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Real Estate Review

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The July Market

The height of the market this year was reached in April, that's one month early. The resale market has drifted off since then. Prices have not fallen but the number of transactions are down about 18%. Also, new listings are up about 20%.

Actually, this makes for some interesting times. Some think the market is going to fall drastically, while others think there will be a levelling off. Still others believe that there will be an opportunity for some excellent returns.

In part, all three are probably right! Asking prices are falling, however deals continue to take place at realistic numbers, and right now there are some very good opportunities.

How To Avoid Title Fraud!

The matter of title fraud, deceit, con-men has gone back in time for centuries.

So, where's the first opportunity to avoid fraud?

Actually, the *Conveyancing and Law of Property Act* contains an interesting right. Let's have a look at section 8:

Rights of purchaser as to execution

8. A purchaser may not require that the conveyance be executed in the purchaser's presence or in presence of the purchaser's solicitor but the purchaser may require that it be attested by a person appointed by the purchaser and the purchaser's solicitor may be appointed for that purpose. R.S.O. 1990, c. C.34, s. 8.

And, here's the definition of **attest**:

1. to bear witness to, certify, declare to be correct, true or genuine, declare the truth of, in words or writing, affirm in an official capacity, to attest the truth of a statement
2. to give proof or evidence of,
3. to put on oath (or affirmation),
4. to testify or bear witness.

So, really there was always a rather ancient remedy contained in the legislation of the Province.

The purchaser had the right to insist upon his own witness under the Act.

As custom evolved, this right, to the extent that it was ever particularly common, fell into disuse. The vendor's solicitor would either personally witness the signature of the vendor or would arrange to have someone from the office witness the signature.

Obviously, there was no problem if everything was on the "up and up". The only time a problem would arise is if the vendor was not real, or was a fraudster. It became relatively easy for a good fraudster to trick an unknowing lawyer into believing they were the vendor.

Today, of course, solicitors require proof of identity, but not too long ago, they basically took a person's word for it.

The interesting older remedy, might be for purchasers to insist that their lawyers require that the vendor execute the deed in the presence of a particular nominated person who might truly attest to the identity of the vendor.

It might be interesting to nominate the realtor. After all, the realtor may have had direct dealings with the vendor, and this would eliminate the fraudster from false impersonation. Another valuable person might be the solicitor who acted for the vendor when the vendor bought the property originally, (this information is available from Land Registry offices).



If there is any lawyer on earth who will not be retained by the fraudster, this is the person. So, the purchaser should hire them, just for this purpose!

If you are purchasing a property and you are concerned about title fraud, don't forget that you are entitled to nominate your own witness.



Real Estate: The Calendar Cycle

Year after year, we are faced with the same cycle, repeated time and time again.

Let's have a look at the last few years and see if we can determine **any patterns?**

We'll look at the ORES Real Estate Index for single family homes in the GTA. The Index started in January 2004 and tracks the monthly change in the average price. As of 1 January 2004, the Index was 100, it is now at 132.24 as of the end of April 2008. Basically, that means a 32.24 percent increase in four years and four months. That works out to a 7.59% annual increase over that period of time. We could also say that works out to 0.62% monthly increase over that same 52 month period. But, not every month is the same. There are some good months and there are some bad months.

Each year, there is a highpoint in the Spring, and another highpoint in the Fall. It is far from a steady progression. We will chart the two highpoints each year.

So, let's have a look at **2004**:

May..... 109.73
October..... 109.56

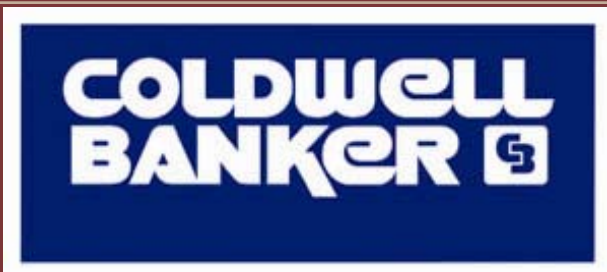
In 2004, the market increased from January to May when it reached its height, then declined from June to August, increased slightly in September, and reached its height once again in October. Thereafter, the market declined for the balance of the year.

What about **2005**:

May..... 116.38
October..... 115.48

In 2005, the market increased from January to May when it reached its height, then declined from June to August, increased slightly in September, and reached its height once again in October. Thereafter, the market declined for the balance of the year.

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Real Estate: The Calendar Cycle (cont'd)

And, let's examine **2006**:

April..... 112.69
October..... 120.05

In 2006, the market increased from January to April when it reached its height, (held flat for one month) then declined from June to August, increased slightly in September, and reached its height once again in October. Thereafter, the market declined for the balance of the year.

What about **2007**:

May..... 127.64
October..... 130.98

In 2007, the market increased from January to May when it reached its height, then declined from June to August, increased slightly in September, and reached its height once again in October. Thereafter, the market declined for the balance of the year.

COMMENT

Are you beginning to see a pattern here? The only year out of step with the pattern was 2006. And, in that year, the actual high point was April at 122.69, but that number held fairly steady. The Index for May was 122.38 which in the grand scheme of things ends up being statistically insignificant. The real decline did start to take place in June when the Index read 120.32. The balance of that year was the same as every other year.

All of this leads me to the conclusion that the following statement concerning the predictability of market prices throughout the year is accurate:

In any year, the market will increase from January to May when it will reach its height, then it will decline from June to August, increase slightly in September, and reach its height once again in October. Thereafter, the market will decline for the balance of the year.

So, what's in store for **2008**?

Here are the actual numbers, so far:

January..... 125.83
February..... 127.84
March..... 127.42
April..... 132.24

We can only start with the first part of the statement: In 2004, the market increased from January to April. If this year is the same as previous years, we might reasonably expect that May would be the high water mark for prices, and that there will be an anticipated and predictable decline in June.

If that occurs, it would (likely) be a seasonal decline and not evidence of a major crash as predicted by the doomsayers. Then, the market will start to drift off over the summer, awaiting a slight resurgence in September, followed by a new record high in October (for a strong market), or simply a Fall high (for a weaker market). In November, the market will start to decline slightly for the balance of the year.

So, if you have been keeping track, here is the **predictable pattern**:

Rising Prices..... January to April
Spring High..... May
Declining Prices..... June to August
Rising Prices..... September
Fall High..... October
Declining Prices..... November to December

Interesting, eh!

Now, you know how to time your next move.

When Do You Give Vacant Possession in Real Estate

This is a simple question and sometimes gives rise to significant problems. The general advice given by lawyers traditionally has been that vacant possession must be given by the "actual time of closing".

The problem is that people just don't leave. They are often in the process of moving out, but they're not quite out. An experienced purchaser will know this, and leave a day's grace, so that there will be no conflict.

Commercially, this is never a problem, but residentially, it is a constant, continuous, every month issue across the city. Everyone seems to want to move on the 15th or the last day of the month. There's no real reason for this, other than it has become common practice. Movers are busy, banks are busy, lawyers are busy; so why pick these days?



Really, the only individual who needs to move in on one of these days would be a tenant who has vacated their premises. Other than those tenants, everyone else can choose their dates; only they don't. Someone, usually their real estate agent chooses the date for them.

This means that a lot of people are "mobile" on the same day of the month. They leave one place and have to be in another by the end of the same day.

The well organized vendor loads up and vacates early in the day. By the time his purchaser arrives, the house is vacant and there is no problem. The disorganized vendor, however, leaves a lot of matters to the very last moment. He's just not ready to move out early. He hasn't quite packed, he orders his movers to arrive in the early afternoon, and by 9 or 10 o'clock at night they leave.

Now, that's probably fine in most cases. The purchaser arrives a little later, unloads, and pays his movers overtime, since they have been ready to unload for hours. Typically, he is just upset, pays the extra money, but within a day or two the excitement of moving into the new house occupies his thoughts and he soon forgets the "moving in" issues.

However, not all the time is the law, just for "cocktail conversation". From time to time, people get sufficiently upset, that they sue. So, what can you do about this? When does the vendor have to be out of the house? If the vendor is still there after closing, can you rescind the transaction? Can you sue for damages?

Let's have a look at the standard form agreement in use in Ontario:

"2. COMPLETION DATE: This agreement shall be completed by no later than 6:00 pm on the 4th day of July 20xx. Upon completion, vacant possession of the property shall be given to the Buyer unless otherwise provided for in this Agreement."

So, there's a time and a date and in the second sentence there are consequences. The purchaser basically has until 6:00 pm to complete the deal. The electronic registration system is still open, and deals for that day can be completed up until then. After that, with a few phone calls, keys are released and the vendor and purchaser are notified. The "move-in" could take place after that. The risk to the purchaser is that by now his movers have been sitting in a local pub since 2:00 pm and they are now on time and a half.

You should note that from a legal perspective, there is nothing in the agreement which obligates the purchaser to close the deal any earlier than 6:00 pm.

The next matter to consider, is the early closing. Even though the deal could have been delayed until 6:00 pm, it was in fact closed at 2:00 pm. Now, we have to look at the obligations which arise under the second sentence. The consequence is that "upon completion" and that means 2:00 pm, "vacant possession shall be given". There is a further statement that says "..... unless otherwise provided...". Usually, this would mean that vacant possession was not intended at all. The property was occupied by a tenant, and the purchaser agreed to assume the tenant. Therefore, the premises were not going to be vacant, they were going to be occupied by a tenant, immediately before, at the time of, upon closing and after closing.

There are essentially two quick legal issues:

1) can the purchaser refuse to close if the premises have not been vacated at the time of closing?

To this question the answer is "no". The Ontario Court of Appeal ruled in *Cooper v. Mysak (1986) 54 O.R. (2d) 346* that it was indeed a breach of contract, but only a fundamental breach of contract would entitle the purchaser to decline to proceed and rescind the contract.

2) if the vendor is still occupying the premises after closing, can the purchaser sue for damages?

To this question the answer is "yes". Although it is only a Small Claims Court decision, the trial Judge followed the reasoning of the Court of Appeal, and concluded that even though it was not a fundamental breach, it was certainly a simple breach, and a simple breach of contract entitles the purchaser to damages. So, the purchaser was awarded his additional moving costs that were incurred by reason of the vendor's breach of contract. A claim for inconvenience and hotel expenses were not covered in the Judgment. See *Foord v. Smith (1993) 33 R.P.R. 279*.

The **legal result** of the two decisions:

- Failure to close by 6:00 pm is a simple breach of contract, provided vacant possession can be given later that day
- Failure to close by 6:00 pm is a fundamental breach of contract, provided vacant possession cannot be given later that day

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- A vendor must vacate by no later than 11:59 pm on the day of closing
- Failure to vacate by the actual closing time is a simple breach of contract
- Failure to vacate by 6:00 pm is a simple breach provided the transaction closes that day
- A purchaser can rescind the agreement for a fundamental breach
- A purchaser cannot rescind the agreement for a simple breach of contract but is entitled to claim damages

What Changes would you want if you were a Purchaser?

All in all, if you're a purchaser and you have paid your money over at 2:00 pm and you don't get your house until midnight, that's not good. So, what could you do to make things a little better? Consider the following:

- A provision making the closing an earlier time in the day, and specifying that failure to complete by such time is a fundamental breach of the contract
- A provision specifying a certain hourly payment to you by the vendor if you don't have possession by a particular time of day

What Changes would you want if you were a Vendor?

Not every purchaser needs to be in the house on the day of closing. The mere fact that you need the purchaser's money to close your purchase, doesn't mean that you have to part with possession.

The basic rule of thumb for a vendor should be to arrange interim financing, even just for a day. Borrow the closing funds needed for your purchase from your bank. You pledge the funds arriving from your sale as security for repayment of the loan. The direction concerning the payment of the funds is all the security you provide. Now, you can close at 9:00 am. You probably only need the funds for a day, or perhaps 3 days if it's a long weekend. This cost is very small compared the aggravation you save. So, some good advice: separate the two deals. Don't make them dependent; make them independent of each other.

When you come back to the terms of the agreement, why not **alter** some of the standard **terms** and consider the following:

- A provision that the purchaser must close by 1:00 pm on the day of closing
- A provision that failure to close by 1:00 pm constitutes a fundamental breach by the purchaser
- A provision that failure to close by 1:00 pm constitutes a simple breach and entitles the vendor to damages of \$100 per hour (or part thereof until closed)
- A provision that failure to close by 1:00 pm constitutes a simple breach and entitles the vendor to damages of \$100 per hour (or part thereof until vacant)
- A provision that failure to close by 1:00 pm constitutes a simple breach and entitles the vendor to liquidated damages in the amount of \$1,000
- A provision that failure to close by 1:00 pm constitutes a fundamental breach and entitles the vendor to rescind the transaction
- A provision that you are entitled to remain in the premises until 9:30 pm notwithstanding the actual time of closing

Amendments to the Standard Agreement

Right now, the standard form agreement says completion and possession are simultaneous. Why? No particular reason! Why not have two times, one for completion and one for possession? This could be undertaken easily. Just have a look at the provision that stated "unless otherwise provided. So, provide otherwise!

Another issue to consider, which appears not to have been raised in the litigation in either case is the timing of closing selected by the lawyers.

Traditionally, law firms just go about their own business and close the deals when it suits them. Now, if the vendor can stay until 6:00 pm without a problem, why would their own lawyer close at 1:00 pm, therefore placing their own client in technical breach of contract? At the very least, they should consult their client to determine when they will be out. Now, they probably need the closing funds for the vendor's purchase of another property, that's the problem. But, if that were not an issue, the vendor's lawyer should confirm in writing that "notwithstanding the earlier time of closing to suit the purchaser's convenience, possession will not be provided until the latest contractually agreed upon time, namely 6:00 pm.

If you are about to enter into an agreement to buy or sell residential property; consider agreeing both about: 1) the time for closing, and 2) the time for possession.

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