

Commercial Real Estate Law

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Time is of the Essence – Not Just Boilerplate

In *1473587 Ontario Inc. v. Jackson*, a recently reported decision, the Ontario Court of Appeal considered the expression “*time is of the essence*” that is commonly found in agreements of purchase and sale, and its effect on contractual obligations that call for performance within a specified time frame. The court concluded that the purchaser’s failure to deliver the deposit within the fixed period of time entitled the vendor to terminate the agreement, notwithstanding the fact that the purchaser was able to rectify the breach.

On September 18, 2003, the purchaser and the vendors signed an agreement for the purchase and sale of 12 acres of a 56 acre parcel of land owned jointly by the vendors. The vendors agreed to sell the land for \$150,000 per acre. As part of the agreement, the purchaser was required to pay a deposit of \$75,000 within five days of the execution of the agreement. The agreement explicitly stated that “*time in all respects shall be of the essence*”.

Through inadvertence on the purchaser’s side, the deposit that was due by September 23, 2003 was not paid until September 30, 2003, twelve days after the agreement was executed. The vendors took the position that the purchaser had breached an essential term of the agreement, bringing it to an end.

After advising the purchaser that the agreement was at an end, the vendors negotiated a new agreement with another purchaser who was interested in acquiring the

entire 56 acre parcel of land for \$125,000 per acre. Both purchasers sought summary judgment from the Superior Court of Ontario to enforce their respective purchase agreements.

The motions judge of the Superior Court of Ontario determined that the vendors had not waived the “*time is of the essence*” provision, and that the first purchaser’s failure to pay the deposit within the agreed upon time frame constituted a fundamental breach of an essential term of the agreement. Therefore, the vendors were entitled to terminate the agreement they entered into with the first purchaser.

The judge found the expression “*time is of the essence*”, in one form or another, to be a well understood and recognized term in respect of obligations pertaining to commercial agreements. By including such an expression in the agreement, the parties were giving a clear and precise indication that the breach of any obligation in the agreement that called for performance within a specified time frame was tantamount to a breach of a fundamental term of the contract. Any such breach may, at the non-breaching party’s discretion, have the effect of releasing that party from any further obligations under the agreement. Furthermore, the judge found that the first purchaser should have known with some reasonable degree of certainty that such a term would be enforced by the vendors.

On July 22, 2005, the Ontario Court of Appeal affirmed the decision of the Superior Court of Ontario. The Court of Appeal agreed that the phrase “*time in all respects shall be of the essence of this agreement*” was an essential term of the contract, and found the vendors’ actions to be reasonable in the circumstances.

The decision of the Ontario Court of Appeal should alert vendors and purchasers to the importance of a “*time is of the essence*” clause in any agreement of purchase and sale. The inclusion of such a clause will be considered to make any obligation that calls for performance at a specified time an essential term of the agreement, the

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breach of which may, absent any mitigating factors, at the option of the non-breaching party, bring the contract to an end.

Although the *1473587 Ontario Inc.* case dealt exclusively with the purchase and sale of real property, this decision may be relevant to other corporate transactions including the exercising of rights under an option agreement and the purchase and sale of regulated securities.

If you wish to discuss this decision and its potential implications, please contact any member of our Commercial Real Estate Group, including, any one of the following:

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