

# KEEPING CURRENT

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## Buyer failed to complete real estate transaction as required by time is of the essence clause (*Correa v. Valstar Homes*)

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Real estate purchase transactions generally require that the parties be in a position to complete their obligations by a set closing date. In many cases, the agreement between the parties may also specify a time on the closing day by which the transaction must be completed. If the agreement contains a clause stating that "time is of the essence" then even a short delay by a few minutes after the closing time may entitle the other party to terminate the transaction despite the harsh consequences.

Such a result was illustrated by the Ontario Superior Court of Justice decision in *Correa v. Valstar Homes (Oakville Sixth Line) Inc.*, [2024 ONSC 3616 \(CanLII\)](#).

The buyers in the case had entered into an Agreement of Purchase and Sale (APS) with Valstar Homes, a residential home builder and developer, for the purchase of a newly built home in Oakville, Ontario. The APS contained a "time is of the essence term" stating as follows:

Time shall be of the essence of this Agreement in all respects, and

any waiver, extension, abridgement or other modification of any time provisions shall not be effective unless made in writing and signed by the parties hereto or by their respective solicitors who are hereby expressly authorized in that regard.

The APS provided for a closing date of no later than 5:00 p.m. on January 27, 2021, subject to amendment by mutual agreement and/or as extended by Valstar pursuant to the terms of the APS. Schedule "A" to the APS permitted Valstar to extend the closing to a "firm closing date" which was eventually scheduled for April 20, 2021.

Valstar's letter to the buyers setting the April 20, 2021, closing date did not specify a time during the day by which the transaction had to be completed.

On the day of closing, the buyers ran into trouble securing the funds required to complete the purchase and their lawyer requested a one-day extension of the closing date.

That request was refused by Valstar, stating that the transaction had to be completed by no later than 5:00 p.m. as purportedly required by the APS.

The buyers were nevertheless able to arrange for alternate private financing and deposit the money required to close into their lawyer's bank account. Their lawyer wired the funds to Valstar's lawyer at 4:52 p.m. Unfortunately, the funds did not arrive in the account of Valstar's lawyer until 5:09 p.m. on the closing day.

The following day, April 21, 2021, Valstar took the position that the buyers had breached the "time is of the essence" term in the APS by failing to close on time and that the APS was at an end.

Valstar offered to revive the APS if the buyers paid an added \$100,000 plus \$13,000 HST, which it justified by claiming that the value of the property had increased by approximately \$600,000.00 since the APS had been signed.

The buyers agreed with Valstar's demand and closed the transaction, although they later claimed to have done so "under protest".

The buyers commenced proceedings against Valstar to recover the overpayment. The buyers claimed that they closed the transaction "under protest", although the letter from their counsel accepting Valstar's offer made no reference to a protest. It is not clear that this would have made any difference.

The buyers brought a motion for summary judgment against Valstar. They argued that Valstar acted in bad faith in refusing to close after receiving the closing funds nine minutes late and that the court should not strictly enforce the "time is of the essence" clause in the APS.

In response, Valstar argued that it was entirely within its rights to have relied on that clause. Valstar asked that the buyers' motion and action be dismissed.

The motion judge assessed whether or not the deadline was in fact 5:00 p.m. on the scheduled closing date. In that regard, the buyers argued that when Valstar set a firm closing date of April 20, 2021, they did not specify that the deadline was at 5:00 p.m.

To support its position, Valstar pointed to the terms of the APS which set out a timeframe for the delivery of funds and transfer of title on the closing date. Funds were to be delivered by 2:00 p.m., failing which one day's interest was to be added, and in any event by no later than 4:45 p.m. to allow for the closing by 5:00 p.m. Valstar argued that the subsequent correspondence which fixed the day for the closing did not alter these timelines.

The buyers relied on a recent Ontario Court of Appeal decision, *More v. 1362279 Ontario Ltd. (Seiko Homes)*, [2023 ONCA 527](#), where the buyers' funds failed to arrive before 5:00 p.m. due to administrative issues at their bank during the COVID-19 pandemic. At 5:11 p.m. the seller terminated the agreement and returned the purchase price less the deposit citing the "time is of the essence" clause. The Court of Appeal affirmed that the seller could not rely on the "time is of the essence" clause since the APS between the parties lacked an actual cut-off time for closing on the closing date.

In the motion judge's view, however, the APS at issue contained a coherent time frame for the provision of funds and closing which distinguished the circumstances from those in *More*. Valstar's solicitor was responsive and both conveyancing lawyers understood that the



time for closing was 5:00 p.m. Of note, the late delivery of the funds was not the fault of a bank's administrative errors or the pandemic.

Accordingly, Valstar was entitled to rely on cases which strictly upheld the time is of the essence deadline, including *Di Millo v. 2099232 Ontario Inc.*, [2018 ONCA 1051](#) and the recent case of *3 Gill Homes Inc. v. 5009796 Ontario Inc. (c.o.b. Kassar Homes)*, [2024 ONCA 6](#), at paragraph [24](#), where the buyer's closing funds were delivered only a few minutes past the deadline but the seller was nevertheless entitled to terminate the transaction despite the objectively harsh consequences to the buyer.

The motion judge therefore concluded that the "time is of the essence" clause applied and the transaction was terminated at 5:01 p.m. on April 20, 2021, due to the buyers' failure to deliver the closing funds. The motion and the action were accordingly [dismissed](#).

Ultimately, the policy behind upholding the strict deadline in the APS is to uphold the contractual bargain made by the parties. In a case where the seller was not at fault, and there were no extenuating circumstances beyond the buyers' control that they could point to, it would be unfair to the seller not to enforce the terms of the contract. If in fact the property had increased in value by \$600,000, as Valstar claimed, then the buyers were wise to complete the purchase by paying an additional \$100,000 since they acquired the asset for a considerable bargain in the current market conditions.

## Contact us

If you have a litigation matter and are in need of legal advice, please contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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