



## Beware: Time is of the Essence

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All dates in an agreement of purchase and sale must be honored. Otherwise, a party to an agreement will be able to claim that the agreement has been breached. More specifically, when a contract explicitly states in writing that "time is of the essence", though not necessarily in those exact words, both parties accept the fact that time is an essential element of the agreement and any violation in relation to the time provision will be a substantial reason for the non-breaching party to rescind the contract. The motivation of the innocent party to rescind the contract will likely not bear on the decision of the courts, so long as the innocent party did not interfere or cause delay with regards to the breach and did not act in bad faith.

A recent Ontario court of Appeal decision highlights the importance of contracting parties to recognize that when a contract states, "time is of the essence" it must be regarded as an essential element of the contract and that any violation of this stipulation will put the enforcement of the contract at a considerable risk.

In *1473587 Ontario Inc. v. Jackson* (2005) 74 O.R. (3d) 539 (Ont. S.C.J.), 1473587 Ontario Inc. and Loblaw Properties Limited (collectively, the "Vendor") agreed to sell property to Eleanor Jean Jackson and company (collectively, the "Purchaser") and entered into an agreement of purchase and sale. The agreement stipulated that "time in all respects shall be of the essence of this Agreement". Through no fault of the Vendor, the Purchaser inadvertently paid the deposit seven days after the five-day deadline. The Vendor then executed a new agreement with a second purchaser since property values had escalated and then alleged that the contract with the original Purchaser was void as an essential term was breached.

The Purchaser argued that the Vendor orally extended the time provision when an agent of the Vendor said, "OK" to the Purchaser's agent in response to the Vendor being informed that the cheque was on its way though late. However, the courts ruled that the waiver of the time provision required unanimous consensus between all vendors, required unambiguous expression and was required to be in writing, all of which were not present in the facts of this case.



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The outcome was that the Purchaser was deemed to have fundamentally breached the contract by reason of the late deposit. This entitled the Vendor to treat the contract as void and rescind the original offer. There is no evidence that the Vendor would have suffered any prejudice due to the late payment, however this had no bearing on the court's final decision to rule that the late payment of a deposit is a fundamental breach of contract when there is a provision that explicitly states, "time is of the essence". Further, attempts to extend the time provision will be held to a strict standard and would at the very least have to be in writing and unambiguous.

This Ontario case is clear in that a "time is of the essence" provision will be held to a strict standard and can have harsh consequences for a party who breaches any date under an agreement. As such, it is very important that when a contract is entered into that all dates be adhered to. If a specific date cannot be adhered to the respective parties must sign a written amendment to the contract. In the absence of a written amendment, the court will rule that the agreement has been breached and that all obligations thereunder are at an end.

*This article was prepared with the assistance of Rick Forno, law student, University of Ottawa, Faculty of Law.*