MEMORANDUM: Re Lecture - Property Conference
DATE: January, 1980
TOPIC: New House Construction: Time is of the essence - Is it?

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I. INTRODUCTION

The topic is necessarily interwoven to some degree with those of tender, warranty, mechanics' liens, and basic contractual remedies, among others. Thus it is necessary to consciously retreat from any direct confrontation of those matters onthe assumption that explanation is either not required or desired in those areas at this point, or the necessary interdependencies will appear from discussion of the contemperaneous submissions, into which areas I don't wish to tread at too detailed a level.

My research zeroes in basically only on the general rules regarding time of completion in purchase and sale contracts and their direct application to the situation involving an uncompleted building, and the practical consequences of the various alternative courses of action and remedies.

II. BASI: RULES

While at common law time was considered to be of the essence o~ a conract of purchase and sale, the equitable rulel is basically that the completon date is only as important as, the parties themselves deem to make it,2 which is really to say that such a stipulation in the contract can be ignored when such can :)e done without injustice to either party, but not when, for example, the parties expressly stipulate its essential y.3 In effect the presence of the clause removes the equitable jurisdiction, which only reattaches upon a waiver taking effect.4

Note should be taken, however, of the circumstantial exception:; to the rule. Time will be automatically regarded as of the essence, firstly, when the land involved is of a mercantile or speculative nature, from the point of view of usage or the particular transaction,5 and secondly, where such intention is clearly manifested at the time the contract is made on the basis of circumstances that a court of equity wi'11 take cognizance of.6

In cases where the equitable rule applies default in performance for a period of time considered "unreasonable" by

the court is a bar to relief.? Either party is entitled in such circumstances to fix and require a reasonable time for closing.8 What is "reasonable" depends entirely on the circumstances; generally, "the largest time that could be reasonably required for the performance of the acts which remained to be done".9 In effect, here, time is being made of the essence by one entitled to rescind at the set time by virtue of the other's default, and the notice is more a mater of evidence of conduct and caution than an absolute requirement.l0

The Court will not generally draw an inference from conduct and circumstances that the parties did not intend to enter the bargain expressly set out,ll and a plaintiff intending to prove lack of intent with regards a "time is of the essence" clause faces an almost impossible task, the fact that the clause is part of a standard printed form contract being immateria1.12 Unless he shows fraud, mistake or inadvertence going to the insertion of the clause, not merely to his default,13 further inquiries into the circumstances of making the contract are regarded as superfluous.14

Where a "time is of the essence" clause does exist, time is of the essence of the whole contract, not just the

offer and acceptance aspects, but, of course, such a result is not achieved where no definite time for completion is set out therein. 14. 1

Time can only be insisted upon as of the essence of

1 the agreement by a litigant who (1) has shown himself ready, willing and able to fulfill his agreement, (2) is not himself in default the cause of the delay, and (3) has not waived his right by subsequently recognizing the agreement as subsisting.1s Rescission will not be attributed to a plaintiff who has never (1) deprived himself of his ability to perform totally (2) communited to the defendant an intent to rescind or (3) insisted on full compliance with the contractual terms.16 He is not obligated to tender where the defendant has repudiated before the time for tender has arrived.17 When relying on the clause as a defendant he is not bound to give notice that he regards the contract as at an end, but merely not to so act so as to impliedly recognize its subsistence.l8 Thus;

"The stipulaton that time shall be of the essence of the agreement does not mean that, if either party fails to complete within the time specified, the agreement shall be at an end; if it had that meaning either party could escape his obligations by making default. What is does mean is that, if either party fails to do his part within the time specified, the other party may declare the agreement to be at an end, if he so desires. The party not in default has an option: he may elect to keep the agreement in force or he may elect to terminate it.19

The question is whether there has been a binding e,lection.20 In effect, default renders the contract voidable at the option of the innocent party, who, to obtain damages due to the breach, must so elect within a reasonable time.21

A party entitled to rely on a time stipulaton may **waive his right**, **whether** it arises from the original contract or is subsequently incorporated,22 though agreement to extend will not necessarily waive the requirement entirely if the expressed and/or notified intent is for the new date to be of the essence.23 This, of course, is an aspect of the entitlement to elect on default. One seeking to avoid his technical default on the time provision has the onus of showing express or implied waiver by the other party,24 but as long as there is not undue exploitation of the situation, the innocent party is not required to make his election immediately on default or to seek out the defaulter with his intentions.25 The right to set up the clause as a defence is waived by any act which involves or implies the continued existence cf the contract.26 The effect of a waiver is thus to deprive the innocent party of the right to set up the other's default as a defence to an action for specific performance, where the whole course of dealing would render such a defence inequitable.27

The agreement continues to exist for a reasonable time following upon the original failure.28

Perhaps what proves to be the most important aspect of the general law regarding the completion date for our purposes is the subject of extension. I have already canvassed the rules relating to when time ceases to be of the essence, and how an implied extension will be determined.29 Since it is rare that a court with regard time as of the essence of an extended agreement without an express statement to that effect,30 it may be rather important for reinstatement or renewal of the provision to be properly effected. The proper procedure and the reasons for it are outlined very concisely by LaMont, to wit:

"If for any reason the closing date is to be changed, you must first of all obtain your client's instructions to do so, and then you must confirm the extended datf- by letter to the other solicitor, specifying that all the other terms of the offer to purchase remain in full force and effect, that time is to remain of the essence, and that the adjustments shall be as f the extended date, or the original date for closing, whichever is applicable. Anything less than that procedure may result in your having to refer to reported cases to ascertain whether ycu have in fact extended the date for closing and whether time remains of the essence, or, i.ideed, your client may be faced with a lawsuit.

For the sake of a smooth-running practice and for the sake of the client, it is a solicitor's responsibility to endeavour to take all steps which will keep the real estate transaction away from the courts."33

It is worthy of note that a solicitor does not generally have authority to vary the contract to extend the time for closing without specific instructions from his client, and the doctrine of implied authority does not expiate the wisdom of insisting on proof of that authority where the other solicitor is unfamiliar to you or the property is especially valuable or important.34

Statute of Frauds enactments are very frequently raised as defences in litigation surrounding mattes of variance, waiver and extension. Generally a contract for the sale of land cannot be varied by parol agreement by either party.35 There can, however, be rescission by parol where an unconditional **dissolution** is evidenced as opposed to an intent to vary, or repudiation by parol if accepted or acquiesced in by the other party.36 Since waiver is a question of whether or not an election to keep the agreement in force has occurred, the enactment has no application to such action.37 An oral extension is regarded as an acqu.escence to delay, and not a variance, so equally the enactment again ;floes not apply.38

A condition as to completion is a condition precedent, which, if failure to fulfil it is not wa=.ved or

acquiesced in, may disentitle the defaulter to any equitable remedy.39 Depending on the wording and the status of the signatories it may be a "true condition precedent", and one's client may not be legally able to unilaterally waive it.40 Thus, though it is submitted that in most cases of construction situations the rule is inapplicable due to the condition's insertion solely for the benefit of the purchase,41 it may be important to provide an express right to waive the condition.42

III PRACTICAL CONSEQUENCES IN CASES OF HOUSES UNDER CONSTRUCTION

The drafting of contracts relating to the purchase and sale of houses under construction, or to be constructed, will already have been dealt with in some detail in an earlier session. Suffice to say the commoner situation will be that the lawyer is not retained in the matter until after these documents are signed, generally in rather vague form as to the condition of "completion". I propose to deal then with the topic of the essentiality of time stipulations from that perspective.

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It is only common sense that the same basic rules apply to building contracts and purchase and sale agreements pertaining to a partially constructed house as to any agreement with respect to the purchase of land.43 The owner or purchaser is entitled to have completion within the specified time, or a reasonable time, if no specific time exists.44 He is not obligated to grant an extension to a builder responsible for the delay, but delay due to conduct or requests of the purchaser disentitles his insistence on the original date, and, in effect, consstitutes a waiver.45 He may indeed be liable, in the latter situation, for damages to the contractor, who must nevertheless complete within the extended time or a reasonable time in the cirsumstances.46 The elections of the purchaser confronted with non-completion on the closing date extend to seeking damages, retaining holdbacks ,for deficiencies, rescission and extension as with any other cortract, however, for our purposes it is more important to examine the practical means of avoiding the problem in the first place, and most effectively asserting the client's rights.

The one major aberrative force in the law affecting this particular type of contract is, of course, a very highly developed doctrine of "substantial performance". While in most

unsophisticated situations the law will imply that entitlement to payment is dependent on full performance by the date stipulated, a contractor is nevertheless entitled to the proper value of **the work** he completed under a simple building contract as long as "substantial performance" exists; basically the agreed price less the amount required to finish or properly improve the work.47 Before the default is regarded as a repudiation the breach must go to the root of the contract; there must be an abandonment or failure to complete per se, as opposed to mere negligent lack of diligence.48 There is no question that because of the inherent vagueness of a term such as "completion" standing alone, the doctrine spills over fairly intact into the legal situation for the purchases of houses under construction.

Supposing, then, the situation where the purchaser arrives with his signed agreement; with the references to what conisitutes completion being fairly vague. The first thing to do is get a detailed indication of the items yet to be cbmpleted, and to provide the listing along with a firm indication that failure to complete on the assigned day will result in refusal to complete until satisfied, or a closing with substantial (say 200$ of the value of the deficiencies)

holdbacks to insure completion. Providing the requisite evidence of an intention to insist throughout on your strict legal rights is, of course, the object of the exercise.49

Periodically before closing, the preparation and forwarding of, hopefully, ever shorter detailed lists and demands that every effort be made to carry out the agreement can only strengthen your hand. The client should be urged to go through the house with the vendor to check on deficiencies the day before closing, and immediately before closing, so that an up to date list of deficiencies is available. This may not prevent war at the closing, but it will to some extent militate against any suggestion that you are suddenly being hard to get along with.

At this point you have your options open. Very few purchasers are in a practical position where they will be able to or desire to rescind the agreement, but the ability will exist so long as the delay is not either their fault or due to their apathy. You may decide to close with holdbacks for deficiencies, which requires a detailed list of uncompleted items acknowledged in writing by both sides. It should be made clear

to the purchaser that the holdback covers only the listed items, and any other deficiencies discovered will be subject to indepedent and unrelated recourse, especially in the case where you represent a vendor interested in the quickes_- possible aFcess to the funds. Undoubtedly some difference of opinion with regards to release of monies item by item or only upon full completion will appear; whatever is agreed upon should simply be made crystal clear.

Most purchasers are in the position of being compelled by circumstances to move in on the closing date, having so arranged their affairs, so the holdback procedure will not always be avoidable. Unforturately it is not as opportune **extending the closing** date for several reasons. Included as the main ones are (1) The holdback frequently en ?s up being compensation alone and the purchaser •.s forced with the difficulty and inconvenience of having someone e-.se finish the job, (2) Even the fairly thorough inspection may result - missing of legally "patent" defects, which become subject t- the doctrine of caveat empter, and the remedy ',rdamages is far from adequate if at law one has acquiesced in such a deficiency, as opposed to those regarded as "latent".50 Extension provides further opportunities for inspection .end remedial action.

The best policy to follow is to postpone the closing if **possible.** Though inconvenient in many cases, it can, as **noted earlier**, be done without prejudice to any substantive rights, if done properly. It is going to have a far more enervating effect on the contractor in most cases since no money is **available until** he performs,51 and the purchaser innocent of arty **default can set** off against the purchase price the cost of **mqving he and his** family into temporary accommodations, furniture storage, and so on, until the date of completion.52