CAN AN EXPIRED CONTRACT BE REVIVED?

The article below from Saskatoon lawyer, Brad Jamieson of Cuelenaere LLP, provides important information to registrants about why an expired contract cannot be saved with an amendment:

A hot topic in the Saskatchewan Real Estate industry these days is: can a contract be revived with an amendment after the contract has expired? The simple answer is: No, it cannot.

Once a contract has expired, it cannot be extended because it no longer exists as a binding agreement. If parties are seeking an amendment (or an extension of the date for acceptance), it must be done prior to the cut-off date specified in the offer.

The case law on this point is very clear. In *Mt. Pleasant Roehampton Developments Limited v. Haussmann,* 2017 ONSC 4300, the Court ruled that the agreement for purchase and sale (APS) was null and void because the Buyer failed to waive conditions within the required time limit set out in the APS.

In *Digger Excavating (1983) Ltd. v. Bowlen,* 2001 ABCA 214, 286 A.R. 291 the Alberta Court of Appeal stated:

> ... Certainty in contracts, especially terms relating to the closing date of contracts for the sale of land is of great commercial importance, and the Court cannot insert itself into the contracting process by extending time for performance absent evidence of relevant misconduct by the innocent party or waiver...

The Ontario Court of Appeal in *DiMillo v. 2099232 Ontario Inc*., 2018 ONCA 1051 at para 31 interpreted a commercial real estate contract which contained the term: *"time is of the essence"*. The Court stated that such phrase means that a time limit in an agreement is essential, such that breach of the time limit will permit the innocent party to terminate, or rescind, the contract.

Time is of the essence is an integral clause of the Saskatchewan Real Estate Commission Residential Contract of Purchase and Sale ("RCPS"). At paragraph 4.9 it states: "The Buyer and Seller agree that time shall be of the essence of this contract." While many may not be aware of this clause or pay any attention to it, what it clearly means is that the dates and times in the agreement are important.

There are 3 main clauses in the RCPS where this becomes an issue. The first is clause 8.1, where a deadline is imposed on the Seller to accept the Buyer's offer. If the Seller has not accepted the Buyer's offer by the day and time specified, the contract is null and void and cannot be revived with an amendment. If the deadline to accept is missed and the parties want to continue with the transaction, a new offer to purchase must be submitted to the Seller and the Seller must accept the new offer by the day and time specified.

The second clause in the RCPS where this issue arises is clause 2.2, where the Buyer lists their conditions and a date by which their conditions must be removed. If the Buyer does not remove their conditions by the specified date, the contract once again becomes null and void and cannot be revived with an amendment. If a condition removal deadline is missed and an amendment is not signed by both parties prior to the removal date, the only option is for the parties to enter into a new RCPS.

The third clause where this becomes an issue is the possession date and time (the "Completion Day") stated at clause 4.3 of the RCPS. Over the last couple years, agents and their clients have been shortening the time frames for closing. This puts more pressure on the clients, lenders and lawyers to complete the required paperwork prior to the expiry of the time limit stated at 4.3 of the RCPS.

This is why, the best practice is to set the Completion Day at least 2 weeks after the condition removal date and if the condition removal date is extended, by an amendment, the possession date should also be extended by a similar number of days. If the Buyer's lender is unable to send mortgage instructions before the Completion Day or if the Buyer is unable to sign their mortgage documents with their lawyer prior to the Completion Day, it is imperative that the agents prepare an amendment of the Completion Day prior to the expiry of the date and time specified in the offer to purchase.

The push back from many agents and brokers appears to be founded on the basis of why does it matter if both parties are in agreement to sign an amendment, after the expiry, and continue on with the sale. The answer is that this isn't an issue until it becomes an issue. This is especially true in a competitive market, such as we currently have in Saskatchewan. For example, a Buyer misses their condition removal date and their agent fails to have an amendment for the condition removal date signed before the expiry of the condition removal date. At that point in time the contract is null and void. Even if the parties elect to proceed with the transaction, if the Seller, prior to the Completion Day, gets cold feet and wants to back out or if they get a more attractive back up offer, they now would have the right to not complete the sale to the original offering party and that first Buyer would have no recourse against the Seller.

If you, as the agent, cause your Buyer to lose a house because the Seller was able to get out from the contract because you did not amend the contract prior to the condition removal date, you could end up liable for the Buyer's damages if they elect to sue you.

However, it is the reverse scenario that is more likely and where agents face a higher risk of being sued. If you, as the Seller's agent, allowed a transaction to proceed with a contract that is null and void and the Buyer subsequently backs out after the condition removal date, your Seller will lose their right to claim the deposit that would have otherwise been forfeited to them. In this scenario you are likely going to lose the listing and thus the commissions when the house does sell and you are likely to be sued by the Seller for the deposit they lost. With the dollar value of deposits ever increasing with the increasing house prices, the risk of being sued for a lost deposit also increases.

The answer as to how to avoid all this is very simple; if your Seller cannot accept an offer prior to the offer expiry date and time at which clause 8.1 expires, have the parties sign an amendment extending the date and/or time, prior to the expiry of the time in the original offer. If your Buyer cannot remove any or all of their conditions by the condition removal date specified in clause 2.2, have the parties sign an amendment, prior to the condition removal date, extending the condition removal date. If you do not get your amendments signed by all parties prior to the contract expiring, do not risk being sued, you simply have to have a new RCPS signed by all parties. If the parties were willing to wrongly sign an amendment extending a contract that is null and void, they surely will agree to sign a new RCPS.

Lastly, if your Buyer is not going to be able to meet the Completion Day set out in clause 4.3 of the RCPS, you need to try to have the Completion Day extended prior to the Completion Day. For all these examples, neither party is bound to sign amendments or new RCPS. Your job is to highlight the issue to your client in advance so that they can make informed decisions on how to proceed. It is the lack of foresight in bringing these issues to your client's attention in advance of the contract becoming null and void that could attract liability.

The best practice is to set reasonable dates and times for acceptance, condition removal and closing that, for the most part, avoid subsequently needing to amend the accepted offer.

Commission Commentary:

Given the information and caselaw noted above, the Commission's Review Officers will recommend to the Investigation Committee that a registrant is in breach of Commission Bylaw 702, by failing to protect and promote the interests of their client should they advise, instruct or allow their client to proceed with an amendment to a contract which is null and void because a deadline has expired. Further, failing to properly advise your client on the importance of dates and times (ie. how "time is of the essence") may also be a breach of Bylaw 702. All of which is in addition to attracting professional liability.

REIX Commentary:

Our position is very clear – whether the buyer and seller may agree to extend the expired offer by means of an amendment in our view is irrelevant. You cannot revive a dead offer, full stop. The offer must be rewritten.

It is unacceptable practice to extend an expired offer or condition removal date for that matter to attempt to revive a dead contract. Registrants that engage in this sort of practice may very well find themselves with a serious insurance coverage problem if one of these transactions "goes south" and litigates. Additionally, there is the very distinct possibility that a court would not recognize the amendment.

Where to get more information:

For more information you can contact the Commission directly:

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