Section G2

THE ESSENTIALITY OF TIME

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Ile are all familiar with Agreements of Purchase and Sale *which contain* a clause stipulating that time shall be of the essence. Since most agreements dealt with by solicitors in Nova Scotia are written up on the Nova Scotia Real Estate Association form we have become particularly **familiar with clause 10 of that** form which reads as follows:

> "Time shall in all respects be of the essence in the Agreement. In the event of a written Agreement of Extension, time shall continue to be of the essence."

What is being attempted with this paper is a synopsis of the meaning of such a clause and the effect that it has on various forms of conduct by the parties to the agreement.

Breach of a time clause allows the innocent party to the agreement to cancel or determine the contract and to resist its specific performance (1). Another way of looking at this is that the breach of a time clause makes the contract voidable, at the option of the innocent party, but not void (2). Therefore the innocent party in such a case is faced with a simple option: he may terminate the contract or he may treat it as continuing and binding on both parties.

As the date of closing of a transaction approaches we are often found in a situation where, for one reason or another, the deal will not close. There are 3 possible outcomes at this stage:

1. The party not in breach may treat the contract as having been rescinded and may seek damages from the court.

2. The party not in breach may waive the time clause and thereby continue with the other terms of the agreement.

3. Both parties may agree to a formal extension of a time for closing.

The only point worth making with regard to the innocent party terminating the contract is that it is because of the time being of the essence that he has such a right. If the agreement in question has no such clause expressly set out or the condition regarding time is no longer effective for whatever reason then a party wishing to repudiate must give a reasonable notice of his intention to do so (3), which gives the defaulting party another opportunity to complete.

No case law was found interpreting this particular clause. **Generally** speaking the case law in this area is, to say the least, confusing. We have a decision of the Nova Scotia Supreme Court Trial Division dealing with this point in the case of Wile v. Cook (7). The relevant facts of that case are that the parties agreed to an extension without any reference to whether time remained of the essence. Nathanson, J. looked to the intention of the parties; if the intention was for time to remain of the essence then the innocent party could insist on performance on the new closing date. on appeal the decision of the trial judge was reversed and it was impliedly held that time was of the essence on the extension. The Appeal Division held that the Vendor had the option to rescind the contract once the extension date had passed.

As a practitioner's guide it is recommended that any extension given should (8):

1. be specifically authorized by the client;

*2. be in writing and dated and for a stipulated period, e.g., a new date for closing;

3. be in language sufficiently plain and unambiguous to indicate that time is to remain of the essence;

4. provide, expressly, that time is of the essence of the extension of itself, i.e., with respect to the new date.

At the outset of this paper it was stated that breach of the time clause allows the innocent party the option of determining the contract and resisting specific performance. There are several modifications of this general statement which were noted in the trial decision of Wile v. Cook:

1. an innocent party who wishes to resist specific performance must himself be ready, willing and able to perform;

2. where neither party is ready, willing and able to close, i.e., where both are in breach, the contract continues in existence but without time being of the essence;

3. either party may reinstate time by serving a notice on the other party fixing a new date for closing and stating that time to be of the essence with respect to the new date. The date so fixed must be reasonable. (9)

That time is of the essence may be waived by a party either expressly or impliedly. The onus of proving that the clause has been waived is on the party so alleging (4). The most common example of an express waiver is an agreement to extend the date of closing which contains no stipulation as to time continuing to be of the essence. It may be argued **that such an extension** no longer occurs because of the wording of clause 10 of the Nova Scotia Real Estate **Association Agreement** of Purchase and Sale.

The conduct of a party seeking to invoke the benefit of a time clause will be looked at by the courts to determine whether the time clause has been impliedly waived. The type of conduct looked for is that which would indicate that the party is treating the contract as subsisting. Examples include acceptance of an overdue installment of purchase money, interest or any other benefit arising from the continuing existence of the contract.

More commonly the innocent party will be held to have impliedly waived the clause by continuing negotiations or discussions with the defaulting party in such a way as to recognize the continued existence and validity of the contract (5). Di Castri (6) at page 371 states that one may continue negotiations without waiving time by using an express "without prejudice" qualification.

One obvious example of an implied waiver is the innocent party making a claim for specific performance. That party's claim to have his rights strictly enforced is clearly inconsistent with a claim that the contract has been rescinded, and therefore he has waived his option to rescind. A further

` quote from Di Castri at page 371 serves to illustrate

two more subtle examples of implied waiver:

"...seeking an Order from the court for cancellation on the ground of the defendant's default, instead of asking for a Declaration as to the fact of a previous extra judicial cancellation, is a recognition of the existence of the contract. Likewise, an allegation by a vendor that the contract is void for uncertainty is inconsistent with his sending a cancellation notice in pursuance of a contractual provision therefore."

The solution commonly resorted to when a deal will not close on a date set for closing is for the parties to agree to an extension. The question becomes what happens to the time being of the essence? Given clause 10 of the Nova Scotia

i Real Estate Association form it may be that in most cases the

answer is clearly that time continues to be of **the essence**.

It should be noted, as mentioned earlier, that the Wile v. Cook decision was overturned on appeal. In a 2-1 decision the Appeal Division held that the Purchaser had filed a Statutory Declaration prior to the extended closing date which had the effect of making his election on whether to rescind or complete the contract conditional and thereby repudiated the contract. Stating that this was apparently overlooked by Trial Judge MacKeigan, C.J.N.S., held that this action by the Purchaser was in breach of the contract and that the Vendor was within his rights to treat the contract as rescinded. The writer submits that the Appeal Division did not reverse the law regarding time as stated by Nathanson, J. Obviously, however, the trial decision is no longer binding on our courts. (10)

As a parting comment it should be noted that, as with the topic of tender, the courts seem to look to the equities of the particular case and then tailor the rules to do justice. The trial decision in Wile v. Cook is a good example. Nathanson, J. stated that the normal rule regarding reinstatement of time and proceeded to find that neither party had served the required notice. He then excused the purchaser from this requirement by finding that "...it was entirely reasonable for the purchaser to insist upon a closing of the transaction on July 10, 1981." The reason that it was entirely reasonable is given at the end of the following paragraph:

"I can find nothing to criticize in the manner in which

(the Purchaser) conducted himself". ,j

1. Steedman v. Drinkle (1916), 9 W.W.R. 1146, 25 DLR 420.

2. Labelle v. O'Connor (1908), 15 O.L.R. 519 (C.A.) at p. 547.

3. Jwanczuk v. Center Square Development Ltd, 1967 1 O.R. 447, 61 D.L.R. (2d) 193.

4. Watts v. Strezas 1955 O.R. 615, 1955 4 D.L.R. 126.

5. Harris v. Robinson (1892) 21 S.C.R. 39.0.

6. Di Castri, Victor, The Law of Vendor and Purchaser. 2nd Ed. Toronto, Canada; The Carswell Company Limited, 1976.

7. (1983), 56 N.S.R. (2d) 711.

8. Di Castri at p. 370.

9. Some indication of how such a notice must be worded is found in Toronto General Trusts Corporation v. Smith (1972) 32 O.W.N. 26 at p. 28:

"Mere grumbling, however forcible, is not enough. The purchaser must, in express terms, or by necessary implication, say that unless the sale is complete by the day named the contract will be treated as abondoned."

10. Cook v. Wile, unreported, S.C.A. 01141.