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# Is there a deal or not? Case is a tricky one

### Judge rules condo builder can't cancel agreement despite clause in document

What happens when a buyer tries to get out of a new home deal - twice - and the builder won't let him? What happens when the same buyer then decides to stay in the deal, but the builder wants out?

It happened in Toronto this year, and it took a court to straighten out the mess, although the decision is under appeal.

Tribeca Lofts is a trendy development at 797 Don Mills Rd., on the corner of Eglinton Ave. E., across the street from the Ontario Science Centre. In a former life, it was the Mony Life office building.

The 17-storey Mony office building became vacant in the early 1990s and was purchased by a developer for conversion into 180 residential condominium units. T.W.S. Developments Inc. marketed the project as Tribeca Lofts on the Upper East Side.

On June 9, 1998, Donald G. Jones signed an agreement to purchase one of the penthouse units in the building.

As is customary for agreements of purchase and sale in projects to be constructed, there was a provision to permit flexibility in the move-in dates. For Jones, the "tentative occupancy date" was set at May 31, 1999. As the date got closer and the building became ready for occupancy, the builder was required to give 60 days' written notice of a "confirmed occupancy date."

A final provision, in Paragraph 25, stated that if occupancy did not take place within 12 months of the tentative occupancy date, either party could terminate the deal. Since the tentative occupancy date was May 31, 1999, it was reasonable to believe the final deadline was May 31, 2000, after which either side could back out.

During the 21/2 years following the signing of the Jones agreement, the developer sent the purchasers in the building a total of seven notices extending the projected occupancy dates, first to "the fall of 1999," then to Sept. 30, 1999, followed by April 26, May 29, July 12, Sept. 9 and, finally, Oct. 31, 2000.

On March 30, 1999, at a meeting with the builder's representative, Jones learned about changes in the elevator configuration and alterations to the upper penthouse design. He wrote the builder saying the changes were a breach of contract, and he demanded cancellation of the agreement and return of his deposit. Letters were exchanged without reaching a resolution.

Jones complained in writing after each announcement of a new delay. After receiving the fifth notice, which extended occupancy to July 25, 2000, Jones complained that he had not received any response to his previous complaints. He noted that the delay of occupancy was in breach of the final deadline clause of the agreement (which he believed was May 31, 2000), and that he was exercising his right to terminate the agreement and receive his deposit back.

There was no reply from the developer.

Finally, on Jan. 11, 2001, the developer's lawyers wrote Jones and advised that his unit had still not been completed sufficient to permit occupancy, and the developer was invoking its paragraph 25 right to terminate the agreement since the one-year deadline had passed. The vendor then relisted the unit at an increased price of $262,900, up $45,000 from the original price.

**The vendor, said the judge, was not entitled to refuse the purchaser's attempts to rescind, and simply wait until January, 2001, before terminating in the prospect of a better sale price by relisting**

This time, however, Jones had changed his mind about backing out and wanted to close on the unit. He hired lawyer Gavin Tighe to take the builder to court to force it to either sell him the unit or pay damages for breach of contract. This, of course, was the same contract that Jones himself had twice attempted to cancel.

Short-circuiting the typical route of taking the case to trial, Jones and his lawyer applied to the court in May for an order for specific performance, a legal term meaning a demand to complete the contract as written.

Tighe argued that under section 25 of the contract, either party could kill the deal if the unit wasn't ready 12 months after the tentative occupancy date. If the tentative occupancy date remained at May 31, 1999, then either side could back out after May 31, 2000.

But, said Tighe, if only the "tentative occupancy date" kept getting delayed, then the 12-month time limit to terminate was also a moving target. Tighe told the court the seven extension dates contained in the letters from the builder did not meet the contract's requirements for confirmed occupancy dates. They were, in fact, only extensions of the tentative occupancy dates.

Under the contract, the builder could only notify purchasers of a confirmed occupancy date after the unit was substantially completed and the City of Toronto had given permission for occupancy. Since neither of these conditions existed, Tighe said, the builder's repeated notices were nothing more than extensions of the tentative occupancy date.

Tighe's argument was that this meant the one-year termination right kept getting postponed with each extension of the tentative move-in date.

Justice Harry J. Keenan agreed with Tighe and his client. In mid-June, he ruled that each letter from the builder was merely an extension of the tentative date and not the confirmed date.

The right of the vendor to terminate based on inability to meet the confirmed date had not yet arisen because the unit was not yet substantially complete and the city had not approved occupancy.

The vendor, said the judge, was not entitled to refuse the purchaser's attempts to rescind, and simply wait until January, 2001, before terminating in the prospect of a better sale price by relisting.

Having won the case, should Jones get damages or the right to buy the penthouse? The Supreme Court of Canada ruled in an earlier case that unless the land involved is unique, specific performance will not be ordered. The judicial trend today is only to award damages when the party refusing to complete the deal is at fault.

The builder, T.W.S. Developments Inc., argued that specific performance should not be ordered since the property was not unique. Justice Keenan, however, agreed with Tighe

that the Tribeca development is part of a unique and distinctive project.

The court ordered the developer to complete the deal. TWS filed an appeal and Jones is still not living in his unit.

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***Bob Aaron is a leading Toronto real estate lawyer.***
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