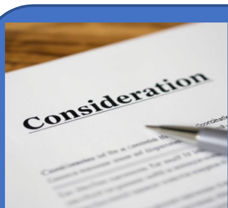
A Common Misunderstanding in Contract Law

A deposit is not the consideration in a contract; it is a demonstration of good faith and a form of assurance.

Two Court Cases for Reference



In *Marieiro v. Czyzycka*,[1] the buyer signed an agreement of purchase and sale to buy a property. She changed her mind and did not close the deal. She claimed there was no deal as she did not pay the deposit. The court ruled that a valid contract had been made, and she was required to pay for the damage caused. The buyer appealed, and the case was dismissed by the judge:

> *"The defendant points out that the defendant's failure to pay the deposit as required under both the original agreement and the amendment to the agreement should make the agreements null and void. As the contract was originally and subsequently with the amendment, under seal, albeit the usual printed seals, no further consideration would be required. In any case, it lies not with the appellant who defaulted under the agreement to now look for some advantage for that default. To conclude otherwise would suggest that the defendant was not acting with good faith in the matter."*

It seems that the judge erred in the law, although his ruling was correct. Even if the contract was not signed under seal, the agreement of purchase and sale had perfect consideration – the purchase price in exchange for the property.

1. 2003 ONSC DC 01-BN-11704

In *1473587 Ontario Inc. v. Jackson*,[2] the buyer entered into an agreement of purchase and sale, which provided that a deposit was to be paid within five days of acceptance of the agreement. However, the deposit was paid a few days later than stipulated. The agreement included a "time is of the essence" provision; the seller interpreted the buyer's failure to deliver the deposit on time as meaning the agreement had come to an end, and subsequently entered into an agreement to sell the property to another purchaser. The buyer sought specific performance.

The case was appealed to the Court of Appeal, and the judge ruled that

> *"When the Buyer, albeit through inadvertence, failed to pay the deposit cheque within the time specified, it breached a term which the parties had agreed was essential to the contract. That made it a fundamental breach entitling the Vendors to treat the contract as discharged and releasing them from their obligations under it."*

2. 2005 CanLII 4578 (ON S.C.), 2005 CanLII 26121 (ON C.A.)

- A deposit is not the consideration of a contract.
- A deposit is not an essential element of a contract.
- Failing to pay a deposit may not be a material breach of contract; it depends.
- An agreement of purchase and sale can be entered into without a deposit being made.

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