



IN THE SUPREME COURT OF THE STATE OF DELAWARE

LEWES INVESTMENT COMPANY,
L.L.C.,

Plaintiff-Below, Appellant,

v.

THE ESTATE OF FRANCES B.
GRAVES, THE FRANCES B. GRAVES
REVOCABLE TRUST DATED JUNE
14, 2002, WILLIAM D. GRAVES, ANN
BAR STUBBS, MAHLON H. GRAVES,
AND DEAN M. GRAVES,

Defendants-Below, Appellees.

No. 156, 2013

APPEAL FROM THE COURT
OF CHANCERY OF THE STATE
OF DELAWARE

C.A. No.: 2893- VCG

APPELLANT'S OPENING BRIEF

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Dated: May 10, 2013

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NATURE AND STAGE OF THE PROCEEDINGS

In its April 12, 2007 Complaint, Lewes Investment Company (“Lewes Investment”) sought either contract damages or rescissory relief arising from a real estate deal that did not close. After three years, four rounds of briefing and a two-day trial on the merits, the Master found in favor of Lewes Investment, largely because the sellers (the “Graves”) were unable to convey good title on the date set for closing, despite having been notified of the title defect nearly two years earlier.

The Graves filed exceptions to the Master’s final report and, on February 12, 2013, the Court of Chancery rejected virtually every material finding made by the Master. The Vice Chancellor’s critical ruling – that time may not be declared to be of the essence by a party who, at the time of its declaration, was not ready to perform – was not briefed by the parties and was based on an incomplete review of the Court’s cited authority. A final order was entered on February 25, 2013.

Lewes Investment filed its notice of appeal on March 26, 2013. This is its Opening Brief. Without a reversal, the party who was unable to convey good title even after a reasonable extension of the date set for closing will achieve a windfall. Even if one accepts the Vice Chancellor’s factual findings (as we do for purposes of this appeal) the correct result would have been rescission, leaving each with that which it started – the Graves keeping their land and Lewes Investment keeping its cash deposits.

SUMMARY OF THE ARGUMENT

1. The Court of Chancery failed to apply the correct standard from which to determine whether time had been made of the essence by written notice from Lewes Investment's counsel. If, as Lewes Investment submits, the time for performance (August 24, 2006) was set by that notice, and assuming the correctness of the Court's conclusion that neither party was able to perform on that date, then rescission should have been granted. The result reached by the Court below creates a forfeiture of Lewes Investment's deposit monies and a windfall to the defaulting Graves, who ignored the undisputed title defect for nearly two years, despite written notice by Lewes Investment.

STATEMENT OF FACTS

Upon its review of the paper record, the Court below rejected nearly every conclusion reached after trial by the Master. For example, although it is undisputed that the contract in question was drafted by the Graves' lawyer and was circulated among prospective buyers on a "take it or leave it" basis, the Court below found that it was unfavorable to the Graves in two regards.

First, it seemed unfair to the Court that the buyer had a right to specific performance but the seller did not: "[t]he contract also provided the buyer – but not the seller – with a right to specific performance." Memorandum Opinion at p.3,¹ attached hereto as Exhibit A; *see also* Memorandum Opinion at p. 10 ("Lewes Investment – but not the Graves – also had the right to seek specific performance of the Agreement"). That, however, is universally true in Delaware; indeed, our courts have held that a real estate seller can rarely obtain specific performance. *See Pettinaro v. Gorland and Mann, Inc.*, 1978 WL 4483 (Del. Ch. April 11, 1978) (attached as Exhibit C).

Next, the Court below believed that the contract created an unfair imbalance between the risks facing the respective parties upon default. *See* Memorandum Opinion at pp. 2, 9, 18-19 ("[i]f the Graves were unable to clear title...the Graves

¹ Citations to the Vice Chancellor's February 12, 2013 opinion are cited herein as "[Memorandum Opinion] at [page number]." The February 25, 2013 final order is attached hereto as Exhibit B.

had to pay Lewes Investment \$1 million. Yet if the Graves did clear title by that date, and Lewes Investment refused to or was unable to perform under the Agreement, the Graves would have no recovery beyond the \$650,000 already paid to them"). Apparently, the Court failed to appreciate that, of the \$1 million that might be due from the Graves, \$800,000 came from Lewes Investment in the form of deposits and extension payments. The actual calculus is simple – if the seller breached, it would return buyer's cash and dig into its own pocket for reimbursement of buyer's out of pocket expenses (approximately \$130,000 in this case). Compared to seller's \$130,000 exposure, buyer faced the loss of its \$800,000 in cash plus its \$130,000 in expenses. That calculus hardly suggests an imbalance of risk favoring the buyer.

Lewes Investment believes that the Master's findings were correct. Lewes Investment understands, however, that this Court must give the same deference to the Vice Chancellor's findings as if he had sat at trial. *See DiGiacobbe v. Sestak*, 743 A.2d 180 (Del. 1999). But because Lewes Investment is entitled to rescissory damages even assuming the correctness of all the Vice Chancellor's factual findings, it need not attempt to clear that rather tall hurdle. Thus, Lewes Investment does not challenge any fact findings made by the Court below.

The Agreement. In an Agreement of Sale dated July 26, 2004 (the "Agreement"), the Graves and Ivy Partners III, L.L.C. ("Ivy Partners" – Lewes

Investment's predecessor in interest) agreed on the purchase and sale of approximately 88.4 acres (the "Property"), divided into two parcels: Parcel 176 and Parcel 177. *See* Agreement at A-18.²

The Agreement was drafted by the Graves' attorney, George B. Smith, Esquire, and no amendments to Mr. Smith's draft were permitted. *See* Trial Trans. Vol. I : 200-201 at A-362; and Trial Trans. Vol. II : 39 at A-432.³ Bids were submitted and Ivy Partners was selected. Memorandum Opinion at p.7.

The Agreement called for a closing within eighteen months of the effective date, but permitted the buyer to pay for a six-month extension. Agreement at ¶3, A-19. The buyer was given a 90-day feasibility period to conduct due diligence. *Id.* at ¶7, A-22. Two deposits were required: (1) an initial deposit of \$10,000 and (2) an additional deposit upon the expiration of the feasibility period that would bring the total deposit amount to 5% of the purchase price. *Id.* at ¶2(a), A-18. Both deposits were submitted timely by Ivy Partners; together they total \$650,000. Memorandum Opinion at p. 8-9.

Formal tender was waived by the parties in accordance with Section 15 of the Agreement: "[p]ossession is to be delivered by Seller to Purchaser at Closing.

² Citations to the Appendix to this Opening Brief are cited herein as "[A]-[appendix number]."

³ Citations to the transcript of the August 22-13, 2011 trial before the Master are cited herein as "[Trial Trans.] [Volume number] : [page number]."

Formal tender of an executed deed and purchase money is hereby waived.” Agreement at ¶15(c), A-26.

As one would expect, title was to be “good and marketable.” The Agreement required that Lewes Investment conduct an immediate review of the Graves’ title and serve notice of any defects. After such notice, silence by the Graves would signal their acceptance of a duty to remove any such defect in time for closing. *See* Agreement at ¶4(a) & (b), A-19.

Finally, the Agreement outlined remedies applicable in the event of default. If the Graves could not deliver “good and marketable” title, they were to return all deposits and reimburse Lewes Investment for “all of [its] out of pocket expenses” *Id.* at ¶14, A-25. If Lewes Investment defaulted, the Graves could retain the initial and additional deposits as liquidated damages. *Id.* at ¶13, A-25.

The Title Defect. A few days after the Agreement was executed, James J. Fuqua, Jr., Esquire, on behalf of the buyer, ordered a title commitment (the “Title Commitment”). Memorandum Opinion at p. 8, *see also* Trial Trans. Vol. I : 202-203, A-364. The Title Commitment revealed that the Graves did not own all of Parcel 176 – the smaller 3.32 acre parcel fronting on Route 9. *See* Title Commitment dated August 23, 2004 at A-34. As Mr. Fuqua explained in his August 23, 2004 letter, a 1/8th interest was missing. *See* Letter from James Fuqua

to George Smith dated August 23, 2004 at A-38. Having identified the defect, he advised that:

Obviously, this issue must be resolved in order for the Seller to be able to deliver good and marketable title. I suggest we meet at your convenience to review the title work.

Id., at A-38(a); *see also* Memorandum Opinion at p. 9. Neither the Graves nor their lawyer responded to that letter.

As the feasibility period was about to expire on or about October 24, 2004, Mr. Fuqua faxed a type-written note to the Graves' attorney, again explaining the title defect and requesting a short extension "in order to give us time to discuss and resolve the question." Memo from James Fuqua to George Smith at A-39. The response was a short e-mail from Mr. Smith, explaining that he was traveling out of the country and would not be able speak with his clients until after the conclusion of the feasibility period. E-mail from George Smith to James Fuqua dated October 21, 2004 at A-40. Smith said nothing about curing the title defect and, indeed, had done nothing about it.

Expecting that the Graves would resolve the title defect before closing, Lewes Investment made the Additional Deposit in the amount of \$640,000. Trial Trans. Vol. I : 215-216, at A-377; *see also* true and correct copies of the deposit checks attached to Letter from Greg Ivanoff to George Smith dated October 21,

2004 at A-41-42. Messrs. Fuqua and Smith met⁴ to discuss the title defect and Mr. Fuqua once again detailed the title deficiency. *See* Trial Trans. Vol. I : 216-218, A-378-380. Neither the Graves nor their counsel did anything to cure the title defect. *See generally* Trial Trans. Vol. II : 28, 136 (testimony of Mr. Smith and Mr. William Graves that Defendants and their counsel did not begin to address the title defect until late 2006), A-421, A-512.

Thereafter, Lewes Investment, working with the Delaware State Housing Authority, as well as its own consultants and engineers, prepared a land development plan for the Property. Memorandum Opinion at p. 10. During that time, Lewes Investment assumed the Graves had obtained (or were working to obtain) the missing 1/8th interest. *See* Trial Trans. Vol. I : 29-30, 32, 219-220 (Lewes Investment's counsel had his title searcher periodically check to see if title was finally cleared), A-222-223, A-225, A-381-382. That assumption proved incorrect.

On October 21, 2005, Lewes Investment exercised a six-month extension pursuant to paragraph 3(a) of the Agreement, establishing July 26, 2006 as the new date for closing. Memorandum Opinion at p. 10. That extension came at the price of \$150,000. *Id.*

⁴ The two counsel recalled the date of that meeting differently at trial, but the difference is immaterial.

Termination of the Agreement. As July 26, 2006 approached, the parties met to discuss the deal. *See e.g.* Trial Tran. Vol. I : 46, 221-223, A-239, A-383-385; *see also generally* Trial Trans. Vol. II : 11-12, A-404. A meeting was held on June 29, 2006, attended by Rick Stout on behalf of Lewes Investment, Mr. Smith and the Graves. *See* Memorandum Opinion at p. 11. The meeting was taped at the request of the Graves, and thus a transcript exists. *Id.*; *see also* Transcript of June 29, 2006 meeting between Ann Barr Stubbs, Dean Graves, Mahlon Graves, William Graves, Richard Stout, and George Smith at A-44 (the “Meeting Transcript”). During the meeting, Mr. Stout discussed various aspects of the Property development, explaining some of its practical difficulties. *See* Meeting Transcript, A-44. He suggested that an extension would be in both parties’ interests. *Id.* at pp. 126-128, A-168-170. The Graves responded with a demand for additional payments in return for any extension (even though they did not have good title to convey) and no extension was agreed upon. *See* Trial Trans. Vol. II : 51-55, A-444-448; *see also* Memorandum Opinion at p. 17 (“there was no formal tolling or extension arrangement agreed to by the parties.”). Thus, July 26, 2006 remained the operative closing date.

At the end of the meeting, Mr. Stout inquired about the status of the title defects. Meeting Transcript pp. 131-137, A-173-179. William Graves and Smith speculated that the problem would be easily resolved. *Id.* It is undisputed that no

steps had yet been taken, notwithstanding that the Graves' counsel had been aware of the title defect for nearly two years. *Id.* at p. 132, A-174; *see also* Graves' Complaint at A-196.⁵

Mr. Fuqua's office continued to work towards closing and checked whether the title issue had been resolved. *See* Trial Trans. Vol. I : 219-225, A-381-387. It had not. *Id.* Just prior to the anticipated closing date, Lewes Investment's agent wrote to Mr. Smith about the closing. Mr. Smith, who had not begun to resolve the title defect, asserted in response that Lewes Investment, rather than his client, was not prepared to close. *See* E-mail from George Smith to Matthew Brittingham dated July 21, 2006 at A-183. The agent responded by confirming that "[t]he Buyers are ready to settle. We are under the impression that there is a[n] issue with the Deed. Is that the case?" *Id.* Thus, with closing imminent, the Graves did not own all of the Property they promised to convey and, apparently, had not yet taken any steps to fix the problem.

On July 25, 2006, the day before the deadline for closing, Lewes Investment's Virginia counsel, Wayne Tatusko, Esquire, wrote to Mr. Smith and explained that, because the date for closing had arrived and the title defect had not yet been resolved, Lewes Investment was entitled to terminate the Agreement. *See*

⁵ The "Graves' Complaint" refers to the Complaint filed by the Graves against their former attorney, Mr. Smith, in the Superior Court of Delaware in and for New Castle County, C.A. No. 07C-07-234. The Master entered the Graves' Complaint as a court exhibit at trial. *See* Trial Trans. Vol. II : 129-130, A-506(a)-506(b).

Letter from Wayne Tatusko to George Smith dated July 25, 2006 (the “Notice Letter”) at A-184; *see* Memorandum Opinion at p. 18; *see also* Graves’ Complaint ¶¶ 20-21, A-196-197. Because time had not been made of the essence at the outset, with express provision in the Agreement, Mr. Tatusko offered an additional 30 days for the Graves to remedy the title defect. *See* Notice Letter, A-185. The Notice Letter advised that if neither closing nor a “mutually acceptable extension” could be concluded within the 30 days, Lewes Investment would be “left with no alternative” but to terminate the Agreement and seek remedy for breach. *Id.*

Mr. Smith responded to the Notice Letter a few days later, but had neither commenced steps to cure the title defect nor proposed a mutually acceptable extension to the Agreement. *See* Letter from George Smith to James Fuqua dated July 31, 2006 at A-187.⁶ At the end of the 30-day period, the Graves had still not secured the missing 1/8th interest. Therefore, in August 2006, with the 30-day adjournment for closing having expired, Mr. Tatusko sent a second letter, advising that the Agreement was terminated but expressing his client’s continuing interest in the Property. *See* Letter from Wayne Tatusko to George Smith dated August 28, 2006 at A-188. That letter was understood by the Graves to be a notice of termination. *See* Graves’ Complaint at ¶ 22, A-197 (in their lawsuit against their

⁶ Mr. Smith’s letter suggests that he had expected a “tolling agreement” from Mr. Fuqua, suggesting that Mr. Fuqua had promised such an agreement. All agree that no formal agreement was reached. At trial, Mr. Fuqua recalled no such promise and Mr. Smith confirmed. *See* Trial Trans. Vol. I : 225-226, A-387-388 and Trial Trans. Vol. II : 47-49, A-440-442.

former counsel in this action, the Graves acknowledge that “[o]n August 28, 2006, Purchaser [Lewes Investment], through it’s [sic] legal counsel, sent notice to [Mr. Smith] terminating it’s [sic] obligations under the agreement”).

The parties met in September 2006 to discuss whether a sale could yet occur, however, no agreement was struck. Seven months after the date set for closing and six months after the date set by Mr. Tatusko’s Notice Letter, the Graves secured the missing 1/8th interest. *See* Memorandum Opinion at p. 30; *see also* Letter from George Smith to James Fuqua dated February 12, 2007 at A-190. On April 2, 2007, the Graves’ new counsel wrote to demand that Lewes Investment perform under the original Agreement. *See* Letter from Craig Karsnitz, Esquire to Richard Stout dated April 2, 2007 at A-191. The letter provided Lewes Investment with 30 days in which to close. *Id.* Lewes Investment preferred, instead, the return of its deposit and, when that did not happen, this litigation commenced.

ARGUMENT

I. THE COURT BELOW ERRED BY FAILING TO APPLY THE CORRECT STANDARD TO DETERMINE WHETHER TIME WAS MADE OF THE ESSENCE OF THE AGREEMENT.

A. Question Presented: Did the Court of Chancery apply the correct standard to determine whether time was made of the essence? No.

The question whether time was made of the essence was addressed below.

See parties' briefing on Defendants' exceptions to the Master's Final Report at A-563 to A-567, A-593 to A-596, A-609 to A-610.

B. Standard of Review: The question presented is one of law, which this Court reviews *de novo*.

The success of Lewes Investment's appeal turns on whether the Vice Chancellor applied the correct legal test to determine whether time became of the essence of a contract. Questions of law are reviewed *de novo*. *Osborn v. Kemp*, 991 A.2d 1153 (Del. 2010); *Gotham Partners, L.P. v. Hallwood Realty Partners, L.P.*, 817 A.2d 160, 170 (Del. 2002) ("[t]his Court reviews *de novo* the Court of Chancery's interpretation of written agreements and Delaware law").

C. Merits of Argument: The law provides three tests by which time can be made of the essence of a contract that did not originally specify such; the Court below failed to analyze the facts of this case under the correct test.

The Vice Chancellor rejected the Master's conclusion that time was made of the essence by Tatusko's Notice Letter. *Compare* Memorandum Opinion at pp. 38-40 and Master's Final Report dated September 24, 2012 p. 20 at A-534 (the

“Master’s Final Report”). While the Court acknowledged that Lewes Investment had attempted to make time of the essence, it reasoned that Lewes Investment was not legally entitled to do so because (in its view of the record) Lewes Investment was, itself, not willing and able to close. Memorandum Opinion at pp. 39-40. Then, having found that time was *not* of the essence, the Vice Chancellor went on to decide whether the Graves’ more than six-month delay to cure title was reasonable. *Id.* at p. 47. In other words, a review of the Vice-Chancellor’s decision turns on whether he correctly held that Lewes Investment was legally unable to make time of the essence.

Where time is not expressly made of the essence by written contract, strict adherence to the temporal provisions of such contract is not required and, instead, parties may have a reasonable time in which to perform. *See Bryan v. Moore*, 863 A.2d 258, 261 (Del.Ch. 2004). However, even where the contract is silent on that point, a party may nevertheless make time of the essence “by express notice given, requiring the contract to be closed or rescinded at the stated time, which must be reasonable, according to the circumstances of the case.” *Tull v. Smith*, 50 A.2d 908, 910 (Del. Ch. 1946); *see also* 15 *Williston on Contracts* § 46:16 (time becomes of the essence where a party “inform[s] the other party that he or she will insist upon timely performance under the contract”).

In arguing to the Court below, the parties did not discuss the preconditions the law might impose on one who seeks to declare time of the essence. Thus, the Court below, considering the issue *sua sponte*, opined that the time for performance of a contract may be made of the essence either: (1) “by performance or tender of performance by one party and a demand of the other,” or (2) “by a demand by a party not in default who is ready to perform.” Memorandum Opinion at pp. 37-38 *quoting* 15 *Williston on Contracts* § 46:16. However, in the next breath, Professor Williston offers a third test or circumstance by which time may be made of the essence: “[time] may also be made of the essence by one of the parties fixing a reasonable time for the completion of the contract and giving notice to the other party of an intention to abandon the contract unless it is completed within the specified time.” 15 *Williston on Contracts* § 46:16. It is this third test, omitted from the Court’s analysis, which applies here.

The Vice Chancellor incorrectly applied only the second of Professor Williston’s three tests or circumstances in order to determine whether Tatustko’s Notice Letter was effective to make time of the essence, focusing its inquiry on whether and when Lewes Investment was ready and able to perform. That precondition should have been immaterial to the analysis. The third test requires no determination about the declaring party’s readiness or ability to perform in order to make time of the essence. Instead, the applicable test asks whether the

demand to close by a particular time was clear and whether fair notice was given to the non-declaring party that the contract would be abandoned if performance failed to occur within that given time. *See Wyatt v. Bergen*, 98 N.J. Eq. 502 (1924).

The difference between the applicable test and the one applied by the Court below makes sense. First, whether the declaring party is fully ready for closing at the time of the notice is and should be irrelevant. Why should a party be ready to close 30 days (in this case) before the date he set for closing? And why speculate at the time of his notice whether he *might* be ready to close at the appointed time? Both parties are fully protected by their respective remedies. If, after the time for closing is set by such a notice, one party is able to perform and the other not, then default has occurred. If neither is able to perform when the date for closing arrives, then rescission should be available to both. In either event, it should not matter under test three, according to Professor Williston, whether the declaring party was ready at the time of the demand.

The Court below did not question whether Lewes Investment made a demand for timely performance; indeed, it recognized that “Tatusko’s July 2006 letter [the Notice Letter] made a demand that the Graves clear title within thirty days.” Memorandum Opinion at p. 39. In their Complaint, the Graves said likewise. *See*, Graves’ Complaint at ¶ 20, A-196. The demand was clear as to the time extended and advised that Lewes Investment would be entitled to recovery for

breach of contract if clear title was not secured (and therefore closing held) or if the parties did not agree to a mutually-acceptable extension. Put another way, Lewes Investment notified the Graves that it intended to abandon the Agreement if closing did not occur in 30 days' time or if no extension to the Agreement was agreed to within the 30-day window.

The only appropriate qualifier to Williston's third test of such notice is that the time fixed by the declaring party be "reasonable." This requirement limits the focus of any inquiry about reasonableness to the adequacy and sufficiency of the period of time *set by the declaring party* – here, the 30-day extension provided by Lewes Investment. As one would expect, the determination of reasonableness turns on the "character of performance and the circumstances." 15 *Williston on Contracts* § 46:16.

If one asks whether the 30-day period provided by Lewes Investment was reasonable, the answer is undisputed in this case: "yes." The findings of the Vice Chancellor below do not conflict with this conclusion. Indeed, he recognized that title could have been cleared in that amount of time. *See* Memorandum Opinion at p. 46 at fn. 179. The Graves themselves admit that the title defect was "easily correctable,"⁷ and at trial their own expert witness testified that the title defect

⁷ Graves' Opening Brief in support of their Exceptions to the Master's Final Report at p. 32, A-573. The Graves admit that "the title problem could have been resolved in a number of ways," and yet they try to avoid the consequences of their failure to do so timely. *Id.*

could easily have been cured within 30 days. *See* Trial Trans. Vol. II : 84-90, A-471-477. Thus, there was no hardship or prejudice to the Graves.

While not quarreling whether 30 days was reasonable, the Vice Chancellor held that 30 days was not “the outer limit to a reasonable time for the Graves’ performance.” Memorandum Opinion at p. 45. That holding is both true and immaterial. Under test three, the only inquiry is whether the time *fixed by Lewes Investment* was reasonable. The analysis, therefore, does not examine the reasonableness of the Graves’ six-month delay. Rather, the test of reasonableness is limited to what was affixed in the demand notice and simply asks whether that period of time was reasonable. The Master found that it was,⁸ and the Vice Chancellor did not disagree.

Moreover, the test of reasonableness should be applied to the circumstances known at the time. The Graves’s cure of their title defect in February 2007 could not have been anticipated by Lewes Investment. Indeed, in response to Tatusko’s Notice Letter, the Graves said nothing about when good title might be achieved. In truth, they had no idea because their efforts to cure had not begun. Yet, the Vice Chancellor’s decision presumes that Lewes Investment should have waited for what turned out to be another six months. The Graves never – not in June, not in July and not in August 2006, said to Lewes Investment, “please wait for 6 months,

⁸ *See* Master’s Final Report at p. 20, A-534.

we will have cured our title defect by then.” It is inequitable *now* to say that Lewes Investment should have waited for what was, at the time, an indeterminate period for the Graves to solve a problem that they had known about for years.

D. If Lewes Investment is correct that the time for performance was the date specified in the Notice Letter, and accepting the Vice Chancellor’s conclusion that neither party was able to perform at that time, then rescission is the correct result.

The Vice Chancellor recognized that notice of a demand for timely performance by one party binds both the declaring party and the party upon whom it is served. Memorandum Opinion at p. 39. *See 15 Williston on Contracts* § 46:16 (a demand to close, “binds not only the party upon whom it is served, but also the party serving it”); *see also Wyatt v. Bergen*, 2 N.J.Eq. at 505-07. By demanding that closing occur in August 2006, Lewes Investment set the deadline for both parties to perform. And failure to perform at that time should have had “the same effect as if the time had been originally stated in the contract and made of the essence.” *15 Williston on Contracts* § 46:16.

Where time is of the essence of a contract and a party fails to perform, it is a material breach of the contract. *See Hifn, Inc. v. Intel Corp.*, 2007 WL 2801393, at *9 (Del. Ch. May 2, 2007) (“[w]hen time is of the essence in a contract, a failure to perform by the time stated is a material breach of the contract”) (attached as Exhibit D). In our case, assuming the Vice Chancellor correctly found that both

the Graves and Lewes Investment were unable to perform at the end of the 30-day period, then *both parties* were in material breach of the contract. Neither can recover against the other for their respective defaults. See 15 *Williston on Contracts* § 47:2. Therefore, the Graves are not entitled to seek remedies under Paragraph 13 of the Agreement and Lewes Investment is barred from its remedies under Paragraph 14.

The inability of either party to hold the other in default did not mean that the Agreement drifted on after August 2006 until one of the parties was ready to perform. A bilateral failure to perform does not serve to continue the life of the contract — it ends it. The inability of either party to perform,

[d]oes not leave the contract open for an indefinite period so that either party can tender performance at his leisure. The failure of both parties to perform concurrent conditions during the time for performance results in a discharge of both parties' duty to perform. Thus, where the parties have made time of the essence of the contract, at the expiration of time without tender by either party, both parties are discharged.

Pittman v. Canham, 2 Cal. App. 4th 556 (2nd Dist. 1992); see also 77 Am. Jur. § 75 (“where the original contract does not make time of the essence but the vendors subsequently do make time of the essence and demand closing by a particular date, and where such date passes without closing or extension, the contract is deemed to be at an end”).

Because the contract ended by failure of both parties, the Graves should not now recover pursuant to Paragraph 13 of the Agreement (which would otherwise allow them to retain the initial and additional deposits as liquidated damages). In such cases, equity requires rescission; the restoration of the parties to their original positions. *See Salem v. Maise*, 449 So. 2d 121 (La.Ct.App. 1984). If otherwise, the Graves would be allowed to pocket a \$800,000 windfall despite being unable to perform timely themselves.

In *Salem*, the Court recognized that “where the agreement to purchase and sell expired with neither party taking the necessary steps to enforce it, all parties were entitled to be restored to their original positions.” *Id.* Such is the case here. Because both the Graves and Lewes Investment are (in the view of the Court below, which is not challenged here) in default of their contractual obligation to close timely, the granting of rescission in favor of Lewes Investment is necessary to avoid what would otherwise be an inequitable forfeiture of the deposit and extension monies. Equity, therefore, requires that Lewes Investment be returned its deposit monies in the amount of \$650,000 and extension monies in the amount of \$150,000.

CONCLUSION

The Court below failed to consider the applicability of the third test for making time of the essence. Under the third test, the July 25, 2006 Notice Letter properly made time of the essence of the Agreement. The Court below erred in concluding that the Agreement continued past the 30 days set forth in the Notice Letter. Instead, because both parties failed to perform timely, the contract terminated with both in breach. Equity requires that the parties be restored to their pre-Agreement positions. The Graves must return the deposit and extension monies, totaling \$800,000, that were remitted in accordance with the Agreement by Lewes Investment. If the Graves are permitted to retain the deposit and extension monies, then inequitable forfeiture would result whereby the Graves would profit despite being in material breach of the Agreement.

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