



When a Real Estate Transaction Doesn't Close

ANGELA KWOK

In a recent case, Simple Technology Inc. ("Simple") bought a warehouse from Redstone Enterprises Ltd. ("Redstone") for \$10,225,000, paying an initial deposit of \$300,000 and an additional \$450,000 when it sought an extension. The Agreement of Purchase and Sale ("APS") provided that if the agreement was not completed by the closing date, the deposit would be released to the seller. Simple failed to close the transaction, so Redstone applied to the courts to keep the deposit. The trial judge agreed that the seller should keep the deposit, but recognized that complete forfeiture of the \$750,000 would be unconscionable, and reduced the forfeited sum to \$350,000. Redstone appealed.

A buyer generally pays a deposit to a real estate agent or lawyer to be held in trust pending closing of the sale. There are many potential stipulations about deposits in an APS. For example, an APS may state that the deposit is an 'earnest', non-refundable and irrevocably paid to the seller on termination as liquidated damages in full satisfaction of all the seller's claims and that the seller shall have no other remedies against the buyer on termination. In contrast, an APS may specify that on default, the deposit is forfeited to the seller without prejudice to any other remedies that the seller may have.

The courts have developed a two-step test to determine whether a vendor should be allowed to retain a deposit upon termination of an APS:

1. Was the forfeited deposit out of all proportion to the damages suffered?
2. Would it would be unconscionable for the seller to retain the deposit?

As the deposit in this case was about 7% of the purchase price, neither the trial judge nor the Court of Appeal found any evidence that this was a commercially unreasonable deposit.

In considering whether the deposit was unconscionable, the trial judge held that the final deposit of \$450,000 was disproportionately large and therefore unconscionable, since there was no evidence that Redstone suffered damages. The Court of Appeal chose to consider the full commercial context, including:

- inequality of bargaining power,
- a substantially unfair bargain,
- the parties' relative sophistication,
- the existence of bona fide negotiations,
- the nature of the relationship between the parties,
- the gravity of the breach, and
- the parties' conduct.



The Court found no evidence of unconscionability and allowed the seller to keep the full deposit of \$750,000. The Court of Appeal's decision guides purchasers and vendors in a commercial context about the factors a court will take into account in determining whether forfeiture of the deposit is warranted.

Damages Suffered by the Vendor

Defaulting purchasers may be liable for closing costs that have been incurred by sellers at the time the APS is terminated, such as fees for legal and real estate services, including a realtor's commission. Purchasers may also be liable for costs involved in relisting the property, moving, alternative accommodation, and storage costs. If a seller is forced to sell the property at a lower price, a defaulting purchaser may be liable for that loss on the resale.

A purchaser may be liable for carrying charges from the date on which the purchaser failed to close to the closing date of the resale. Monthly carrying charges would include interest on mortgage payments, insurance charges, property taxes, utilities, maintenance, gas, and hydro expenses.

The defaulting purchaser also may be liable for expenses incurred as a result of the seller being forced to abandon the purchase of another property, such as interest and administrative expenses associated with obtaining a bridge loan.

At Lawrence's, our Real Estate and Litigation lawyers have significant experience in how best to manage the risks and minimize the damages in purchase and sale transactions for both purchasers and vendors.



Angela Kwok is a member of Lawrence's Litigation Group and has experience in recovering damages against defaulting purchasers. She can be reached at (905) 452-6877 or ahkwok@lawrences.com.

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We Will Remember Them



At the Law Society of Ontario's annual Remembrance Day Service at Osgoode Hall, an honorary Call to the Bar ceremony was held for the 18 law students who lost their lives serving during the Second World War.

One of those students, Lt. Charles Earl Hersom, articulated at a forerunner firm of Lawrences.

Charlie Hersom was born in Streetsville in 1916, the son of a carpenter who immigrated to Canada from England in 1905. Charlie first trained as a teacher before receiving his BA from Queen's University, where he served with the Canadian Officers Training Corps. He was admitted to the Law Society as a student in 1941 and articulated under Henry Edward Cook, QC, of Graydon, Lawrence & Cook, which later became Lawrence, Lawrence, Stevenson LLP. Henry Cook served as a Cadet with the Canadian Officers Training Corps at Osgoode Hall.

Charlie Hersom enlisted as a Second Lieutenant with the Royal Canadian Army Service Corps. He trained at Brockville and Camp Borden. He was promoted to Lieutenant before going to England in 1941. He was assigned to the 2nd Division Ammunition Column (4th Company) in March 1942. The Ammunition Column was responsible for transporting ammunition to support the 2nd Canadian Division.

Lt. Hersom died on June 22, 1942, when he was stationed in the Isle of Wight, where his division was preparing to take part in the Allied raid on Dieppe. He is buried at Brookwood Military Cemetery in Surrey,



Charles Earl Hersom (left) articulated in Toronto under Henry Edward Cook (right), QC, of Graydon, Lawrence & Cook (now Lawrence, Lawrence, Stevenson LLP).

U.K., where his grave marker is inscribed "His memory is as dear today as in the hour he passed away." His name is also inscribed on the Streetsville War Memorial in Mississauga.

At the Remembrance Day ceremony, Lt. Hersom's nephew accepted the Honorary Call to the Bar certificate on behalf of his family.

60 Years a Lawyer

One of our newest lawyers, L. Murray Eades, was called to the bar before most of his colleagues at Lawrences were born. Below, he reflects on the changes he has seen in his 60 years as a business lawyer:

"It is a different world today; not necessarily better, just different. The greatest change that has taken place is the degree of specialization in law. In the late 1950's, when I began, lawyers were general practitioners and dealt with whatever matters their clients presented. This meant that in my early days, I dealt with divorce, real estate, wills and estates, among many others, as these issues came across my desk, as well as business matters. There did not yet exist the highly developed area of family law that we have today, the concept of "family assets" was unheard of, there were relatively few female lawyers, and no lawyer devoted his entire practice to family law. I would provide income tax advice in conjunction with my business law practice. Today, highly specialized practitioners in the areas of family law and tax, among numerous other specialties, work in these areas exclusively.

The changes in the law itself over the past six decades have been enormous. We now have crimes like money-laundering, hate crime, and internet abuses that did not exist in the Criminal Code when I started practice. In business law, numbered, single shareholder and director corporations are now permitted, corporations are no longer required to have audited financial statements, and a corporation's directors are no longer required also to be shareholders. In real estate law, the most significant changes have been in how it is practised: registrations are completed remotely with the lawyers for the vendor, purchaser, and mortgagee all fulfilling their functions from their own offices electronically. When I began, condominium law did not exist. Today, as is the case in family law, tax, and other areas, there are many lawyers whose entire practices are devoted to this area of law.

As with society in general, advances in technology have changed the practice of law completely. When I first began in this profession, law offices used typewriters and carbon paper for copies. "Portable" dictaphones were the size and weight of a standard briefcase with two or three heavy law books in it. Telephones were attached to land lines. "Portable" telephones were the size of a loaf of bread and weighed two or three pounds. Desktop computers were still a long way off and only the largest offices had any computer capacity, which in the early years consisted of large "mainframes" that had to be kept in large, separately air-conditioned, humidity-controlled rooms.

It has been my pleasure to work with and for many clients as their businesses have developed and grown. One client was a small, two-bay automobile body shop on a back lane in Streetsville when I started acting for them. By the time the founders sold this business many years later, it had grown into one of the largest companies in Canada, refurbishing and doing repairs and maintenance for a large number of significant bus and truck fleets. I am proud to say that I continue to act for the founders.

For over 50 years, I have been the general counsel for United Van lines (Canada) Ltd., a company that has also grown to lead its industry. I advise United and its carrier members in far-reaching areas of law, including competition, employment, corporate, real property, planning, intellectual property, taxation and transportation law. I have served



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them as general counsel throughout their significant growth, working with many sets of directors, shareholders, and executives over the years, and I continue in this role to this day.

Another aspect of the practice that has given me great pleasure over the years has been the many families who have used my services across generations—in some instances across three generations. This has been and continues to be a source of great pride for me.

My many clients, like me, have been warmly welcomed at Lawrences, a firm with which I dealt with many times over the past 50 years. Lawrences' long-standing commitment to ethics, excellence and client service is consistent with what I was taught and practised. At this stage of my career, with more years behind me than ahead, I am glad to have joined the Lawrences' team confident in the knowledge that in the future my clients will be looked after with the same degree of care and attention as I have provided them for 50 years and counting."

L. Murray Eades is counsel to Lawrences, where he practices corporate/commercial law, transportation law, and tax planning. He can be reached at (905) 452-6876 or meades@lawrences.com.

Life at Lawrences

Lawrences' lawyers lead active lives in the profession and in the community. Here are some of their latest achievements.



Lunch at Lawrences

On November 22, 2017, the Treasurer of the Law Society of Ontario, Paul Schabas, joined Lawrences' lawyers for lunch and then gave a talk on the issues facing the Law Society and the legal profession. Treasurer Schabas (seen here centre right) answered questions and welcomed comments from Lawrences' lawyers.

New Face at Lawrences



Munish Mehta has joined the Business Law Group at Lawrences following his call to the Ontario Bar in 2017. Munish has a combined degree in Law and Business and has worked in several large companies during summer, internship and articling positions. At Lawrences, he focuses on helping owner-managers with business structures, shareholder and partnership arrangements, and acquisitions and divestitures. Welcome to Lawrences, Munish!

Lawrences' Lawyers on Boards of Directors

Lawrences' lawyers have a long tradition of involvement in community organizations. Three of them have recently accepted new positions on Boards of Directors.



Lawrences' co-managing partner **Heather Picken** has been appointed to the Board of Directors for the Central West Local Health Integration Network, by the Lieutenant Governor of Ontario. The Central West LHIN is responsible for integrating, funding, and monitoring the health care system for Brampton, Caledon, Dufferin, Malton, north Etobicoke and west Woodbridge. **Michael**

Luchenski, Lawrences' other co-managing partner, commented: "Heather will do a great job as a board member of the Central West LHIN and will bring to that role the care for those affected by her decisions, the attention to detail, the concern for practical realities, and the fearless advocacy that are so much a part of her character."



Lawrences' head of litigation **Edwin Upenieks** has been elected to the Board of Directors of the Headwaters Health Care Foundation for a three-year term. The Foundation is the fundraising arm of Headwaters Health Care Centre, a continuing care facility in Orangeville that serves the surrounding area. The Centre's catchment population is approximately 135,000, including the communities around Grand Valley, Orangeville, Shelburne, and Caledon.



A new face on the Board of Directors for the Brampton Board of Trade is Lawrences' business and franchise lawyer, **Louis Voulokos**. The BBoT focuses on driving economic prosperity and productivity for local businesses. Louis, who will continue to serve on the BBoT's International Committee, comments: "I am honoured to play a strategic role in helping Brampton grow its local businesses and also to continue Lawrences' tradition of serving the Brampton Community."



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Lawrence, Lawrence, Stevenson LLP
43 Queen Street West
Brampton, ON L6Y 1L9
T: (905) 451-3040
F: (905) 451-5058
E: info@lawrences.com
www.lawrences.com