the day before closing.

There is one final observation that we as litigation counsel make. While we have set out our review of the cases and the principals to be derived from them, an overarching theme tends to emerge. That theme is simply that the Court will favour the party who has acted in good faith, in compliance and with his or her contractual obligations. When advising the client we recommend being "up front". Courts today look for the justice of the case, rather than for strict formality.

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[33] *Ibid* at paragraph 43