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PUTTING TOGETHER THE PUZZLE OF TIME OF THE ESSENCE

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In the law of contract, the concept of time of the essence takes shape out of a variety of doctrines and topics. Waiver, election, penalties, specific performance, equitable relief from forfeiture, restitution, the nature of a deposit, statutory provisions, the theory of contract terms, and the fusion of equity and the common law are some of the doctrines and topics involved. In addition, case law provides special rules for the interpretation and application of time of the essence. The purposes of this article are to examine and describe these various parts of time of the essence to create a synthesis or understanding of this complex topic.

Dans le droit des contrats le concept du temps comme élément essentiel du contrat est le produit de diverses doctrines et divers sujets parmi lesquels on peut inclure: la renonciation, l'élection, les pénalités, l'exécution en nature, le redressement en "equity" dans le cas d'une déchéance, la restitution, la nature d'un dépôt, les dispositions de la loi, la théorie des termes du contrat et la fusion de la "common law" et de "l'equity". De plus la jurisprudence apporte d'autres règles pour l'interprétation et l'application de ce concept de temps comme élément essentiel. L'auteur s'est donné pour but dans cet article d'examiner et de décrire le temps comme élément essentiel sous ses différents aspects afin d'en faire la synthèse et d'aider à la compréhension de ce sujet complexe.

Introduction

The law of time of the essence presents conflicting authorities and ancient case law to be revisited and explained in a modern context. There have been advances and reversals in the jurisprudence and some unasked and unanswered questions. Waiver, election, penalties, specific performance, equitable relief, restitution, the nature of a deposit, statutory provisions, the classification of contract terms, and the fusion of equity and the common law are some of the issues involved.

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The goal of this article is to examine the pieces, and then put together and solve the puzzle of time of the essence. To do this, the discussion will begin with an analysis of the effect and the theory behind time being or not being of the essence. Then, the issue of when time is of the essence will be considered. Next, there will be a discussion of how to avoid or alter the effects of time being of the essence. This will involve a discussion of relief from forfeiture and penalties. The article will end with a summary putting all the pieces together.

I. The Effect of Time Being or Not Being of the Essence

A contract may specify a date or deadline for the performance of an obligation or for the exercise of a contract right. As an example of a time limit for the performance of an obligation, a contract for the sale of property might provide that the conveyance take place on or before a specified date. As an example of a time limit for the exercise of a right, a long term lease might allow periodic rent review if the landlord gives notice at a defined time during the term. Or, a tenant may have an option to purchase the leased premises or have a right to renew the lease if notice is given within a stipulated time. The purpose of the discussion in this part of the article is to identify the effect and the theory of time being or not being of the essence for these dates or deadlines.

Beginning with the theoretical framework, time of the essence may be placed within the general theory of contract law that gives effect to contract terms according to their classification. In the classic analysis, contractual terms are classified as warranties or conditions.¹ For the breach of a warranty, the injured party may claim damages, but is not discharged from its own contractual obligations.² For the breach of a condition, the injured party is entitled to be discharged from further performance and to claim damages. The injured party may alternatively keep the contract alive and, if necessary, sue for specific performance, in which case its own obligations must be performed. In other words, the injured party may elect to treat the breach of condition as a breach of warranty. Closely related to a breach of condition is the concept of repudiation where a party expressly or by conduct indicates that it will no longer honour the terms of the agreement.³ The legal consequences of repudiation are the same as those for breach of a condition.

¹ See A.G. Guest *et al.* (eds.), *Chitty on Contracts* (26th ed., 1989), para. 787, 764; M.P. Furmston (ed.), *Cheshire and Fifoot's Law of Contract* (11th ed., 1986), pp. 140-149; G.H.L. Fridman, *The Law of Contract in Canada* (2nd ed., 1986), pp. 462-470; D.W. Grieg, *Condition—or Warranty* (1973), 89 *Law Q. Rev.* 93.

² *Jorian Properties Ltd. v. Zellenrath* (1984), 10 D.L.R. (4th) 458, 46 O.R. (3d) 775 (Ont. C.A.); *Bentsen v. Taylor, Sons & Co.*, [1893] 2 Q.B. 274 (C.A.); *Field v. Zien*, [1963] S.C.R. 632, (1963), 42 D.L.R. (2d) 708.

³ *Mersey Steel and Iron Co. v. Naylor, Benzon & Co.* (1884), 9 App. Cas. 434 (H.L.); *Mayson v. Clouet*, [1924] A.C. 980 (P.C.); *Heyman v. Darwins Ltd.*, [1942] A.C. 356,

In a refinement of the classic analysis, contract terms may also be classified as "intermediate". An intermediate term is an obligation, which, if breached, may have consequences ranging from the trivial to a total destruction of the contract bargain. For example, in the leading case of *Hongkong Fir Shipping Co. Ltd. v. Kawasaki Kisen Kaisha Ltd.*,⁴ a shipowner's obligation to provide a seaworthy vessel under a charterparty was classified as an intermediate term. Depending on the gravity of the breach, an intermediate term will be treated as a condition or a warranty.⁵

This general theory that classifies contract terms was used by Lords Diplock and Simon in the important English case of *United Scientific Holdings Ltd. v. Burnley Borough Council*⁶ to explain the effect of time of the essence. This case was one of two appeals heard together by the House of Lords. The other case was *Cheapside Land Development Co. Ltd. v. Messels Service Co.*⁷ In each case, the parties were landlord and tenant under long term leases that provided for periodic rent review. In the *United Scientific* case, the lease was for ninety-nine years. In the *Cheapside* case, the lease was for twenty-one years. In both cases, the landlord failed within the specified time period to implement the procedure for rent review. Although the leases did not expressly stipulate, the English Court of Appeal (a different panel for each case)⁸ concluded that time was of the essence; that is, time was strictly enforced and the landlords had lost their right to a rent review. The House of Lords, however, concluded that time was not of the essence and allowed the landlords to proceed with the rent review.

In his judgment, Lord Diplock pointed out that up to the Judicature Act of 1873, in equity time was not of the essence unless:⁹

... the express words of the contract, the nature of its subject matter or the surrounding circumstances made it inequitable not to treat the failure to comply exactly with the stipulation as relieving the other party from the duty to perform his obligations under the contract.

[1942] 1 All E.R. 337 (P.C.); *Piggot Const. Co. v. W.J. Crowe Ltd.* (1961), 27 D.L.R. (2d) 258, [1961] O.R. 305 (Ont. C.A.), aff'd, [1963] S.C.R. 238, (1963), 38 D.L.R. (2d) 9; *Netupsky v. Hamilton*, [1970] S.C.R. 203, (1969), 8 D.L.R. (3d) 351; D.M. McRae, *Repudiation of Contracts in Canadian law* (1978), 56 Can. Bar Rev. 233.

⁴ [1962] 2 Q.B. 26, [1962] 1 All E.R. 474 (C.A.).

⁵ *Cehave N.V. v. Bremer Handelsgesellschaft mbH*, [1976] Q.B. 44, [1975] 3 All E.R. 739 (C.A.); *L. Schuler A.G. v. Wickman Machine Tool Sales Ltd.*, [1974] A.C. 235, [1973] 2 All E.R. 39 (H.L.); A.C. Hutchinson and J.N. Wakefield, *Contracts—Innominate Terms: Contractual Encounters of the Third Kind* (1982), 60 Can. Bar Rev. 335.

⁶ [1978] A.C. 904, [1977] 2 All E.R. 62 (H.L.).

⁷ *Ibid.*

⁸ Buckley, Roskill and Browne L.J.J. in the *United Scientific* case, [1976] Ch. 128, [1976] 2 All E.R. 220 (C.A.), and Stamp, Scarman and Goff L.J.J. in the *Cheapside* case, unreported, May 21, 1976.

⁹ *Supra*, footnote 6, at pp. 927 (A.C.), 70 (All E.R.).

Stated positively, the rule in equity was that time was of the essence if it was equitable to treat one party's failure to perform on time as discharging the innocent party from his or her obligations. Contemporaneously, said Lord Diplock, the common law was establishing a similar rule. Under the common law, the theory developed that the breach of only certain terms discharged the other side from performance. These significant terms were conditions, that is terms, a breach of which would deprive the innocent party of substantially the whole intended benefit of the contract. Applying this theory to stipulations as to time, under the common law, a party was obliged to perform his or her obligations unless the other side's failure to perform on time was serious enough to discharge the agreement. In the *United Scientific* case, the landlord's failure to give timely notice was not serious enough to discharge the tenant of its obligation to submit to a rent review.

Lord Simon noted that discussions about time stipulations generally turned on the distinction between time being or not being of the essence, but suggested that in light of the analysis used in the *Hong Kong Fir Shipping Co.* case, it was now possible to use a more sophisticated analysis. He stated:¹⁰

The law may well come to inquire whether a contractual stipulation as to time is (a) so fundamental to the efficacy of the contract that any breach discharges the other party from his contractual obligations ("essence"), or (b) such that a serious breach discharges the other party, a less serious breach giving a right to damages (if any) (or interest) or (c) such that no breach does more than give a right to damages (if any) (or interest) ("non-essential").

Thus, Lord Simon described a stipulation where time was of the essence as being either a condition or an intermediate term, and, as already noted, Lord Diplock described such a stipulation as having the effect of a condition.

In the Ontario case of *Lyall Construction Co. v. Maguire Contracting Co.*,¹¹ Wright J. defined a time of the essence stipulation as if it were classified as a condition, stating:

Where the parties have expressly agreed that time shall be of the essence, they must both be deemed to have contracted that in case one of them makes default in any substantial term of the contract to be performed by him within the time specified, the other is released from his obligations under the contract.

In *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana*,¹² a charterparty case, the charterer inadvertently missed a payment, and four days later the owners exercised the contract's withdrawal clause. In an unanimous judgment written by Lord Diplock, the House of Lords concluded that in a charterparty, where there is no transfer of ownership of the vessel, the timely payment of the monthly hire charge is of the

¹⁰ *Ibid.*, at pp. 945 (A.C.), 84 (All E.R.).

¹¹ (1923), 25 O.W.N. 151, at p. 153 (Ont. H.C.), app. allowed (1923), 25 O.W.N. 196, 254 (Ont. C.A.).

¹² [1983] 2 A.C. 694, [1983] 2 All E.R. 763 (H.L.).

essence. In reaching this conclusion, Lord Diplock again used the idea that time of the essence doctrine could be explained by the theory of the classification of contract terms. He stated:¹³

When time is made of the essence of a primary obligation, failure to perform it punctually is a breach of a condition of the contract which entitles the party not in breach to elect to treat the breach as putting an end to all primary obligations under the contract that have not already been performed.

In *Bunge Corpn. v. Tradax S.A.*,¹⁴ the House of Lords reduced the likelihood that in a commercial context a time stipulation will be classified as an intermediate term. Under a contract for the sale of soya bean meal, the buyer was obliged within a defined period to give fifteen days' notice of the probable readiness of a vessel for delivery. The contract did not specify that time was of the essence. The full notice period, however, was important so that the sellers could exercise their contractual right to select a loading port and ensure the availability of the bean meal at that port. The buyer's notice came late and the sellers treated this as grounds for terminating the contract and claiming damages. The House of Lords concluded that the seller could terminate and thus the court treated the buyer's obligation to give timely advance notice as a condition of the contract.

The court rejected the buyer's argument that the notice stipulation should be classified as an intermediate term. In particular, the Law Lords rejected the argument that the classification of a contract term could be determined with hindsight. Rather, a term was intermediate where the parties had not specified the consequences of its breach and the parties could be taken at the outset to have agreed that the effect of the clause would depend on the consequences of its breach. Generally speaking, however, in a commercial context, a time stipulation would be treated as a condition. Lord Roskill stated:¹⁵

... the need for certainty in mercantile contracts is often of great importance and sometimes may well be a determining factor in deciding the true construction of a particular term in such a contract.

And Lord Lowry stated:¹⁶

The second general point which I desire to mention concerns stipulations as to time in mercantile contracts, in regard to which it has been said that, broadly speaking, time will be considered to be of the essence. To treat time limits thus means treating them as conditions. ...

Lord Wilberforce agreed that, generally speaking, time was of the essence of mercantile contracts. He stated that for a time stipulation, there could only be one kind of breach, namely, to be late. To classify the time classification, two questions had to be asked. First, have the parties expressly

¹³ *Ibid.*, at pp. 703 (A.C.), 768 (All E.R.).

¹⁴ [1981] 1 W.L.R. 711, [1981] 2 All E.R. 513 (H.L.).

¹⁵ *Ibid.*, at pp. 729 (W.L.R.), 553 (All E.R.).

¹⁶ *Ibid.*, at pp. 719 (W.L.R.), 544-545 (All E.R.).

indicated the effect to be given the stipulation. Second "in the absence of expressed agreement, what consequences ought to be attached to it having regard to the contract as a whole".¹⁷

The judgments in *Bunge Corpn.* do not absolutely preclude a time stipulation being characterized as an intermediate term. However, they indicate that this classification is unlikely in a commercial context where a time stipulation will generally be of the essence. The attitude of the Law Lords was that the wait and see aspects of an intermediate classification were inappropriate in the mercantile context where contracting parties require certainty and predictability to govern their commercial affairs. In particular, the parties need to know with certainty if they are committed to their bargain or are free to return to the market place.

In *Raineri v. Miles*,¹⁸ the House of Lords demonstrated how a stipulation as to time could operate as a warranty. The plaintiff, Raineri, sold his home in anticipation of purchasing the home of the defendants, Miles. The Miles purchased a new home from the third parties, the Wiejskis, who were also purchasing a new home. All four transactions were scheduled to close on the same day. Time was not of the essence. Rather, each contract provided that if the transaction did not close on the specified date, then the purchaser could make time of the essence by serving a notice for a closing within twenty-eight days. The Wiejskis, because of temporary difficulties with financing, were unable to complete their own purchase at the specified time. Accordingly, they did not close with the Miles, who in turn did not close with Raineri. But, Raineri's sale did close, and he was left without accommodation for his family. After the abortive closings, the Miles served the Wiejskis with a notice making time of the essence, and the transactions closed within time. Raineri successfully sued the Miles for damages caused by the failure to close on the original date, and the Miles brought third party proceedings claiming an indemnity. The Wiejskis defended by arguing that where time is not of the essence, the intervention of equity's jurisdiction meant that a stipulation as to time was interpreted as at the specified time or a reasonable time thereafter, and accordingly, there had been no breach.

The Wiejskis' argument was rejected and they were found liable, Viscount Dilhorne dissenting. The correct theory was that outlined in the leading case of *Stickney v. Keeble*.¹⁹ Where time was not of the essence, equity might allow specific performance despite a failure to perform on time. This, however, did not mean that the contract had not been breached, but only that the breach was of a warranty. The innocent party was not discharged and was thus subject to specific performance but could claim damages.

¹⁷ *Ibid.*, at pp. 715 (W.L.R.), 541 (All E.R.).

¹⁸ [1981] A.C. 1050 (C.A. and H.L.), [1980] 2 All E.R. 145 (H.L.).

¹⁹ [1915] A.C. 386 (H.L.).

The erroneous argument in *Raineri* illustrates a common misunderstanding about time of the essence under the common law and in equity. The misunderstanding is that time of the essence is given a different effect in law and in equity. The correct view is rather that equity and the common law differ only about when time is of the essence. If, however, time is of the essence, then the result is not different under the common law or in equity.²⁰

The issue of time of the essence under the common law and equity was central to *Stickney v. Keeble*. In this case, the purchaser, Stickney, was one of twenty-three purchasers who had agreed to purchase land out of an assembly. The assembly and sale was complicated by the need to appoint trustees under the Settled Lands Act and by the involvement of mortgagees. Stickney, who was a farmer, made it clear to the vendors that he urgently needed the land. The agreement provided for a closing on October 11, 1911. That date passed, although Stickney was ready to close. He then twice demanded and waived new closing dates. Finally on January 30, 1912, Stickney put the vendors on notice that if there was not a closing on February 13, 1912, he would treat the transaction as at an end. On February 10th, the vendors responded that they would close on February 23rd. Stickney held firm and successfully sued for the return of his deposit.

In the House of Lords, the issue was whether time was of the essence. If time was of the essence, then the vendors had breached the agreement, and Stickney was entitled to the return of his deposit. Earl Loreburn and Lords Parker, Parmoor, Mersey and Atkinson all agreed that time was made of the essence by Stickney's notice which was reasonable in the circumstances. Lord Parker stated that in a contract for the sale of land, the common law treated the time fixed for the completion as essential. About the situation in equity, Lord Parker stated:²¹

Where it [equity] could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, and as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure.

This is all that is meant by and involved in the maxim that in equity the time fixed for completion is not of the essence of the contract, but this maxim never had any application to cases in which the stipulation as to time could not be disregarded without injustice to the parties, when for example, the parties for reasons best known to themselves, had stipulated that the time fixed should be essential, or where there was something in the nature of the property or the surrounding circumstances which would render it inequitable to treat it as a non-essential term of the contract.

²⁰ As examples of time of the essence in operation, see *Walton v. Morris*, [1944] O.W.N. 410 (Ont. H.C.); *Stubbs v. Downey* (1957), 8 D.L.R. (2d) 720, [1957] O.W.N. 330 (Ont. C.A.); *Fong v. Weinper* (1973), 35 D.L.R. (2d) 244, [1973] 2 O.R. 760 (Ont. H.C.).

²¹ *Stickney v. Keeble*, *supra*, footnote 19, at pp. 415-416.

It may be noted that in Lord Parker's analysis, equity did not interfere to restrain proceedings at law if the circumstances were such that time should be treated as of the essence. The difference between law and equity was in defining the circumstances when time was of the essence. At law, time was usually of the essence, while in equity, time was of the essence only expressly, by reason of the nature of the property or circumstances or by reasonable notice.

The issue of time of the essence under the common law and in equity was also a central matter in the *United Scientific* case. The Law Lords, in particular Lords Diplock and Simon, stated that in light of the 1873 Judicature Act that fused the common law and equity it was no longer meaningful to perpetuate a dichotomy between the rules of equity and the common law. In equity, said Lord Simon, the position was that time was held to be of the essence only in cases of direct stipulation or necessary implication. Section 25(7) of the Judicature Act (in England, later replaced by section 41 of the Law of Property Act, 1925) directed that contractual stipulations as to time should be construed in accordance with the equitable rule. The end result is that the equitable rule now governs as to the circumstances when time is of the essence. If, however, time is of the essence, the result is the same under the common law or equity.

II. When Time Is Of The Essence

In Canada and England, legislation directs that contractual stipulations as to time are not to be deemed of the essence unless they would be so construed by a court of equity. This legislation is successor to the Judicature Act that brought law and equity into one court jurisdiction.²²

Applying equity's approach to time of the essence, the first general rule is that the parties may make time of the essence by express stipulation. As noted by Lord Parker in the passages cited above, the parties may do this "for reasons best known to themselves". In *Scandinavian Trading Tanker Co. AB v. Flota Petrolera Ecuatoriana*,²³ Lord Diplock stated:

Prima facie parties to a commercial contract bargaining on equal terms can make "time to be of the essence" of the performance of any primary obligation under the contract that they please, whether the obligation be to pay a sum of money or to do something else.

²² See now, in England, the Law of Property Act, 1925, s. 41; in Ontario, Mercantile Law Amendment Act, R.S.O. 1980, c. 265, s. 15; in British Columbia, the Law and Equity Act, R.S.B.C. 1979, c. 224, s. 27; in Alberta, the Judicature Act, R.S.A. 1980, c. J-1, s. 22; in Saskatchewan, the Queen's Bench Act, R.S.S. 1978, c. Q-1, s. 45.6; in Manitoba, the Mercantile Law Amendment Act, C.C.S.M., c. M120, s. 5; in Nova Scotia, the Judicature Act, R.S.N.S. 1989, c. 240, s. 43(8); in New Brunswick, the Judicature Act, R.S.N.B. 1973, c. J-2, s. 32; in Newfoundland, the Judicature Act, R.S.N. 1970, c. 187, s. 21(1).

²³ *Supra*, footnote 12, at pp. 703 (A.C.), 768 (All E.R.).

As a second general rule, the nature of the property or the surrounding circumstances may indicate that the parties intended time to be of the essence, or conversely, that the parties did not intend that timely performance was essential. In other words, the court looks at the nature of the contract and the circumstances and then classifies the time stipulation accordingly. For example, in *Roberts v. Berry*,²⁴ time was not of the essence for the delivery of the abstract of title in a real estate transaction. In this case, there was nothing to show that strict attention to time was important. In *Tilley v. Thomas*,²⁵ a case in equity, time was held to be of the essence for the delivery of possession and good title to leased premises. Both parties knew that the defendant was obliged to move out of his current premises and required performance of the contract in a timely fashion. In *Sprague v. Booth*,²⁶ time was of the essence in a transaction involving a sale of a substantial holding of stocks and bonds in a railway. Moss C.J.O. stated:²⁷

The nature of the property, the fluctuating values of such holdings, the chances, changes, and risks to which it was exposed, the possibilities of loss arising from great financial disturbances or monetary stress ... and the long time which was given within which the contract was to be carried out, all strongly tend to show that it was never contemplated by any of the parties that, if it was not completed by the time fixed, it was to remain open for a further indefinite period.

As an example, already noted above, in the *Bunge Corp.* case, the court concluded that time was of the essence for giving notice of vessel readiness. The timely delivery of this information was essential for the seller to carry out its obligations under the contract.

In the *United Scientific* case, in concluding that time was not of the essence for rent review, the Law Lords rejected the tenants' argument that a right to rent review was analogous to an option; that is a right to extend or shorten (or "break") the term of a lease or acquire an interest in property. The tenants made this argument because, generally, time is of the essence for the exercise of an option.²⁸ The Law Lords, however, saw the right to rent review as part of an ongoing bilateral relationship. By comparison, option rights are unilateral in their nature and if exercised will bring into existence a new relationship.²⁹ (In the case of the exercise of a break clause,

²⁴ (1853), 3 De G.M. & G. 284, 43 E.R. 112 (L.J.J.).

²⁵ (1867), L.R. 3 Ch. App. 61 (L.J.J.).

²⁶ (1908), 21 O.L.R. 637 (Ont. C.A.), aff'd, [1909] A.C. 576 (P.C.).

²⁷ *Ibid.*, at p. 655 (O.L.R.).

²⁸ *Pierce v. Empey*, [1939] S.C.R. 247, [1939] 4 D.L.R. 672; *Petridis v. Shabinsky* (1982), 132 D.L.R. (3d) 430, 35 O.R. (2d) 215 (Ont. H.C.); *Affiliated Realty Corp. Ltd. v. Sam Berger Restaurant Ltd.* (1973), 42 D.L.R. (3d) 191, 2 O.R. (2d) 147 (Ont. H.C.); *Krause v. Bain Bros. Ltd.* (1972), 29 D.L.R. (3d) 500 (Alta. T.D.); *The Law of Options*, Annotation, [1930] 1 D.L.R. 1, at pp. 20-21.

²⁹ See the discussion of the distinctions between unilateral and synallagmatic (i.e. reciprocally binding) contracts in *United Dominions Trust (Commercial) Ltd. v. Eagle Aircraft Services Ltd.*, [1968] 1 W.L.R. 74, [1968] 1 All E.R. 104 (C.A.).

the landlord is free to lease to a new tenant). Given that a person should know with certainty whether or not he or she has legal obligations to another, the Law Lords noted that there were thus good practical reasons for requiring time to be of the essence for the exercise of options and rights of renewal.

In contracts for the sale of goods, the Sale of Goods Act³⁰ states that unless the contract provides otherwise, time is not of the essence for payment of the purchase price. Under the Act, whether time is of the essence for other obligations depends on the terms of the contract. In other words, the Act provides little guidance and the issue is left as a matter of interpretation. As a matter of case law, time is *prima facie* of the essence with respect of delivery of goods under a contract of sale.³¹

In general, time will be of the essence in mercantile contracts except as to time of payment.³² It will also generally be of the essence where the subject matter of the transaction is an income property, such as a mine, oil well or a tavern,³³ or is of a speculative nature.³⁴

As a third general rule, where time is not of the essence, it may become so by one party giving the other notice and specifying a date for performance that is reasonable in the circumstances. In deciding whether the specified time is reasonable, the court will consider all of the circumstances, including the prior history and conduct, what remains to be done, the need for performance and whether time was previously of the essence.³⁵

The initiation of time of the essence might follow the waiver of the express time of the essence stipulation. (The topic of waiver will be considered below). *Stickney v. Keeble*³⁶ is an example of this kind of case. *Toronto General Trusts Corporation v. Smith*³⁷ is another example. In this case,

³⁰ See, e.g., R.S.O. 1980, c. 462, s. 11.

³¹ *Bowes v. Shand* (1877), 2 App. Cas. 455 (H.L.); *Hartley v. Hymans*, [1920] 3 K.B. 475 (K.B.D.).

³² *Hartley v. Hymans*, *ibid.*; S.J. Stoljar, *Untimely Performance in the Law of Contract* (1955), 71 Law Q. Rev. 527.

³³ *Mills v. Haywood* (1877), 6 Ch. D. 196 (C.A.); *Lang v. Provincial Natural Gas and Fuel Co. of Ontario* (1908), 17 O.L.R. 262 (Ont. H.C.).

³⁴ *Tymo v. Wild Rose Properties Ltd.* (1983), 27 R.P.R. 301 (Alta. Q.B.); *Doyle v. Low* (1932), 41 O.W.N. 28 (Ont. C.A.); *O'Kelly v. Downie* (1914), 17 D.L.R. 395, 6 W.W.R. 911 (Man. C.A.); *O'Gorman v. Fitzmaurice* (1911), 19 O.W.R. 876, 2 O.W.N. 1480 (Ont. H.C.); *Sanderson v. Burdett* (1869), 16 Gr. 119, *aff'd* 18 Gr. 417 (Ont. C.A.).

³⁵ *Stickney v. Keeble*, *supra*, footnote 19; *Hartley v. Hymans*, *supra*, footnote 31; *Charles Rickards Ltd. v. Oppenheim*, [1950] 1 K.B. 616, [1950] 1 All E.R. 420 (C.A.).

³⁶ *Supra*, footnote 19.

³⁷ (1927), 32 O.W.N. 26 (Ont. H.C.). See also: *Dahl v. St. Pierre* (1913), 11 D.L.R. 775, 24 O.W.R. 05 (Ont. H.C.), *aff'd* (1913), 14 D.L.R. 514, 25 O.W.R. 261 (Ont. C.A.); *Shortt v. Liebelt*, [1955] 5 D.L.R. 80, [1955] O.W.N. 680 (Ont. C.A.); *Bogue Electric of Canada Ltd. v. Crothers Manufacturing Ltd.*, [1961] S.C.R. 108; *King v. Urban & Country Transport Ltd.* (1973), 40 D.L.R. (3d) 641, 1 O.R. (2d) 449 (Ont. C.A.); *Beacon*

the parties waived time of the essence and the solicitors were very casual about completion. Abruptly, the defendant's solicitor changed the course of dealings and by a letter imposed a four day deadline. The court concluded that the letter failed to make time of the essence because it did not communicate clearly that the contract would be treated as at an end if not completed on the day named.³⁸ Moreover, the four day deadline was not reasonable having regard to the way the solicitors had been handling the matter and in light of what remained to be done.

In England, there was at a time support for the view that where time is not initially of the essence of a real estate transaction, it cannot become so until there has been an unreasonable delay after the originally specified time for closing.³⁹ That rule has now been decided not to be the law in England,⁴⁰ and in any event it had never been applied in Canada.

III. *Avoiding Or Altering The Effect Of Time Of The Essence*

A. *Introduction*

A great part of the jurisprudence about time of the essence concerns efforts to avoid or alter its effect. Where time is of the essence, despite the failure to perform on the day specified in a contract, a party will seek specific performance or recovery of the deposit or purchase moneys. The discussion in this part of the article considers the various legal doctrines that allow this to be done.

At the outset, it should be noted that where specific performance is in issue, the case law will typically involve the sale of land. This follows because specific performance is generally not available for contracts involving the sale of goods or the performance of personal services.

B. *Waiver, Election and Shifting the Blame for the Delay*

Waiver is an equitable doctrine that may apply when a party to a contract adopts a course of conduct that leads the other party to understand that the strict rights arising under the contract will not be enforced.⁴¹ For

Industrial Dev. Corp. Ltd. v. G.C. Farm Supply Ltd. (1981), 123 D.L.R. 467 (Alta. Q.B.); *Babacomp Ltd. v. Rightside Properties Ltd.*, [1974] 1 All E.R. 142 (C.A.); *United Scientific Holdings Ltd. v. Burnley Borough Council*, *supra*, footnote 6, at pp. 946 (A.C.), 85 (All E.R.) per Lord Simon.

³⁸ As to the clarity of the notice, see also: *Shewan v. Mills*, [1949] O.W.N. 137 (Ont. H.C.); *Woels and Woels v. Mashinter*, [1976] 5 W.W.R. 79 (Alta. T.D.); *Rados v. Paconla Investments Ltd.* (1981), 20 R.P.R. 154 (B.C.S.C.).

³⁹ See, e.g., *Smith v. Hamilton*, [1951] 1 Ch. 174, [1950] 2 All E.R. 928 (Ch. D.); *Ajit v. Sammy*, [1967] 1 A.C. 255 (P.C.); *Rightside Properties Ltd. v. Gray*, [1975] Ch. 72, [1974] 2 All E.R. 1169 (Ch. D.).

⁴⁰ *Raineri v. Miles*, *supra*, footnote 18.

⁴¹ *LeRoy Plow Co. v. J. Clark & Son* (1921), 65 D.L.R. 370, 49 N.B.R. 285 (N.B.C.A.); *Danforth Heights Ltd. v. McDermid Bros.*, [1923] 4 D.L.R. 757, (1922), 52 O.L.R. 412

example, a party may by words or conduct lead the other side to believe that time is no longer of the essence. In these circumstances, the failure to perform at the originally stipulated time cannot be said to be a breach of contract at all. The party who "waives" strict performance is estopped from alleging that the contract has been breached.

Election is a doctrine of the law of remedies that may apply when an injured party has a choice of remedies or alternative claims. For example, where time is of the essence, if one party fails to perform on time, the contract does not automatically come to an end. The innocent party has the right to "elect" to treat the breach as ending the contract or to keep the contract alive and claim damages. Once the injured party elects one remedy, then, generally, he or she is precluded from claiming an alternative.⁴² In cases of election between remedies, it is sometimes said that the innocent party has waived the alternative remedy. For example, if the party elects damages only, he or she has waived the option of treating the contract as at an end. Waiver and election, however, are different concepts, although the same fact situation may give rise to both.

The concept of waiver may be traced back to the case of *Hughes v. Metropolitan Railway Co.*⁴³ In this case, Hughes, the landlord, notified the tenant railway company that it should repair the leasehold property within six months. The railway did not begin repairs but responded to the notice by suggesting that Hughes might purchase the railway's interest. The parties negotiated unsuccessfully and then Hughes brought an action for possession based on the railway's failure to repair within the original six month period. The House of Lords dismissed the claim. Lord Cairns stated:⁴⁴

... it is the first principle upon which all Courts of Equity proceed, that if parties who have entered into definite and distinct terms involving certain legal results—certain penalties or legal forfeiture—afterwards by their own act or with their own consent enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them where it would be inequitable having regard to the dealings which have thus taken place between the parties.

(Ont. C.A.); *Wauchope v. Maida* (1971), 22 D.L.R. (3d) 142, [1972] 1 O.R. 27 (Ont. C.A.); *Petridis v. Shabinsky*, *supra*, footnote 28; *Hartley v. Hymans*, *supra*, footnote 31; *Charles Rickards Ltd. v. Oppenheim*, *supra*, footnote 35; *W.J. Alan & Co. v. El Nasr Export & Import Co.*, [1972] 2 Q.B. 189, [1972] 2 All E.R. 127 (C.A.).

⁴² There are two exceptions: for example, after a breach, the innocent party may elect to keep the transaction alive and sue for specific performance. The guilty party, however, may be incapable of performing and the innocent party may then be allowed to re-elect and claim damages: *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.); *Standard Trust Co. v. Little* (1915), 24 D.L.R. 713, 8 W.W.R. 112 (Sask. C.A.); *Davidson v. Sharpe* (1920), 60 S.C.R. 72, 52 D.L.R. 186.

⁴³ (1887), 2 App. Cas. 439 (H.L.).

⁴⁴ *Ibid.*, at p. 448.

Hughes was applied in *Birmingham and District Land Co. v. London and North Western Railway Co.*⁴⁵ where the English Court of Appeal made clear that the doctrine was a general equitable doctrine not confined to cases of relief from forfeiture. *Hughes* was also applied by the English Court of Appeal in *Charles Rickards Ltd. v. Oppenheim*,⁴⁶ where the conduct of a buyer of a custom built luxury automobile precluded him from insisting on the original timetable for delivery. Denning L.J. (Singleton and Bucknill L.J.J. concurring) said:⁴⁷

Whether it be called waiver or forbearance on his part, or an agreed variation or substituted performance, does not matter. It is a kind of estoppel. By his conduct he evinced an intention to affect their legal relations. He made, in effect, a promise not to insist on his strict legal rights. That promise was intended to be acted on, and was in fact acted on. He cannot afterwards go back on it.

The doctrine of waiver has been applied in many time of the essence cases. For example, in *Dahl v. St. Pierre*,⁴⁸ time of the essence was waived by the vendor and the purchaser continuing negotiations after the scheduled closing date.⁴⁹ In *Roman v. Vineskie*,⁵⁰ a transaction did not close as scheduled because the conduct of the vendor's solicitor led the purchaser's solicitor to understand that the closing date had been extended. The evidence as to waiver was a letter from the vendor's solicitor suggesting a postponement to allow the title requisitions to be answered and the evidence of the purchaser's solicitor that a postponement had been confirmed by telephone.⁵¹

In *Iwanczuk v. Center Square Developments Ltd.*,⁵² the original closing and two extensions, all with time of the essence, passed. The casual understanding between the purchaser's solicitor and the conveyancing clerk

⁴⁵ (1888), 40 Ch. D. 268 (C.A.). The *Hughes* case was recognized by the Supreme Court of Canada in *Pierce v. Empey*, [1939] S.C.R. 247, [1939] 4 D.L.R. 672. The *Hughes* and *Birmingham* cases were the authorities relied on by Denning J. in *Central London Property Trust Ltd. v. High Trees House Ltd.*, [1947] 1 K.B. 130, (1946) [1956] 1 All E.R. 256 (K.B.D.), to establish the doctrine of promissory estoppel.

⁴⁶ *Supra*, footnote 35.

⁴⁷ *Ibid.*, at pp. 623 (K.B.), 432 (All E.R.).

⁴⁸ *Supra*, footnote 37. See also the other authorities in footnote 37.

⁴⁹ See: *Webb v. Hughes* (1870), L.R. 10 Eq. 281 (V.C.); *Woels and Woels v. Mashinter*, *supra*, footnote 38; *Nepean Carleton Developments Ltd. v. Hope*, [1978] 1 S.C.R. 427, (1976), 71 D.L.R. (3d) 609; *Cotton v. Medcalf* (1910), 15 O.W.R. 787 (Ont. D.C.); *Norman v. McMurray* (1913), 10 D.L.R. 757, 24 O.W.R. 532 (Ont. S.C.).

⁵⁰ (1974), 46 D.L.R. (3d) 654, 3 O.R. (2d) 734 (Ont. H.C.).

⁵¹ As examples of waiver being established on slight evidence, see: *R.J. Mayo Ltd. v. Wolsey* (1965), 50 D.L.R. (2d) 482, [1965] 2 O.R. 321 (Ont. H.C.), and the minority judgment (on this point) of Gibbs C.J. and Murphy J. in the important Australian case of *Legione v. Hateley* (1983), 152 C.L.R. 406, 57 A.L.J.R. 292 (Aust. H.C.), discussed *infra*. As other examples of waiver established by the conduct of the parties, see: *Hutts v. Hancock*, [1954] 1 D.L.R. 790, [1954] O.R. 105 (Ont. C.A.); *Smith v. Patel* (1977), 82 D.L.R. (3d) 103, 18 O.R. (2d) 132 (Ont. H.C.).

⁵² (1967), 61 D.L.R. (2d) 193, [1967] 1 O.R. 447 (Ont. H.C.).

employed by the vendor's solicitor was that the transaction would close when the purchaser received funds from another sale. Fifteen days after the last rescheduled closing, the purchaser's solicitor advised the vendor's solicitor that the purchaser was in funds. Then, for the first time, the vendor's solicitor asserted that the agreement had ended. The purchaser's action for specific performance succeeded. The court concluded that the vendor had waived time of the essence.

Turning to election, this concept was considered in the leading case of *Scarf v. Jardine*⁵³ and was recently discussed in *Peyman v. Lanjani*.⁵⁴ In *Scarf*, a two member partnership dissolved but one of the partners continued in business using the old firm name with a new partner. The plaintiff, who had sold goods to the old firm, supplied goods to the new firm unaware of the changes. When the plaintiff was not paid, he sued the new firm and proved his claim in bankruptcy. Afterwards, he sued the retired partner from the old firm. The House of Lords held that the plaintiff had a choice of claiming against the members of the new or the old firm. The first choice accepted the dissolution of the old firm while the second choice involved ignoring the dissolution and estopping the members of the old firm from asserting that it no longer existed. The court held that having made his choice and acted upon it by suing the new firm, the plaintiff was bound by this election and could not retract it.

In *Peyman*, the issue of election and its relationship to waiver was considered in the context of bizarre facts. The defendant Lanjani, who could not speak English, owned a leasehold he had acquired by an assignment of the lease. The landlord's consent to the assignment had been obtained by Lanjani's agent impersonating Lanjani. This stratagem was adopted because the agent spoke English and was more presentable. Lanjani agreed to sell his leasehold to the plaintiff Peyman. Lanjani and Peyman were represented by the same solicitors. Prior to the closing, Peyman and the solicitors learned the facts of how Lanjani had acquired his leasehold. The solicitors did not advise Payman that he now had grounds to end the transaction. Peyman went into possession and subsequently sued to set aside the transaction. The trial judge dismissed the action concluding that since Payman or his solicitor knew the facts giving rise to the right to end the transaction, Peyman had elected to affirm the transaction and was bound by that election.

The English Court of Appeal reversed the trial judgment. Peyman, it was said, had a right to set aside the transaction and he was entitled to elect the exercise or forego that right. However, to be bound by his election, Peyman must have made his decision with an awareness not only

⁵³ (1882), 7 App. Cas. 345 (H.L.).

⁵⁴ [1985] Ch. 457, [1984] 3 All E.R. 703 (C.A.).

of the facts but of their legal significance. The making of an election presupposes a knowledge that a choice of alternative courses is available. Election was different from estoppel or waiver. Election bound a person to a communicated choice made with knowledge of the legal consequences. Estoppel or waiver bound a person because others had relied on an apparent choice and it was unfair to allow the strict rights to be asserted. About the differences between election and waiver, Slade L.J. stated:⁵⁵

Where the other stated conditions for the operation of the common law doctrine of "election" are present, a person may be held to his election even though the other party has not in any way acted to his detriment in reliance on the relevant communication; the mere facts of the unequivocal act or statement, coupled with the communication thereof to the other party, suffice to bring the doctrine into play. For this reason, if no other ... a clear distinction has to be drawn between election on the one hand and estoppel or waiver by conduct on the other hand.

Since most cases about time of the essence involve waiver only, the distinction between waiver and election is usually lost sight of. If the distinction is kept in mind, an analytic approach may be developed and some difficulties in applying the law and in justifying or explaining the results may be removed. If the innocent party "waives" time of the essence, then there is no breach by the failure to perform on time and there is no election of remedies to be made. If there has been a breach, then the innocent party may have made an election that precludes taking the position that the contract is at an end, but the innocent party may still have a remedy in damages. Thus, in determining whether the contract has been brought to an end by a failure to perform on time, the court must determine whether time of the essence has been waived and if not waived whether the innocent party, in choosing a remedy, has elected to keep the contract alive.

If this analytical approach is adopted then the difficult problem of determining the effect of failing to object to late performance becomes more manageable. An example of this problem is *Danforth Heights Limited v. McDermid Brothers*.⁵⁶ An agreement provided for a closing of a land sale on February 5, 1920. The purchasers were ready, but the vendors were unable to close because a *lis pendens* had been registered. The closing date passed in silence, and not until March 20, 1920 did the purchasers formally take the position that the transaction was over. The vendors sued for specific performance alleging that the purchasers had waived the time of the essence provision. The Ontario Court of Appeal dismissed the vendors' action.

In the Court of Appeal, Sutherland J. concluded that waiver had not been proven, stating: "Any alleged waiver as to time must be of a

⁵⁵ *Ibid.*, at pp. 500 (Ch.), 734 (All E.R.).

⁵⁶ *Supra*, footnote 41. See also: *Minshull v. Hudnick* (1970), 11 D.L.R. (3d) 713, 74 W.W.R. (N.S.) 705 (Sask. C.A.); *Labelle v. O'Connor* (1908), 15 O.L.R. 519 (Ont. Div. Ct.).

definite character and fully proved."⁵⁷ Mulock C.J. Ex. said that the vendors had failed to prove waiver, the purchasers were under no obligation to give notice, and the delay in giving notice did not amount to waiver. Kelly J. said that the most that could be said was that the purchasers adopted a passive attitude between February 5 and March 20, but they had done nothing to recognize the continued existence of the agreement. Masten J. said the purchasers did nothing to communicate a willingness to extend, and they were free to cancel the agreement.

Rose J., who wrote the most extensive reasons, agreed that waiver had not been proven. He also considered the issue of the significance of the Statute of Frauds which he concluded was not an obstacle. The explanation was that when time is of the essence, the failure of one party to perform does not automatically bring the transaction to an end. The innocent party has the election to treat the contract as continuing or as at an end. The right of election is not a variation of the contract required to be in writing under the Statute, but an aspect of the original contract.

Although the judges in *Danforth Heights* do not make the distinction between waiver and election, the case may be explained using these concepts. The conduct of the purchasers did not amount to waiver of the strict rights under the contract, and thus they were in a position to elect remedies. In the circumstances, the delay in making a decision about a remedy was not an election and the purchasers could choose to end the contract. Thus, keeping in sight the distinction between election and waiver assists in analysing whether a party purporting to rely on time of the essence may do so. However, the analysis is not complete until an additional factor is considered. There is a line of Canadian and, in particular, Ontario authority that operates independently of waiver to turn off the operation of a time of the essence stipulation. The authority may be traced back to the brief note of *Rice v. Knight*⁵⁸ reported in the Ontario Weekly Notes. A real estate transaction with time of the essence was scheduled to close on August 15, 1919. The transaction did not close on that day. The purchaser was not ready, and the vendor, although not obliged to do so, as a matter of courtesy was clearing up a title problem. Three days later the title was cleared, but the purchaser refused to close, and the vendor sued for specific performance. The action was successful, and the purchaser was not allowed to rely upon the time of the essence stipulation. The note of the judgment of Lennox J. sets out certain qualifications before a party can insist on time of the essence:⁵⁹

Time may be insisted upon as of the essence of the agreement by a litigant who has shewn himself ready, desirous, prompt and eager to carry out his agreement: *Mills v. Haywood* (1877), 6 Ch. D. 196; who has not been himself the cause of

⁵⁷ *Ibid.*, at pp. 761 (D.L.R.), 416 (O.L.R.).

⁵⁸ (1920), 18 O.W.N. 393 (Ont. H.C.).

⁵⁹ *Ibid.*, at p. 394.

the delay or in default: *Brickles v. Snell*, [1916] 2 A.C. 599; and who has not subsequently recognized the agreement as still subsisting. He must not play fast and loose at his pleasure: *Springer v. Gray* (1859), 7 Gr. 276, 277.

The result in *Rice v. Knight* seems just and, as will be seen from the following discussion, the principles articulated in this case have been gainfully employed in subsequent cases⁶⁰ to produce results that also seem just. However, a closer investigation reveals that its proposition that time of the essence may only be invoked by a litigant who is ready, desirous, prompt and eager to carry out the agreement has a weak case law foundation.

The closer investigation may begin with the cases cited in support of the qualifications set out in *Rice v. Knight*. In *Mills v. Haywood*,⁶¹ Haywood was the trustee in bankruptcy for Austin. Before his bankruptcy, Austin agreed to lease a tavern to Mills. The lease had a ten year term beginning in 1861 and contained an option to purchase exercisable during the term. In 1867, Mills gave written notice that he elected to exercise the option. A draft conveyance was prepared, but it was not settled because Austin and Austin's mortgagee could not agree as to who should receive the purchase moneys. Mills did not press the matter until five years later when Austin's trustee in bankruptcy proposed a sale of the tavern. Mills responded with a bill for specific performance. The bill was dismissed, Cotton L.J. stating for the Court of Appeal that it was a well established principle that "a party cannot call upon a Court of Equity for a specific performance unless he has shewn himself ready, desirous, prompt and eager".⁶² *Mills v. Haywood* is thus a case about the qualifications for specific performance and not at all about the qualifications for invoking time of the essence to end a contract.⁶³

In *Brickles v. Snell*,⁶⁴ Snell agreed to purchase lands from Brickles with time of the essence. On the day fixed for closing, due to an unexpected illness of Snell's solicitor, the transaction did not close, and Brickles took the position that the transaction was at an end. Snell's action for specific performance was dismissed. Time was of the essence, and there was no

⁶⁰ The following cases have recited or paraphrased the above quotation from the *Rice v. Knight* case, sometimes with and sometimes without attribution: *Shaw v. Holmes*, [1952] 2 D.L.R. 330, [1952] O.W.N. 267 (Ont. C.A.); *Campbell v. Securities & Holding Co. Ltd.*, [1958] O.R. 441 (Ont. H.C.), aff'd, at p. 719 (Ont. C.A.); *Metropolitan Trust Co. v. Pressure Concrete Services Ltd.*, (1973), 37 D.L.R. (3d) 649, [1973] 3 O.R. 629 (Ont. H.C.), aff'd (1975), 60 D.L.R. (3d) 431, 9 O.R. (2d) 375 (Ont. C.A.); *Morgan v. Lucky Dog Ltd.* (1987), 45 R.P.R. 263 (Ont. H.C.).

⁶¹ (1877), 6 Ch. D. 196 (C.A.).

⁶² *Ibid.*, at p. 202.

⁶³ On the requirement of a suitor for specific performance being ready, willing and able to perform, see also: *Harris v. Robinson* (1892), 21 S.C.R. 390; *Watts v. Strezos*, [1955] 4 D.L.R. 126, [1955] O.R. 615 (Ont. H.C.); *Beckett v. Karklins* (1974), 50 D.L.R. (3d) 21, 5 O.R. (2d) 211 (Ont. H.C.); *Dacon Construction Ltd. v. Karkoulis* (1964), 44 D.L.R. (2d) 403, [1964] 2 O.R. 139 (H.C.).

⁶⁴ [1916] 2 A.C. 599, (1916), 30 D.L.R. (P.C.).

waiver. The reference in *Rice v. Knight to Brickles v. Snell* is a *non sequitur* since, on its facts, the latter case does not raise the issue of whether a party in default may invoke time of the essence. In *Brickles*, there was no doubt about the innocent vendor's right to rely on time of the essence to end the contract. However, whatever the legal logic, it does make sense that a party in default should not be able to call for an end of the contract. In any event, there is good authority that supports this proposition. In *Foster v. Anderson*,⁶⁵ the purchaser's failure to perform on time was excused by the prior default of the vendor in delivering a draft deed as required by the agreement of sale. Anglin J. reasoned that the vendor's prior default operated as a waiver of the time of the essence stipulation. Moss C.J.O. said: "[H]aving regard to her own default, she [the vendor] is not in a position to insist upon the stipulation as to time."⁶⁶

In *Springer v. Gray*,⁶⁷ the third case cited in *Rice v. Knight*, the plaintiff signed an agreement to lease and insisted that the lease be drafted so that he did not have to pay rent over a few inches of land. The majority of the appeal court found the plaintiff's demand unreasonable, obstinate, pernicious and unsupported by the agreement to lease. The majority concluded that the defendant had been discharged from any obligation to the plaintiff and stated that the plaintiff could not have specific performance of an agreement he had repudiated: "It would be unreasonable that the plaintiff should be allowed thus to play fast and loose at his pleasure."⁶⁸ Thus, *Springer v. Gray* is once again a case about specific performance, not about time of the essence. The case, however, does support the general proposition that a party should not be able to repudiate and then rely on a contract or to take advantage of a situation that the party has wrongfully created. These general propositions are well established in England and Canada⁶⁹ and they do seem appropriate as qualifications for invoking time of the essence.

⁶⁵ (1908), 16 O.L.R. 565 (Ont. C.A.), aff'd (1909), 42 S.C.R. 251. See also: *Dahl v. St. Pierre*, *supra*, footnote 37; *Rogers and Brown v. Hazelhurst*, [1930] 2 D.L.R. 609, (1930), 65 O.L.R. 81 (Ont. C.A.); *Consolidated Press Ltd. v. J.E. Gibson*, [1933] 3 D.L.R. 64, [1933] O.R. 458 (Ont. C.A.); *Shaw v. Holmes*, *supra*, footnote 60; *Thomson Groceries Ltd. v. Scott*, [1943] 3 D.L.R. 25, [1943] O.R. 290 (Ont. C.A.); *Armstrong v. Graham*, [1947] 3 D.L.R. 59, [1947] O.W.N. 295 (Ont. H.C.); *Watts v. Strezos*, *supra*, footnote 63; *Mikkelsen v. Duff*, [1930] 1 D.L.R. 760 (B.C.S.C.).

⁶⁶ *Ibid.*, at p. 570 (O.L.R.).

⁶⁷ (1859), 7 Gr. 276.

⁶⁸ *Ibid.*, at p. 277.

⁶⁹ *New Zealand Shipping Co. v. Société des ateliers et chantiers de France*, [1919] A.C. 1 (H.L.); *Commrs. of Agricultural Loans of Ont. v. Irwin*, [1942] S.C.R. 196, [1942] 2 D.L.R. 81; *Beitel v. Sorokin* (1973), 38 D.L.R. (3d) 455, [1973] 5 W.W.R. 639 (Alta. A.D.), aff'd, [1974] S.C.R. vi, (1974), 42 D.L.R. (3d) 319; *McCallum v. Zivojinovic* (1977), 79 D.L.R. (3d) 133, 16 O.R. (2d) 71 (Ont. C.A.); *Kiefert v. Morrison* (1975), 67 D.L.R. (3d) 395, 11 O.R. (2d) 731 (Ont. H.C.).

To summarize, the authorities relied on in *Rice v. Knight* do not support the proposition that in order to invoke time of the essence, a party must be ready, desirous, prompt and eager to carry out the agreement, if this proposition means more than that a party who is in default and not ready to perform or who is the cause of the delay or default may not rely on time of the essence. The elements of being desirous, prompt and eager to perform, however, are significant if a party is seeking an equitable remedy. Wheatherstone J. appears to have understood the subtleties about time of the essence in *Wandoan Holdings Ltd. v. Pieter Vos Ltd.*,⁷⁰ where he stated:

... if a party is merely standing on his legal rights, and if his conduct in the meantime does not amount to an implied waiver of the [time] provision, no more is required of him than that he be ready, willing and able to perform his contractual obligations at the stipulated time. On the other hand, a party who invokes the equitable jurisdiction of the Court must not blow hot and cold, or be dilatory in the performance of his obligations; he must show that at all times he was desirous, prompt and eager to complete the contract.

In any event, whatever their juridical weaknesses, the propositions articulated in *Rice v. Knight* have been applied in many cases and may be taken as settled law. For example, in *Lucifora v. Walfish*,⁷¹ the purchaser's solicitor intentionally absented himself on the closing day, wrongly thinking that if the transaction did not close that day, it was at an end. The Ontario Court of Appeal viewed the solicitor's conduct as a repudiation of the agreement and stated: "The [purchasers] if they desire to take advantage of the provision that time shall be of the essence of the agreement, must show that they were ready, desirous, prompt and eager to carry out the agreement."⁷²

In *Metropolitan Trust Co. v. Pressure Concrete Services*,⁷³ the vendor breached a complicated sale and leaseback transaction by failing to apply for the mortgagee's consent as required by the agreement. The court held that a party who is himself in default cannot rely upon time being of the essence, and that if the vendor desired to take advantage of time of the essence, it had to show that it was ready, desirous, prompt and eager to carry out the agreement on the closing date. In *Bayshore Investments Ltd. v. Wilson*,⁷⁴ in a sale of land, the parties agreed to extend the closing to April 26, 1973. Time was of the essence. Prior to rescheduling closing, the vendors decided that they did not wish to complete the sale. They refused to execute the deed, but somewhat diffidently gave their solicitor instructions to call them should the purchaser tender. The purchaser,

⁷⁰ (1974), 47 D.L.R. (3d) 202, at pp. 207-208, 4 O.R. (2d) 102, at pp. 107-108 (Ont. H.C.).

⁷¹ [1955] O.W.N. 898 (Ont. C.A.).

⁷² *Ibid.*, at p. 899.

⁷³ *Supra*, footnote 60.

⁷⁴ (1975), 66 D.L.R. (3d) 208, 11 O.R. (2d) 392 (Ont. H.C.).

apparently acting under some misunderstanding that the closing had been rescheduled for the 27th, did not tender until that day. The tender was refused, and the purchaser successfully sued for specific performance. The court held that the vendors were not ready, willing and able to close and could not rely on the time of the essence stipulation.⁷⁵

The important case of *King v. Urban & Country Transport Ltd.*⁷⁶ considers a problem caused by the proposition that in order to invoke time of the essence, a party must be ready, desirous, prompt and eager to carry out the agreement. The purchasers of land agreed to give back a mortgage to the vendor as part payment of the purchase price. The purchasers assigned their interest and, on the day set for closing, the vendor refused to close with the new purchaser. Following some correspondence, a few days later the new purchaser tendered a mortgage which included the original purchasers as guarantors. Arnup J.A. concluded that neither party was ready to close on the agreed date. The vendor was not ready because it was not prepared to close on the agreed date. The new purchasers were not ready because they could not force the vendor to close with a new purchaser when the transaction involved a mortgage back unless the original purchasers joined in the mortgage. The situation presented a stalemate between the authorities that would deny the purchasers specific performance because of their failure to be ready, willing and able to close on the appointed date and the authorities that would deny the vendor the right to invoke time of the essence because of its similar failure. Without disturbing either line of authority, Arnup J.A. solved the stalemate by asserting that in these circumstances time of the essence can be reinstated by either party serving a notice fixing a new date for closing. The new date must be reasonable and the notice should state that time is to be of the essence for this new date.⁷⁷ In the circumstances of *King v. Urban & Country Transport Ltd.*, the vendor ought to have accepted the purchasers' tender, and thus their action for specific performance was granted.

One additional problem should be noted. In *Barclay v. Messenger*,⁷⁸ Jessel M.R. held that agreeing to a new closing date waived time of the essence for the original closing, but time of the essence was preserved for the new date. This rule has the advantage of setting a certain standard by which the parties may govern themselves and was adopted by the Supreme Court of Canada in *Bogue Electric of Canada Ltd. v. Crothers Manufacturing*

⁷⁵ Another example is *Morgan v. Lucky Dog*, *supra*, footnote 60. See also, *Wandoan Holdings Ltd. v. Pieter Vos Ltd.*, *supra*, footnote 70, where the vendor was held ready, willing and able to perform and entitled to rely on time of the essence when the purchaser failed to close on time.

⁷⁶ *Supra*, footnote 37.

⁷⁷ See also, *Zender v. Ball* (1974), 51 D.L.R. (3d) 499, 5 O.R. (2d) 747 (Ont. H.C.); *Rados v. Paconla Investments Ltd.*, *supra*, footnote 38; *Morris v. Cam-nest Developments Ltd.* (1988), 50 D.L.R. (4th) 707, 64 O.R. (2d) 475 (Ont. H.C.).

⁷⁸ (1874), 43 L.J. Ch. 449 (M.R.).

*Ltd.*⁷⁹ However, in *Bogue Electric*, the court did not refer to its own decision in *Hanson v. Cameron*,⁸⁰ where Kellock J. (Rinfret C.J. concurring) held that in the absence of express wording, an extension was a general waiver of time of the essence. The result is that authorities in Canada go both ways on this issue.⁸¹ Given the uncertainty of the case law, practitioners in Canada are obviously best advised to specify that time is of the essence when a new date is agreed for closing.

C. Specific Performance and Relief from Forfeiture

The next issue is whether, when time is of the essence, a party who fails to perform on time may, nevertheless, enforce the contract and stop the innocent party from bringing it to an end. For this issue, it may be assumed that there is no waiver of time of the essence and no fault by the other party to the contract who elects to end the contract. In other words, for these circumstances, the question is: may a party who fails to perform on time obtain specific performance when time is of the essence? The answer to this question involves: (1) an understanding of the nature of the interests at risk of being lost; (2) an exploration of the equitable doctrine of relief against forfeiture; and (3) another look at equity's attitude to the timely performance of contractual obligations. The interaction of these elements has produced a troublesome and controversial line of authority.

As to the nature of the interests at risk of being lost, both sides to an abortive transaction risk the loss of the bargain and exposure to a judgment to pay damages. In general, however, where time is of the essence, it is a purchaser who has more to lose if he or she breaches the contract by untimely performance. Depending on the provisions of the contract, a purchaser risks losing the deposit and any purchase moneys that already have been paid. Moreover, in an executory contract, the vendor gets to keep the property and it may be resold, perhaps without any loss of the benefit of the original bargain. In sale of land contracts, the purchaser also risks losing his or her equitable ownership interest in the property, the theory being that upon the signing of the contract, the purchaser acquires an equitable interest in the land commensurate with his or her right to

⁷⁹ *Supra*, footnote 37.

⁸⁰ [1948] S.C.R. 101, [1949] 1 D.L.R. 16.

⁸¹ *Whittall v. Kour* (1969), 8 D.L.R. (3d) 163, 71 W.W.R. 733 (B.C.C.A.); *Allarco Devs. Ltd. v. Moran*, [1971] 2 W.W.R. 604 (Alta. T.D.); *World Land Ltd. v. Daon Dev. Corp.*, [1982] 4 W.W.R. 577 (Alta. Q.B.); *Dixon v. Weibe* (1979), 98 D.L.R. (3d) 305, [1979] 3 W.W.R. 354 (Sask. Q.B.) support the proposition that the extension is a general waiver. *Landbank Minerals Ltd. v. Wesgeo Enterprises Ltd.*, [1981] 5 W.W.R. 524 (Alta. Q.B.), and *Howren v. J. Heathcote & Co.* (1982), 26 R.P.R. (B.C.S.C.), follow *Bogue Electric*.

convert the equitable title to a legal title by an action for specific performance.⁸²

The loss of the purchaser's equitable interest in the property may be characterized as a forfeiture.⁸³ Equity, however, provides a jurisdiction to relieve against forfeitures. This jurisdiction is based on the idea that the loss of the property interest is inequitable and a disproportionate remedy for the innocent party, given the nature of the interests to be protected and the availability of alternative remedies.

The equitable jurisdiction to relieve against forfeiture is of long standing. In 1722, in *Vernon v. Stephens*,⁸⁴ the plaintiff was awarded specific performance despite: (1) having defaulted in making payments under an agreement to purchase lands; (2) repeating the default under two consent court orders that extended the time for payment; and (3) a term in the court orders that if the payments were not made, the moneys already paid should be forfeit and the agreement cancelled. The Lord Chancellor stated:⁸⁵

Here have been solemn agreements that ought not slightly to be got over; but however, if the defendant has his money, interest and costs, he will have no reason to complain of having suffered; on the contrary, it would be a very great hardship on the plaintiff, to lose all the money which he has paid. . . .

In 1806, in *Sanders v. Pope*,⁸⁶ Lord Erskine L.C. described equity's jurisdiction to relieve against forfeiture:

That jurisdiction rests only upon this principle; that one party is taking advantage of a forfeiture; and as a rigid exercise of the legal right would produce a hardship, a great loss and injury on the one hand arising from going to the full extent of the right, while on the other hand the party may have the full benefit of the contract, as originally framed, the Court will interfere; where a clear mode of compensation can be discovered.

More recently, in *Shiloh Spinners Ltd. v. Harding*,⁸⁷ the owner of adjoining leasehold properties assigned one lease and reserved a right of re-entry should the assignee breach covenants to repair and support. The covenants were breached and the right of re-entry was exercised. The House

⁸² *Rose v. Watson* (1864), 10 H.L.C. 672, 11 E.R. 1187; *Lysaght v. Edwards* (1876), 2 Ch. D. 499 (Ch. D.); *Cornwall v. Henson*, [1899] 2 Ch. 710, at p. 714 (Ch. D.); *Kloepfer Wholesale Hardware and Automotive Co. Ltd. v. Roy*, [1952] 2 S.C.R. 465, at p. 477, [1952] 3 D.L.R. 705, at pp. 712-713; *Howard v. Miller*, [1915] A.C. 318, at p. 326 (P.C.).

⁸³ Since the purchaser's equitable interest is based on the availability of specific performance, it may be that equity's jurisdiction here would be better described as relieving against the loss of the right to specific performance. See, W.M.C. Gummow, *Forfeiture and Certainty: The High Court and the House of Lords*, in P.D. Finn (ed.), *Essays in Equity* (1985), pp. 35-37.

⁸⁴ (1722), 2 P. Wms. 66, 24 E.R. 642 (L.C.).

⁸⁵ *Ibid.*, at pp. 67 (P. Wms.), 643 (E.R.).

⁸⁶ (1806), 12 Ves. 282, at p. 289, 33 E.R. 108, at p. 110 (L.C.).

⁸⁷ [1973] A.C. 691, [1973] 1 All E.R. 90 (H.L.).

of Lords held that the court had jurisdiction to relieve against the forfeiture of the assignee's interest in the lease, but that the jurisdiction should not be exercised because the breach had been wilful. Lord Wilberforce (Viscount Dilhorne, Lords Pearson and Kilbrandon concurring) reviewed the law and, accepting the generality of equity's jurisdiction, stated that two points were well established:⁸⁸

First, where it was possible to state that the object of the transaction and of the insertion of the right to forfeit is essentially to secure the payment of money, equity has been willing to relieve on terms that the payment is made with interest, if appropriate, and also costs . . . Secondly, there were the heads of fraud, accident, mistake or surprise, always a ground for equity's intervention. . . .

Lord Simon of Glaisdale was in general agreement with Lord Wilberforce, but delivered short reasons of his own where he suggested that equity's jurisdiction to relieve against forfeiture should now be viewed in light of a less rigorous attitude toward the sanctity of contract rights. Accordingly, he was prepared to hold that equity had an unlimited and unfettered jurisdiction to relieve against contractual forfeitures and penalties.

With this background, the application of equity's jurisdiction to relieve against forfeiture may be considered in the context of time of the essence. The discussion here may begin with the important case of *Re Dagenham (Thames) Dock Company*.⁸⁹ A company incorporated to construct a dock signed an agreement to purchase lands for the dock. The company paid £2,000 of the £4,000 purchase price and was allowed into possession. The agreement provided that if the balance was not paid on a specified date, the vendor could re-enter, eject the company and keep the land and the moneys already paid. Time was expressed to be of the essence. The balance of the purchase price was not paid, and the vendor brought an application to eject the company which, at the time, was in the process of being wound up.

In very short judgments, James and Mellish L.JJ. upheld the decision of the Master of the Rolls that dismissed the vendor's application to regain possession of the land. James L.J. said it was "an extremely clear case of a mere penalty for non-payment of the purchase money",⁹⁰ and the company was entitled to be relieved on payment of the balance of the purchase money with interest. Mellish L.J. was of the same opinion and stated:⁹¹

I have always understood that where there is a stipulation that if, on a certain day, an agreement remains wholly or in any part unperformed—in which case the real damage may be either very large or very trifling—there is to be a certain forfeiture incurred, that stipulation is to be treated as in the nature of a penalty.

⁸⁸ *Ibid.*, at pp. 722 (H.L.), 100 (All E.R.).

⁸⁹ (1873), L.R. 8 Ch. App. 1022 (L.JJ.).

⁹⁰ *Ibid.*, at p. 1025.

⁹¹ *Ibid.*

The effect of the decision was that the company was given the opportunity to perform the contract despite a stipulation that time was of the essence. The judgments, however, have their problems and raise a number of unanswered questions. There is no discussion about the time of the essence provision or about the nature of the forfeiture affected by the penal provision. Moreover, it is odd that a company in liquidation should be given the opportunity to purchase lands for a dock. Presumably, the liquidators would rather have had a return of the purchase moneys paid.⁹² The mystery is heightened since the Master of the Rolls' order in the court below had not been for completion of the contract, but rather for a judicial sale of the land. Finally, the judgments contain no direction as to the consequences should the liquidators not take up the opportunity to complete the purchase.

Despite these frailties, until 1916 and the equally important and controversial decision of *Steedman v. Drinkle*,⁹³ *Dagenham* was applied as authority to allow a purchaser specific performance notwithstanding failure to perform on time and the presence of a time of the essence stipulation. For example, the case was followed in the high water mark case of *Kilmer v. British Columbia Orchard Lands Limited*.⁹⁴ Kilmer signed an agreement to purchase land from British Columbia Orchard Lands Limited for \$75,000. The agreement provided for installment payments and stipulated time of the essence. The agreement further provided that should there be a default, then all the payments were forfeit, and the vendor was at liberty to resell. Kilmer paid the first installment of \$2,000 and was granted an extension until July 7, 1910 for the payment of the second installment of \$5,000. Kilmer did not pay on the 7th, but rather wrote the vendor on the 8th with an explanation and a promise to pay without fail on July 12th. The vendor responded by calling the transaction off and by suing for a declaration to this effect. Kilmer paid the overdue installment into court and counterclaimed for specific performance. Restoring the trial judgment, the Privy Council ordered specific performance. Lord Macnaghten wrote the judgment of the court and viewed the case as coming within the principles of *Dagenham*. The provision in the contract calling for a loss of all payments was penal, especially since the provision became more severe as the agreement approached completion.

In *Steedman v. Drinkle*,⁹⁵ Drinkle was the purchaser of land under an installment contract and Steedman was the vendor. Time was expressed

⁹² On this point, see the comment of Anglin J. in *Bark-Fong v. Cooper* (1913), 49 S.C.R. 14, at pp. 28-29, 16 D.L.R. 299, at p. 308.

⁹³ [1916] 1 A.C. 275, (1915), 25 D.L.R. 420 (P.C.).

⁹⁴ [1913] A.C. 319, (1913), 10 D.L.R. 172 (P.C.). See also: *Bark-Fong v. Cooper*, *supra*, footnote 92; the dissenting judgment of Meredith C.J. in *Labelle v. O'Connor*, *supra*, footnote 56; *Chadwick v. Stuckey (No. 2)* (1912), 8 D.L.R. 357, 3 W.W.R. 549 (Alta. C.A.); and, in a recent second coming of the *Dagenham* doctrine, *Legione v. Hateley*, *supra*, footnote 51, discussed *infra*.

to be of the essence. Drinkle missed an installment payment and Steedman exercised the provision in the contract giving him the right to declare the agreement at an end and to retain any payments. Drinkle brought an action for specific performance, or in the alternative, for relief from the loss of the amounts paid.

The Privy Council concluded that Drinkle was entitled to relief from the loss of the payments, but he was not entitled to specific performance. Specific performance was not available because time was expressly made of the essence and equity would not intervene unless this provision was waived. Lord Haldane, who delivered the judgment of the court, in a passage that would come to be frequently quoted, stated:⁹⁶

Courts of Equity, which look at the substance as distinguished from the letter of agreements, no doubt exercise an extensive jurisdiction which enables them to decree specific performance in case where justice requires it, even though literal terms of stipulations as to time have not been observed. But they *never* exercise this jurisdiction where the parties have expressly intimated in their agreement that it is not to apply by providing that time is to be the essence of their bargain.

Lord Haldane distinguished or explained away *Kilmer* as an example of waiver of time of the essence, and he did this despite the absence of a discussion of waiver in the judgments in that case.

Steedman has been followed in many cases⁹⁷ and has not been seriously challenged until the recent Australian case of *Legione v. Hateley*.⁹⁸ The purchasers bought a vacant parcel of land for \$35,000. They paid a deposit of \$6,000 and the balance was due about a year later, on July 1, 1970, with time for payment being of the essence. The agreement, however, required the vendors to give written notice specifying a time period to remedy any default.

The purchasers were allowed to take possession, and unknown to the vendors, the purchasers erected a dwelling on the land. As the closing date approached, the purchasers asked for an extension since they had run into difficulties completing a sale from which they intended to use the funds for their purchase. The extension was refused, the July closing date passed, and the vendors gave the required notice specifying a deadline of August 10, 1979 for closing. On August 9, a conversation took place

⁹⁵ *Supra*, footnote 93.

⁹⁶ *Ibid.*, at pp. 279 (A.C.), 422 (D.L.R.). (Emphasis added). This statement is consistent with the statement of Lord Parker in *Stickney v. Keeble*, *supra*, footnote 19.

⁹⁷ *Brickles v. Snell*, *supra*, footnote 64; *Boericke v. Sinclair*, [1929] 1 D.L.R. 561, (1928), 63 O.L.R. 237 (Ont. C.A.); *Taylor v. Grey Real Estate and Investments Ltd.* (1930), 39 O.W.N. 298 (Ont. H.C.); *Walton v. Morris*, [1944] O.W.N. 410 (Ont. H.C.).

⁹⁸ *Supra*, footnote 51. Discussed in K.G. Nicholson, *Breach of an Essential Time Stipulation and Relief Against Forfeiture* (1983), 57 A.L.J. 632; C. Harpum, *Relief Against Forfeiture and the Purchaser of Land* (1984), 43 Camb. L.J. 134; Gummow, in Finn, *op. cit.*, footnote 83; I.C.F. Spry, *Some Recent Problems in Regard to Specific Performance*, in Finn, *ibid.*; K. Hodgkinson, *Specific Performance and Deposits* (1984), 4 Oxford J.L.S. 137; A.G. Lang, *Forfeiture of Interests in Land* (1984), 100 Law Q. Rev. 427.

between the purchaser's solicitor and a secretary for the vendor's solicitor followed by some correspondence about the availability of bridge financing. The purchasers could have completed on August 10, but they did not feel pressed to do so. On August 14, the vendors took the position that the transaction had ended as of the August 10 deadline. The purchasers tendered and followed up with an action for specific performance.

In the Australian High Court, three judgments were delivered. Brennan J. dissented and would have dismissed the action based on *Steedman v. Drinkle*. Gibbs C.J. and Murphy J., in a jointly written judgment, found a waiver of time of the essence based on the August 9th conversation. However, they could not gather a majority around this position. Alternatively, they held that the equitable doctrine of relief from forfeiture would allow specific performance to be awarded notwithstanding the time of the essence stipulation. Mason and Deane JJ., in a jointly written judgment, agreed with this conclusion, although their reasoning differed somewhat.

Gibbs C.J. and Murphy J. noted that had the purchasers been denied specific performance, they would have lost their equitable interest in the land. Equity had historically granted relief from forfeiture, especially in cases where the right of forfeiture was inserted to secure the payment of money.⁹⁹ As for *Steedman*, its result and the correctness of its treatment of *Kilmer v. British Columbia Orchard Lands Limited*¹⁰⁰ were doubtful. Rather, the results in *Kilmer, Re Dagenham (Thames) Dock Company*¹⁰¹ and *Vernon v. Stephens*,¹⁰² supporting a right to specific performance notwithstanding time being of the essence, were preferable. The judges stated:¹⁰³

... if it is just to relieve against the forfeiture which is incurred when the vendor retains payments already made under the contract, it is difficult to see why it should be unjust to relieve the purchaser against the forfeiture of the interest in the property that results in exactly the same circumstances. No doubt where the parties have chosen to make time of the essence of the contract the grant of relief against forfeiture as a preliminary to an order for specific performance will be exceptional. Nevertheless on principle we can see no reason why such an order should not be made if it will not cause injustice but will on the contrary prevent injustice.

In *Legione*, having regard to the circumstances, the shortness of the delay, the good faith of the purchasers and the "ill-merited" windfall should the vendors recover an improved property, it was just to order a new trial on the issue of specific performance.

Mason and Deane JJ. also observed that the purchasers sought relief from the loss of their equitable interest in the property. They doubted

⁹⁹ Gibbs C.J. and Murphy J. relied on the expansive view of equity's jurisdiction to relieve against forfeiture espoused in *Shiloh Spinners v. Harding*, *supra*, footnote 87.

¹⁰⁰ *Supra*, footnote 94.

¹⁰¹ *Supra*, footnote 89.

¹⁰² *Supra*, footnote 84.

¹⁰³ *Supra*, footnote 51, at pp. 429 (C.L.R.). 300 (A.L.J.R.).

the correctness of *Steedman*, which imposed an inflexible rule that would not allow relief from forfeiture where time was expressed of the essence. They preferred a strict, but flexible rule. The rule was strict because, where time was of the essence, specific performance would be granted only in exceptional circumstances based on the presence of unconscionable conduct. They stated:¹⁰⁴

In the ultimate analysis the result in a given case will depend upon the resolution of subsidiary questions which inevitably arise. The more important of these are: (1) Did the conduct of the vendor contribute to the purchaser's breach? (2) Was the purchaser's breach (a) trivial or slight, and (b) inadvertent and not wilful? (3) What damage or other adverse consequences did the vendor suffer by reason of the purchaser's breach? (4) What is the magnitude of the purchaser's loss and the vendor's gain if the forfeiture is to stand? (5) Is specific performance with or without compensation an adequate safeguard for the vendor?

Applying these criteria, Mason and Deane JJ. concluded that the purchasers satisfied some of the criteria, but there was insufficient evidence to make a final decision and thus, they directed a trial of an issue.

Because of the continuing authority of *Steedman*, *Legione* does not represent the current law in Canada or in England. Indeed, in England, although *Shiloh Spinners Ltd. v. Harding*¹⁰⁵ appeared to recognize an expansive jurisdiction for equitable relief, recent cases and, in particular, *Scandinavian Trading Tanker AB v. Flota Petrolera Ecuatoriana*,¹⁰⁶ have reaffirmed that equitable relief will not be used to alter the effect of a time of the essence provision. In the latter case the charterer attempted to use this expansive view of equity's jurisdiction to obtain relief from the time of the essence stipulation for the payment of the charter hire. The attempt was rebuffed by the House of Lords, in part because the charterparty did not involve any transfer of an interest in the vessel and thus, there was no property interest to forfeit, but also because the policy concerns of maintaining and establishing certainty in commercial transactions stood against the invocation of any equity jurisdiction.¹⁰⁷

Legione, however, does suggest a means for challenging the currently governing rule from *Steedman* and questions the merits of its absolute rule. *Legione* offers a strict but not absolute rule based on unconscionability and relief from forfeiture.¹⁰⁸

¹⁰⁴ *Ibid.*, at pp. 449 (C.L.R.). 309 (A.L.J.R.).

¹⁰⁵ *Supra*, footnote 87.

¹⁰⁶ *Supra*, footnote 12.

¹⁰⁷ See also: *Sport International Bussum BV v. Inter-Footwear Ltd.*, [1984] 2 All E.R. 321 (H.L.), where the House of Lords rejected an attempt to use *Shiloh Spinners Ltd. v. supra*, footnote 87, as a means to get around a time of the essence provision.

¹⁰⁸ In *Ciavarella v. Balmer* (1983), 153 C.L.R. 438, 57 A.L.J.R. 632, the Australian High Court stressed the element of unconscionable conduct in *Legione* and refused to follow it and grant relief in a case where the vendor had fairly relied on time of the essence stipulation.

D. *Recovery of the Deposit and Purchase Moneys*

The discussion in this part of the article considers the law about the recovery of deposits and purchase moneys. Where this kind of recovery is possible, it may soften the effect of time of the essence on the party who fails to perform on time. The discussion will reveal a number of unsettled legal issues.

The discussion here may begin with a matter of semantics. The forfeiture or loss of a deposit or purchase moneys is sometimes referred to as a penalty. While this type of forfeiture may hurt or punish the party who fails to perform, as a legal concept this forfeiture is, strictly speaking, not a penalty. A penalty is a contract term that imposes an additional monetary obligation upon a party who breaches a contract.¹⁰⁹ To be a penalty, the amount of the obligation goes beyond a genuine pre-estimate of the innocent party's damages and operates *in terrorem* of the breaching party. Equity's jurisdiction to relieve against penalties and its jurisdiction to relieve against forfeitures cover similar policy ground and share a number of common themes.¹¹⁰ For example, both a penalty provision and a forfeiture provision have the effect of deterring non-performance. Further, in testing whether a contract provision is a penalty a relevant consideration is whether the amount of the additional payment required is extravagant and unconscionable when compared to the greatest possible loss. This consideration is also relevant in analysing the effect of a forfeiture provision since the amount forfeited may exceed the innocent party's loss, particularly in cases where the innocent party is allowed to recover the subject matter of the sale and also retain payments of purchase moneys.¹¹¹

As an example of the sharing of concepts or word usage in discussions of forfeitures and penalties, in *Steedman v. Drinkle*,¹¹² where the Privy Council was prepared to allow the purchaser to recover his purchase moneys despite time of the essence and the failure to perform on time, the court described the stipulation for forfeiture as "in the nature of a penalty".

¹⁰⁹ *Dunlop Pneumatic Tyre Co. v. New Garage & Motor Co.*, [1915] A.C. 79 (H.L.); *Bridge v. Campbell Discount Co. Ltd.*, [1962] A.C. 600, [1962] 1 All E.R. 385 (H.L.); *Canadian General Electric Co. v. Canadian Rubber Co.* (1915), 52 S.C.R. 349, 27 D.L.R. 294; *H.F. Clarke Ltd. v. Thermidaire Corp. Ltd.*, [1976] 1 S.C.R. 319, (1974), 54 D.L.R. (3d) 385; *Elsley v. J.G. Collins Ins. Agencies Ltd.*, [1978] 2 S.C.R. 916, (1978), 83 D.L.R. (3d) 1.

¹¹⁰ See D. Vaver, *Developments in Contract Law: Chief Justice Laskin and the Law of Contracts* (1985), 7 Sup. Ct. L.R. 131, at pp. 167-172, showing how Laskin C.J.C. appreciated the essential similarity of penalty clauses and forfeiture clauses.

¹¹¹ Both branches of equity's jurisdiction are codified by legislation. For example, see, *Courts of Justice Act*, 1984, S.O. 1984, c. 11, s. 111, which states: "A court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

¹¹² *Supra*, footnote 93.

In the important case of *Stockloser v. Johnson*,¹¹³ discussed below, the judgments use the language of penalties to analyse the court's jurisdiction to relieve against the forfeiture of installment payments.

Turning now to the case law, the first topic to explore is deposits. *Howe v. Smith*¹¹⁴ is a leading case in this area and is usually cited for the proposition that if a purchaser breaches a contract of sale, then he or she forfeits the deposit. In this case, under an agreement to purchase lands for £12,500, the purchaser paid £500 "as a deposit and in part payment of the purchase price". The agreement specified that if the purchaser breached the agreement, then the vendor was free to resell and claim any deficiency. The purchaser breached, and his action for specific performance was dismissed. On appeal, the purchaser sought leave to claim a return of the deposit. The Court of Appeal regarded a deposit as an earnest or guarantee that the contract shall be performed. Thus, the deposit is forfeit if the purchaser fails to perform. The court held that if the contract is performed, then the deposit is applied to the purchase price. Of the three judges, Cotton and Bowen L.JJ. held that if the purchaser repudiates or abandons the contract, the deposit is absolutely forfeit.¹¹⁵ In this case, the purchaser's conduct was repudiatory. Fry L.J. agreed that the purchaser was not entitled to recover the deposit and stated that the purchaser lost the deposit if unable to secure specific performance and if unable to claim damages at law. In this case, specific performance was not available, and damages could not be claimed because the purchaser had breached the contract by failing to show a readiness and willingness to perform within time.

Cotton and Bowen L.JJ. left room for recovery of purchase moneys, including a deposit, where the purchaser's conduct, although sufficient to preclude specific performance, was short of repudiation or abandonment. Cotton L.J. stated:¹¹⁶

It may well be that there may be circumstances which would justify this Court in declining, and which would require the Court, according to its ordinary rules, to refuse to order specific performance, in which it could not be said that the purchaser had repudiated the contract, or that he had entirely put an end to it so as to enable the vendor to retain the deposit. In order to enable the vendor so to act, in my opinion there must be acts on the part of the purchaser which not only amount to delay sufficient to deprive him of the equitable remedy of specific performance, but which would make his conduct amount to a repudiation on his part of the contract.

The underlying policy appears to be that the purchaser cannot, by repudiating, acquire rights. In the words of Bowen L.J.: "It is quite certain that the purchaser cannot insist on abandoning his contract and yet recover

¹¹³ [1954] 1 Q.B. 476, [1954] 1 All E.R. 630 (C.A.).

¹¹⁴ (1884), 27 Ch. D. 89 (C.A.).

¹¹⁵ See also: *Soper v. Arnold* (1889), 14 App. Cas. 429 (H.L.).

¹¹⁶ *Supra*, footnote 114, at p. 95.

the deposit, because that would enable him to take advantage of his own wrong."¹¹⁷

The idea from *Howe v. Smith* that the purchaser must show a willingness to perform in order to recover a deposit, may be noted in *Steedman v. Drinkle*, and it has been regarded as a requirement for recovery in many other cases.¹¹⁸ It is, however, an idea that has been reconsidered in modern case law.

Before considering the modern developments, it is necessary next to explore the topic of the recovery of purchase moneys other than the deposit. This topic was considered in *March Brothers & Wells v. Banton*,¹¹⁹ a decision of the Supreme Court of Canada and *Mayson v. Clouet*,¹²⁰ a decision of the Privy Council. *March Brothers & Wells* involved an agreement for the sale of land. The agreement provided that upon the purchaser's default, by giving notice, the vendor might terminate and keep the purchase moneys. The purchaser did not make timely payments, and the vendor purported to exercise his right to terminate. The purchaser's action for specific performance was dismissed because of his delay in making timely payments. The court, however, ruled that the vendor's notice was ineffective and thus, there was no operative provision for keeping the purchase moneys. The question then became whether the purchaser could recover these moneys. The court answered yes. Simple purchase moneys, unlike a deposit, do not have the character of a guarantee for performance. In the absence of clear language in the agreement showing an intention to forfeit, purchase moneys must be restored to the purchaser.¹²¹ The vendor, however, will have a claim for damages.

In *Mayson v. Clouet*, the purchaser agreed to purchase property upon which a building was to be constructed. The purchaser paid a deposit and two installments of ten per cent of the purchase price. The balance was due on the completion of the building. The agreement provided for the forfeiture of the deposit, but not of the installments. The purchaser failed to pay, and his assignee in bankruptcy sought to recover the two

¹¹⁷ *Ibid.*, at p. 98.

¹¹⁸ *Cornwall v. Henson*, *supra*, footnote 82; *March Brothers & Wells v. Banton* (1911), 45 S.C.R. 338, 1 W.W.R. 544; *Sprague v. Booth* (1908), 21 O.L.R. 637 (Ont. C.A.), *affd.*, [1909] A.C. 576 (P.C.); *Walsh v. Willaughan* (1918), 42 D.L.R. 581, 42 O.L.R. 455 (Ont. C.A.); *Dobbin v. Niebergall* (1920), 56 D.L.R. 510, 48 O.L.R. 343 (Ont. H.C.); *Boericke v. Sinclair*, *supra*, footnote 97; *Taylor v. Grey Real Estate and Investments Ltd.*, *supra*, footnote 97; *Mussen v. Van Diemen's Land Co.*, [1938] Ch. 253, [1938] 1 All E.R. 210 (Ch. D.); *Kowbel v. Marusiak* (1957), 7 D.L.R. (2d) 424, 21 W.W.R. 35 (Alta. C.A.); *Hughes v. Lukuvka* (1970), 14 D.L.R. (3d) 110, 75 W.W.R. 464 (B.C.C.A.).

¹¹⁹ *Ibid.*

¹²⁰ *Supra*, footnote 3, followed in *Stevenson v. Colonial Homes Ltd.*, [1961] O.R. 407 (Ont. C.A.).

¹²¹ See also: *Brown v. Walsh* (1919), 45 O.L.R. 646 (Ont. C.A.); *Whitely v. Richards* (1920), 57 D.L.R. 728, 48 O.L.R. 537 (Ont. H.C.).

installment payments. Lord Dunedin for the court stated that the result in each case depended on the provisions of the contract. He referred to *Howe v. Smith*¹²² and noted that the elaborate argument in that case about deposits would not have been necessary if purchase moneys *per se* were forfeitable. Lord Dunedin concluded that the installments were not forfeited.¹²³

The key to *March Brothers & Wells v. Banton* and *Mayson v. Clouet* is that the agreements did not provide for forfeiture of the purchase moneys. Thus, a distinction can be drawn between deposits which are *per se* forfeitable and purchase moneys that are not. From this distinction, the rule has developed that in the absence of a provision in the contract for forfeiture, purchase moneys other than the deposit are recoverable after deducting the vendor's damages.¹²⁴

The theory behind the distinction between deposits and purchase moneys is usually not discussed and, consequentially, is somewhat obscure. In the Australian case of *MacDonald v. Denny Lascalles Ltd.*,¹²⁵ Dixon J. offered the following theory. When a contract is discharged by breach, rights that have already been unconditionally acquired are not divested. A deposit falls into this category. Purchase moneys in the absence of a forfeiture provision do not fall into this category. Such moneys are paid conditionally "for the use of the purchaser" for the completion of the contract. Thus, in circumstances where there is no forfeiture provision, if the contract is breached the common law allows the guilty purchaser a restitutionary claim for moneys had and received. As a matter of restitutionary law, the innocent vendor has not unconditionally acquired the purchase moneys and cannot have both the land and the money.¹²⁶ In *Labelle v. O'Connor*,¹²⁷ Anglin J. explained the theory as follows:

The reasons why, without any express provision, money paid as a deposit should be forfeited, while money paid on account of the purchase price should, upon rescission for default, be returned to the purchaser are obvious. The former money is paid as a guarantee that the purchaser will not make default and from the nature of the payment forfeiture upon default is implied. To moneys paid merely as an installment

¹²² *Supra*, footnote 114.

¹²³ See also: *Dies v. British and International Mining and Finance Corporation Ltd.*, [1939] 1 K.B. 724 (K.B.D.).

¹²⁴ *Labelle v. O'Connor*, *supra*, footnote 56; *De Palma v. Runnymede Iron & Steel Co.*, [1950] 1 D.L.R. 557, [1950] O.R. 1 (Ont. C.A.); *Stevenson v. Colonial Homes Ltd.*, *supra*, footnote 120; *Bradley Bros. (Oshawa) Ltd. v. A to Z Rental Can. Ltd.* (1973), 32 D.L.R. (3d) 521, [1973] 1 O.R. 823 (Ont. H.C.), varied (1974), 46 D.L.R. (3d) 686, 3 O.R. (2d) 766 (Ont. C.A.); *Ménard v. Gagnéux* (1982), 138 D.L.R. (3d) 273, 39 O.R. (2d) 55 (Ont. H.C.).

¹²⁵ (1933), 48 C.L.R. 457 (Aust. H.C.). This case was unanimously approved by the House of Lords in *Johnson v. Agnew*, *supra*, footnote 42.

¹²⁶ See also, R. Goff and G. Jones, *The Law of Restitution* (3d ed., 1986), pp. 468-475; Harpum, *loc. cit.*, footnote 98, at pp. 134-136.

¹²⁷ *Supra*, footnote 56, at pp. 550-551.

of purchase money the character of a guarantee is not attached, and upon rescission, the consideration for the payment being extinguished, in the absence of an express provision for forfeiture, restitution is a natural consequence.

Many agreements will provide for forfeiture of all purchase moneys. The contract in *Mussen v. Van Diemen's Land Co.*¹²⁸ is an example. The contract here was for the purchase of parcels of land for a total price of £321,000 payable in installments over a number of years. The contract provided that should the purchaser default, then any moneys already paid were forfeit. The contract provided for conveyances of parcels as installments were made. The plaintiff paid £139,000 and received parcels priced at £99,300. The purchaser became unable to complete and sought recovery of the excess paid over the value of the land received. Fairwell J. dismissed the action. It was his view that the provision in the agreement for forfeiture was not a penalty. The basis of equity's jurisdiction to relieve against penalties, he said, was where it was against conscience for the person with the money to retain it. Here, the parties had expressly contracted for forfeiture, and it was not unconscionable that the vendors should keep the money. In Farwell J.'s view, with the exception of *Steedman v. Drinkle*,¹²⁹ a purchaser only obtained relief where the court was prepared to award specific performance. As for *Steedman v. Drinkle*, where the purchase money was recovered, that was a case where the purchaser was willing to perform and, but for the time of the essence, specific performance would have been available.

*Stockloser v. Johnson*¹³⁰ began the modern reassessment of the requirements for recovery of the deposit and purchase moneys. The defendant owned the royalties from the plant and machinery in two quarries. By two written agreements, the defendant assigned the royalties and sold the plant and equipment to the plaintiff. Each contract provided for installment payments and each contained a provision that in the event of the plaintiff's default, the defendant could retake possession and all payments would be forfeit. The plaintiff defaulted and, although unwilling to perform, brought an action to recover the installment payments. The action was dismissed, but the judges of the Court of Appeal differed in their views of the applicable law.

Romer L.J. held that since the plaintiff had received royalties and was entitled to keep his income, there was no question of a penalty or any right to a return of the payments. However, out of deference to the argument, he went on to consider the case as if the plaintiff had not received any income. It was Romer L.J.'s view that even in this case, there was no basis for the return of the payments. The plaintiff must be taken to know the risk he was running by entering into a contract that provided

¹²⁸ *Supra*, footnote 118.

¹²⁹ *Supra*, footnote 93.

¹³⁰ *Supra*, footnote 113.

for the forfeiture of installment payments. Romer L.J. agreed with the views of Farwell J. in *Mussen v. Van Diemen's Land Co.*¹³¹ Romer L.J. concluded that equity would only relieve against a contractual stipulation for the loss of purchase moneys through its jurisdiction to award specific performance. This jurisdiction would require a purchaser able and willing to proceed with the contract. Cases like *Re Dagenham (Thames) Dock Company*¹³² and *Kilmer v. British Columbia Orchard Lands Limited*¹³³ were examples where the courts, in the exercise of their equitable jurisdiction, gave the purchaser more time to perform. Romer L.J. summed up his opinion by stating:¹³⁴

In my judgment, there is no sufficient ground for interfering with the contractual rights of a vendor under forfeiture clauses of the nature which are now under consideration, while the contract is still subsisting, beyond giving a purchaser who is in default, but who is able and willing to proceed with the contract, a further opportunity of doing so; and no relief of any other nature can properly be given, in the absence of some special circumstances such as fraud, sharp practice, or other unconscionable conduct of the vendor, to a purchaser after the vendor had rescinded the contract.

The judgments of Somervell L.J. and Denning L.J. took a more liberal view of the court's jurisdiction to order a return of purchase moneys, including the deposit. Based on equitable relief from penalties, they described a jurisdiction that would allow purchase moneys to be recovered notwithstanding that specific performance was unavailable and even notwithstanding that the purchaser was unwilling or unable to complete.

Somervell L.J. thought that, in theory, the plaintiff could get back the installment payments. He disagreed with the restrictive view of equity's jurisdiction and stated that if it could be shown that the retention of the installments was unconscionable, then the court had the power to give relief against the enforcement of the forfeiture provisions although there was no sharp practice by the vendor and although the purchaser was unable or unwilling to perform. Unconscionability, however, could not be established in this case.

Denning L.J. agreed that there was equitable jurisdiction to relieve against the forfeiture provisions.¹³⁵ The problem was defining the circumstances for the exercise of this jurisdiction. In Lord Denning's view, two things were necessary: first, the forfeiture clause must be of a penal nature

¹³¹ *Supra*, footnote 118.

¹³² *Supra*, footnote 89.

¹³³ *Supra*, footnote 94.

¹³⁴ *Supra*, footnote 113, at pp. 501 (Ch.), 644 (All E.R.).

¹³⁵ See also, *Bridge v. Campbell Discount Co. Ltd.*, *supra*, footnote 109, at pp. 631 (A.C.), 400-401 (All E.R.), per Lord Denning, 624 (A.C.), 396 (All E.R.), per Lord Radcliffe. This case involved the hire purchase of an automobile, Lord Radcliffe also commented about the jurisdiction to order the return of a deposit where the forfeiture amounted to a penalty.

in the sense that the sum forfeited must be out of all proportion to the damage; and second, it must be unconscionable for the seller to retain the money. The purchaser's readiness and willingness to perform were not prerequisites to the exercise of the equitable jurisdiction to relieve against forfeiture. In this case, however, it was not appropriate to grant relief from forfeiture.

It may be submitted that the more expansive view of equity's jurisdiction is preferable. The opinions of Farwell J. in *Mussen v. Van Diemen's Land Co.*¹³⁶ and of Romer L.J. in *Stockloser v. Johnson* are inconsistent with *Steedman v. Drinkle*¹³⁷ where the court made it clear that despite the unavailability of specific performance, purchase moneys might be recovered.¹³⁸ Further support is available from Dixon J.'s judgment in *McDonald v. Dennys Lascalles Ltd.*¹³⁹ where he stated:

Although the parties might by express agreement give the vendor an absolute right at law to retain the installments in the event of the contract going off, yet in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved.

Further still, it is anomalous to require a purchaser to pursue specific performance in order to obtain equitable relief when that effort, while it may demonstrate the purchaser's good faith, nevertheless is doomed to failure because of a time of the essence stipulation that forecloses specific performance. Moreover, given the discretionary nature of equitable relief and that the loss of the purchase moneys and the property may be excessive and unconscionable, it seems just that the court should have the jurisdiction to effect a result that fairly compensates the vendor, but does not unduly punish the defaulting purchaser.

In England, the strength of the more liberal view of equity's jurisdiction as described in *Stockloser v. Johnson* is unclear. In *Galbraith v. Mitchenall Estates Ltd.*,¹⁴⁰ a case about forfeiture of installments under a hire-purchase contract for a mobile home, Sachs J. as a trial judge preferred the view of Romer L.J. However, a liberal jurisdiction was conceded and not argued in the Court of Appeal in *Starside Properties Ltd. v. Mustapha*,¹⁴¹ where the issue was the jurisdiction of the court to vary an order that granted equitable relief.

In any event, in England, the issue of the recovery of purchase moneys, including deposits, is in part addressed by section 49 of the Law of Property Act, 1925 which provides that "where the court refuses to grant specific performance of a contract, or in any action for the return of a deposit,

¹³⁶ *Supra*, footnote 118.

¹³⁷ *Supra*, footnote 93.

¹³⁸ See also: *Brickles v. Snell*, *supra*, footnote 64.

¹³⁹ *Supra*, footnote 125, at p. 478.

¹⁴⁰ [1965] 2 Q.B. 473, [1964] 2 All E.R. 653 (Q.B.D.).

¹⁴¹ [1974] 1 W.L.R. 816, [1974] 2 All E.R. 567 (C.A.).

the court may, if it thinks fit, order the repayment of any deposit". This provision applies to contracts for the sale or exchange of an interest in land. The courts have ruled that the discretion provided by the statute should be liberally exercised to secure just results.¹⁴²

Courts in Canada have adopted the expansive view of equity's jurisdiction to relieve against forfeiture as espoused by Somervell and Denning L.J.J. in *Stockloser v. Johnson*. For example, in *Tymo v. Wild Rose*,¹⁴³ the purchaser defaulted in paying installments under an agreement to purchase lands after paying \$515,000 of the \$1,200,000 purchase price. The agreement stipulated time of the essence and provided that upon default, the purchaser was deemed to have repudiated and abandoned the agreement. Purvis J. applied *Steedman v. Drinkle*¹⁴⁴ to deny specific performance, but as allowing relief from the loss of the installment payments. As for the criteria to determine whether relief from forfeiture should be granted, Purvis J. selected the test from *Stockloser v. Johnson*. However, there was insufficient evidence to decide the point, and a new trial was directed. For that trial, the evidence of land values would be an important factor.¹⁴⁵ If land values had increased, then it might be inequitable for the vendors to keep the money and the land. Other important factors are the risks undertaken by the parties when they entered into the agreement and the amount of money already paid.

In *216927 Alta. Ltd. v. Fox Creek (Town)*,¹⁴⁶ the Alberta Court of Appeal directly considered whether relief from forfeiture was available when a purchaser repudiates. In this case, a developer agreed to develop a commercial complex on land purchased from a municipality. All of the purchase money, \$250,000, was paid but it was a term of the agreement with the municipality that title not be transferred until the developer had completed the foundations for the project. This never occurred because circumstances made the project uneconomical. The municipality purported to keep the \$250,000 and the land which had a value of \$88,500. The developer was granted relief from forfeiture in the amount of \$88,500. The court concluded that the better view of the authorities was that equitable relief may be granted in meritorious cases notwithstanding the repudiation by the purchaser.

¹⁴² *Universal Corporation v. Five Ways Properties Ltd.*, [1979] 1 All E.R. 552 (C.A.); *Schindler v. Pigault* (1975), 30 P. & C.R. 328 (Ch. D.).

¹⁴³ *Supra*, footnote 34. See also: *City of Edmonton v. A. & M. Developments Ltd.* (1980), 17 R.P.R. 304 (Alta. Q.B.), varied (1981), 25 R.P.R. 293 (Alta. C.A.), leave to appeal to S.C.C. refused (1981), 25 R.P.R. 293n; *Popyk v. Western Savings & Loan Assn.* (1969), 3 D.L.R. (3d) 511, 67 W.W.R. 684 (Alta. App. Div.); *Howren v. J. Heathcote & Co.*, *supra*, footnote 81.

¹⁴⁴ *Supra*, footnote 93.

¹⁴⁵ See also: *World Land Ltd. v. Daon Development Corpn.*, *supra*, footnote 81.

¹⁴⁶ [1990] 3 W.W.R. 321 (Alta. C.A.). See also: *Barber v. Glen*, [1987] 6 W.W.R. 689 (Sask. C.A.).

In other Canadian cases, the expansive equitable jurisdiction has been recognized, but not exercised, because it was inappropriate to do so in the circumstances.¹⁴⁷ Thus, in *Craig v. Mohawk Metal Ltd.*,¹⁴⁸ Parker J. would not allow relief from forfeiture of a \$25,000 deposit on a \$1.1 million sale when the purchaser was not in funds on the closing date. The vendor was allowed to forfeit the deposit despite having resold at a higher price. Referring to *Stockloser v. Johnson*, Parker J. said it was not unconscionable for the vendor to keep the money.¹⁴⁹

Conclusion

Putting the pieces together, the law about time of the essence may be summarized as follows:

- (a) Where time is of the essence, a time stipulation operates as a condition, that is, if a party fails to perform within the time specified, then the other party has the right to treat the contract as at an end and to sue for damages. Alternatively, the innocent party may sue for specific performance.
- (b) Where time is not of the essence, a time stipulation operates as a warranty; that is, if a party fails to perform within the time specified, then the other party may not treat the contract as at an end but may sue only for damages. And, depending on the type of contract, the innocent party may be compelled to perform by a decree of specific performance.
- (c) As a matter of classification, a time stipulation may be of the essence (a condition), not of the essence (a warranty) or intermediate (a condition or a warranty as determined from the seriousness of the breach). *Bunge Corp. v. Tradax S.A.*¹⁵⁰ indicates that it is unlikely, however, that a time stipulation will be classified as intermediate, especially in the case of a mercantile contract.
- (d) In light of the fusion of the common law and equity arising from the Judicature Act, 1873 and its successor legislation, what had been the rule in equity now governs when time is of the essence. (The common law rule was that a time stipulation usually was of the essence).

¹⁴⁷ *B.C. Dev. Corp. and NAB Holdings Ltd.* (1986), 30 D.L.R. (4th) 560, 6 B.C.L.R. (2d) 145 (B.C.C.A.); *Buck v. Cooper* (1955), 1 D.L.R. (2d) 282 (B.C.S.C.).

¹⁴⁸ (1975), 61 D.L.R. (3d) 588, 9 O.R. (2d) 716 (Ont. H.C.). See also: *Hughes v. Lukuvka* (1970), *supra*, footnote 118; *Clark v. Montreal Trust Co.*, [1977] 2 W.W.R. 34 (B.C.S.C.); *Lee v. Skalbania* (1987), 47 R.P.R. 162 (B.C.S.C.).

¹⁴⁹ See also: *Dimensional Investments Ltd. v. The Queen* (1967), 64 D.L.R. (2d) 632 (S.C.C.) where Ritchie J., who delivered the judgment of the court, noted the divergence between the views of Romer L.J. and Somervell and Denning L.J.J., but did not have to decide between them because, on the facts of the case, it was not unconscionable for the vendor to keep the installments.

¹⁵⁰ *Supra*, footnote 14.

The rule now is that time is of the essence only expressly, by reason of the nature of the property or circumstances of the contract or by reasonable notice.

- (e) Where the parties do not expressly make time of the essence, the essentiality of time becomes a matter of interpretation of the particular contract. Certain types of contracts, however, are usually interpreted as involving time of the essence; for example, options to purchase land or to renew leases.
- (f) In general, time will be of the essence: (a) in mercantile contracts except as to time of payment; (b) where the subject matter of the transaction is an income property; and (c) if the subject matter of the transaction is of a speculative nature.
- (g) Time of the essence may be restored or initiated by a party giving notice and specifying a date for performance that is reasonable in the circumstances. In deciding whether the specified time is reasonable, the court will consider all the circumstances, including the prior history and conduct, what remains to be done, the need for performance and whether time was previously of the essence.
- (h) Time of the essence may be waived. Waiver involves one party leading the other to understand that the strict rights of the contract will not be insisted upon. Where there is waiver, the failure to perform at the originally stipulated time cannot be said to be a breach of contract.
- (i) Where time is of the essence, if one party fails to perform on time and there is no waiver, the contract does not automatically come to an end. The innocent party has the right to "elect" to treat the breach as ending the contract or to keep the contract alive and claim damages. Once the injured party elects one remedy, then generally he or she is precluded from claiming an alternative.
- (j) Since most cases about time of the essence involve waiver only, the distinction between waiver and election is usually not noted.
- (k) A party who is in default and not ready to perform or who is the cause of the delay or default may not rely on time of the essence.
- (l) In Ontario, despite a weak case law foundation, there is a well established rule that in order to invoke time of the essence, a party must be ready, desirous, prompt and eager to carry out the agreement. The criteria of being ready, desirous, prompt and eager to perform seem to have been copied from criteria associated with the equitable remedy of specific performance.
- (m) Where time is of the essence and neither party is ready, willing and able to close on the appointed date, time of the essence can be reinstated by either party serving a notice fixing a new date for closing. The new date must be reasonable and the notice should state that time is to be of the essence for this new date.

- (n) Where there is a failure to perform on time and time of the essence has not been waived and the innocent party elects to end the contract, the law in Canada and in England is that specific performance will not be granted to the guilty party. In other words, in England and in Canada, equity's jurisdiction to relieve against forfeiture by granting specific performance is not available where time is of the essence. In Australia, however, there is a jurisdiction to grant relief from forfeiture by a decree of specific performance notwithstanding time being of the essence. This jurisdiction, recognized in *Legione v. Hately*,¹⁵¹ is available in exceptional circumstances based on the presence of unconscionable conduct.
- (o) In the absence of a forfeiture provision, purchase moneys, other than a deposit, are returnable to a purchaser who fails to perform on time. The vendor will, however, have a claim for damages.
- (p) If a purchaser breaches a contract of sale, then he or she forfeits the deposit and, where there is a forfeiture provision, also purchase moneys that have been paid.
- (q) There are competing lines of authority over whether there may be equitable relief from the forfeiture of purchase moneys and the deposit. One line of authority holds that equitable relief from forfeiture is only available in circumstances where the purchaser shows a willingness to perform the contract by seeking specific performance. Another more liberal line of authority views forfeiture provisions as similar to penalties and this line of authority allows relief from forfeiture of purchase moneys, including the deposit, where the forfeiture clause is in the nature of a penalty and where it would be unconscionable for the vendor to retain the moneys. The liberal jurisdiction would be available even though there was no sharp practice by the vendor and although the purchaser was unable or unwilling to perform. Recent case law has recognized the liberal view of equity's jurisdiction and it may be submitted that this line of authority is preferable.

¹⁵¹ *Supra*, footnote 51.