January 1986

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PROPERTY LAW—WAIVER OF CLOSING DATE IN LAND SALES CONTRACTS IN NORTH CAROLINA—Fletcher v. Jones

INTRODUCTION

Under North Carolina law, where no time has been fixed for the expiration of a land sale contract, the parties have a judicially implied right to perform their contractual duties within a reasonable time from the contract's closing date. Whether a party's performance after the closing date is within a "reasonable" time depends upon the purposes that the parties intended to accomplish and other circumstances of the particular case.

Parties to a land sale contract can provide for the contract's expiration on the closing date by making time of the essence to their contract. A time of the essence provision means that one party's performance on time is a condition of the other party's duty to perform. When a land sale contract contains a closing date and time is of the essence to the closing, the contract expires if a party does not perform at the closing date.

Two conflicting legal consequences result when a seller makes oral assurances to perform his contractual obligations after the closing date. First, where time is not of the essence and the seller purports to terminate the contract, a court can view the seller's oral assurances as some evidence of whether his purported termination was reasonable. In contrast, when the contract explicitly provides that time is of the essence, the seller's oral assurances to perform beyond the closing date are irrelevant as the contract expires by its terms on the closing date.

To prevent this conflicting result, when time is of the essence to the contract, courts often hold the seller's oral assurances of

3. See Douglas v. Brooks, 242 N.C. 178, 87 S.E.2d 258 (1955). The parties can also provide for the contract's expiration on a specific date by including an expiration date in the contract.
4. 3 A. Corbin, Corbin on Contracts, § 722 at 380 (1960).

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later performance to be a waiver of the time of the essence provision. When the time of the essence provision is deemed waived by the seller, the parties have a reasonable time to perform from the contract’s closing date.

In *Fletcher v. Jones*, the North Carolina Supreme Court held that a seller who made oral assurances to a buyer of his intent to comply with the terms of a land sale contract after the closing date, where time was not of the essence, waived the closing date. The court then held that a reasonable time for performance was computed from the date the buyer had notice that the seller was ready to close.

This Note will demonstrate that the *Fletcher* court erred in holding that a land sale contract closing date could be waived. This Note will show that the court misapplied the doctrine of waiver to a land sale contract closing date, the court erroneously concluding that the seller was estopped from contending that reasonable time for performance should be computed from that date. Additionally, this Note will also show that the court modified the contract closing date for the purpose of computing a reasonable time for performance, a result that the parties themselves could not have reached without a written modification of the closing date that complied with the Statute of Frauds. The Note discusses the impact of the *Fletcher* decision and concludes that the court’s application of waiver to a closing date was an unwarranted abandonment of the rule that performance be within a reasonable time from the closing date.

**The Case**

In August 1980, the buyer and seller entered into a land sale contract for three lots located in Dare County. The contract was subject to a condition that either the seller obtain an absolute divorce from his wife or his wife agree to co-execute a deed with the seller-husband. The contract provided for closing on January 9,

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9. *Id.*
10. 69 N.C. App. at 432, 317 S.E.2d at 412.
11. 314 N.C. at 390, 333 S.E.2d at 733. At the time of the contract, the seller
On the closing date the condition was not satisfied. The parties created a written addendum, extending the closing date to March 10, 1981. The condition remained unsatisfied on that date. Two weeks later, the seller requested another extension of the closing date. The buyer agreed to extend the closing to June 10, 1981. However, the seller did not sign the written extension agreement. Later, the seller assured the buyer that he would be ready to close after his divorce was final. In addition, the seller’s attorney assured the buyer’s attorney that the seller intended to close on the property.

On August 4, 1981, the seller notified the buyer that he was ready to close, but neither party arranged for a specific closing date. In mid-September, the seller accepted a third party offer for the three lots. The buyer received a letter from the seller declaring their contract null and void. The buyer notified the seller of his intent to enforce the contract and tendered under the contract’s terms. The seller refused to convey the property. The buyer sued for specific performance and special damages because of his reliance on the contract. The seller pleaded the Statute of Frauds as a defense to the unsigned written extension of the March 10 closing date and contended that the “plaintiff’s failure to tender performance after all conditions and extensions of the contract had expired” rendered the contract void.

The trial court granted the buyer’s request for specific per-
formance but did not make a specific finding on whether the buyer had tendered within a reasonable time from the March 10 closing date. The North Carolina Court of Appeals held that the seller's oral assurances to perform beyond March 10 were invalid as a modification of that closing date. The court of appeals remanded the case for determination of whether a reasonable time for performance had elapsed from March 10 to the time of the seller's purported termination in September.

The North Carolina Supreme Court reversed, holding that the seller's oral assurances constituted a waiver of the March 10 closing date. The court held that the buyer had tendered within a reasonable time from August 4, 1981, the date the buyer had notice that the seller was ready to close.

**Background**

In North Carolina, land sale contracts and their modifications must be in writing and must meet the other requirements of the Statute of Frauds. The written memorandum is required to prevent frauds and perjuries in land sale transactions. The traditional exception to the requirement of strict compliance with the Statute is where its use would perpetrate a fraud upon the other party. Although an oral agreement to extend a land sale con-

23. Id.
25. Id at 435-36, 317 S.E.2d at 414.
26. Id.
27. 314 N.C. 389, 333 S.E.2d 735.
28. Id. at 396, 333 S.E.2d at 736.
29. All contracts to sell or convey any lands, tenements or hereditaments, or any interest in or concerning them, and all leases and contracts for leasing land for the purpose of digging for gold or other minerals, or for mining generally, of whatever duration; and all other leases and contracts for leasing lands exceeding in duration three years from the making thereof, shall be void unless said contract, or some memorandum or note thereof, be put in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.
N.C. GEN. STAT. § 22-2 (1965). For modifications see Westmoreland v. Lowe, 225 N.C. 553, 35 S.E.2d 613 (1943) (modifications of land sale contracts required to be in writing).
31. See Loeb v. Gendel, 23 Ill. 2d 502, 179 N.E. 7 (1961) ("courts of equity will not permit the Statute of Frauds . . . to be used where the effect will be to accomplish a fraud"). Id. at 505, 179 N.E. at 9.
tract's closing date is within the Statute of Frauds, a seller may not raise the Statute as a defense to the invalid oral modification where the seller, before the closing date, requested the extension for his benefit even though the contract included a time of the essence provision.\(^\text{32}\)

In *Alston v. Connell*,\(^\text{33}\) the buyer and seller entered into an option contract for the sale of land, time being of the essence to the option.\(^\text{34}\) Before the option's expiration date, the seller requested a one-year extension of the option.\(^\text{35}\) The buyer agreed, but the modification was not reduced to a writing. When the buyer tendered under the option's terms within the time fixed by the oral modification, the seller refused to accept.\(^\text{36}\) The court held that where the option's expiration date was extended at the seller's request, for his convenience, and all the circumstances clearly implied that the seller intended to comply with the option's other terms, the seller could not raise the Statute of Frauds as a defense to the invalid oral modification.\(^\text{37}\) Otherwise the seller could use the Statute to commit fraud against the buyer.\(^\text{38}\)

Similarly, the court in *Johnson v. Noles*\(^\text{39}\) held that where the seller orally agreed to a six-day extension of an option contract so that the buyer's attorney could remedy certain title defects, the seller could not invoke the Statute of Frauds as a defense to the invalid oral modification of the option's expiration date. The seller contended that the oral extension was without consideration and void under the Statute.\(^\text{40}\) The court disagreed, holding that the oral extension was for the seller's benefit because the seller could


\(^{33}\) 140 N.C. 485, 53 S.E. 292 (1906).

\(^{34}\) Generally, time is of the essence in option contracts. See Bateman v. Kramer Lumber Co. 154 N.C. 248, 70 S.E. 474 (1911).

\(^{35}\) 140 N.C. at 491, 53 S.E. at 294.

\(^{36}\) Id.

\(^{37}\) Id.

\(^{38}\) Id. (quoting from Hickman v. Haines, 10 L.R.-C.P. 598, 603 (1875)).

\(^{39}\) 224 N.C. 542, 31 S.E.2d 637 (1944).

\(^{40}\) Id. at 545, 31 S.E.2d at 639.
not give a good warranty deed on the option's expiration date.\textsuperscript{41}

The *Alston* and *Johnson* decisions support the proposition that a seller, under an option contract where time is of the essence, will not be allowed to raise the Statute of Frauds as a defense to an invalid oral modification of the expiration date, given \textit{before} the option expires, for the seller's benefit or convenience, and where the circumstances clearly indicate that the seller intended to comply with the option's other terms.\textsuperscript{42}

In *Wagner v. Consolidated Realty Corp.*\textsuperscript{43}, the court held that letters sent by a seller to a buyer after the closing date, indicating his intent to comply with the other terms of a land sale contract (time being of the essence to the closing) was a "waiver" of the essence provision. In *Wagner*, the seller contended that a land sale contract expired on the closing date when time was of the essence to the closing.\textsuperscript{44} The court found that the seller's letters evidenced an intent to comply with the other terms of the contract after the closing date and held that the seller waived his right to enforce the time of the essence provision.\textsuperscript{45} The waiver of the essence provision "\textit{restored} in the [buyers] the right within a reasonable time to consummate the purchase."\textsuperscript{46}

Traditionally, waiver has been defined as the intentional relinquishment of a known right.\textsuperscript{47} When one party has a right to expect performance of a contract on time, he relinquishes that right if he intentionally leads the other party to believe that the right will not be enforced.\textsuperscript{48}

\textsuperscript{41} Id., 31 S.E.2d at 640.
\textsuperscript{42} In *Harvey v. Linker*, 226 N.C. 711, 40 S.E.2d 202 (1946), the court held that where the seller had orally agreed to extend the option date and \textit{reduce} the purchase price, the Statute of Frauds could be used as a defense to the buyer's action for specific performance. The court found that the purchase price was a material term of the option contract that could only be modified in compliance with the statute.
\textsuperscript{43} 210 N.C. 1, 185 S.E. 421 (1936).
\textsuperscript{44} Id. at 7, 185 S.E. at 424.
\textsuperscript{45} Id. (emphasis supplied).
\textsuperscript{46} See *Danville Lumber & Mfg. Co. v. Gallivan Bldg. Co.*, 177 N.C. 104, 97 S.E. 718 (1919); *Fetner v. Rocky Mount Marble & Granite Works*, 251 N.C. 296, 302, 111 S.E.2d 324, 328 (1959). The essential elements of a waiver are: (1) the existence, at the time of the alleged waiver, of a right, advantage or benefit; (2) the knowledge, actual or constructive, of the existence thereof; and (3) an intention to relinquish such right, advantage or benefit. *Danville*, 177 N.C. at 106, 97 S.E. at 720.
\textsuperscript{47} A time of the essence provision gives the parties the right to expect per-
Waiver has also been defined as the "excuse of the non-occurrence or of a delay in the occurrence of a condition of a duty." A time of the essence provision means that "performance on time [by one party] is a condition of the other party's duty" to perform. Therefore, a time of the essence provision is a "condition of a duty."

Under either definition of waiver, a time of the essence provision can be excused or "waived" in a land sale contract where there has been conduct by one party after the closing date that has led the other to believe that the time for performance has been extended. In *Shoreham Developers Inc. v. Randolph Hills, Inc.*, the Maryland Court of Appeals held that a seller's request for the extension of a land sale contract's closing date and further oral assurances to comply with the terms of the contract after the closing date was a waiver of the contract's time of the essence provision. The seller contended that an oral modification of the closing date was invalid under the Maryland Statute of Frauds. The Maryland court held that even if the oral modification was invalid, the conduct by the seller was sufficient to effect a waiver of the contract's time of the essence provision.

**ANALYSIS**

In *Fletcher v. Jones*, the North Carolina Supreme Court held that a closing date can be waived by a seller who made oral assurances to a buyer of his intent to perform beyond the closing date. The court further held that computation of reasonable time for performance began on the date that the buyer had notice that

formance no later than the date set for closing. After the closing date, the right can be relinquished by conduct demonstrating an intent to comply with the contract's other terms.

50. 3 A. Corbin, *supra* note 4, at 380.
51. [T]he courts have a fondness for treating certain conduct as a "waiver" rather than a "modification." By characterizing the conduct as a "waiver" rather than a "modification", a court may avoid three requirements for a modification: the requirement of assent, the requirement of a writing under the Statute of Frauds, and the requirement of consideration or detrimental reliance.

*Fletcher*, 314 N.C. at 394 n.2, 333 S.E.2d at 735 n.2 (1985).

52. 248 Md. 267, 235 A.2d 735 (1967).
53. *Id.* at 273-74, 235 A.2d at 740.
54. *Id.* at 275-76, 235 A.2d at 741.
the seller was "ready to close." Justice Mitchell, dissenting in part, felt that the case should be remanded because the trial court did not apply the proper legal standard to the facts for determining whether a reasonable time had elapsed from the March 10, 1981 closing date to September 24, 1981, the date of the seller's purported termination.

The North Carolina Supreme Court misapplied its definition of waiver in *Fletcher*. The court defined waiver as the "excuse of a non-occurrence or a delay in the occurrence of a condition of a duty." The contract in *Fletcher* did not contain a time of the essence provision. In fact, there was no condition in the parties' contract that required performance to be on the closing date. The closing date was merely a date set by the parties, viewed as "an approximation of what the parties regard[ed] as a reasonable time [for closing] under the circumstances of the sale." The court erred by holding that the closing date was a waivable "condition of a duty" because the closing date was not binding as a condition on either parties' duty to perform.

The court cited *Tantillo v. Janus* and *Kimm v. Andrews* as authority for defining a waiver. A brief review of these cases will demonstrate that the North Carolina Supreme Court misapplied its definition of waiver to the closing date in *Fletcher* where time was not of the essence.

In *Tantillo*, the sellers contended that the buyers had not redeemed a promissory note within the time allotted for redemption where time was of the essence to the contract. The *Tantillo* court found that the sellers waived their right to enforce a time of the essence provision in their contract because the sellers knew of the buyers' tardiness in complying with the redemption requirement.

56. *Id.* at 395, 333 S.E.2d at 735.
57. *Id.* at 400, 333 S.E.2d at 738 (Mitchell, J., concurring in part, dissenting in part). Justice Mitchell found that no specific finding of reasonable time for performance supported the trial judge's conclusion that the buyer was entitled to specific performance.
58. *Id.* at 395, 333 S.E.2d at 735 (emphasis supplied).
59. *Id.* at 393, 333 S.E.2d at 734.
60. The *Fletcher* contract did not contain an expiration date.
62. 87 Ill. App. 3d 231, 408 N.E.2d 1000 (1980).
63. 270 Md. 601, 313 A.2d 466 (1974).
64. 87 Ill. App. 3d at 234-35, 408 N.E.2d at 1003.
for several months before declaring the contract null and void. 65

In Kimm, the sellers were unable to comply with a condition precedent before the closing date, time being of the essence to the closing. 66 However, the sellers conveyed to the buyers under the terms of the original contract after the closing date. 67 The Kimm court held that the parties' subsequent conduct, evidencing an intent to comply with the original contract and in fact resulting in a settlement, was a waiver of the time of the essence provision. 68 The plaintiff in Kimm was a third-party purchaser under a later contract with the sellers, and the court held that the waiver of the essence provision was effective against him. 69

The Tantillo and Kimm decisions do not support the Fletcher holding that a mere closing date is a waivable condition. By holding that the seller waived the March 10 closing date, the Fletcher court estopped the seller from contending that a reasonable time for performance should be computed from March 10.

A. The Sole “Condition of a Duty”

In the Fletcher contract, the only condition that preceded the parties’ duties to perform was that the seller obtain an absolute divorce or his wife agree to co-execute a deed. 70 This condition is commonly referred to as a condition precedent. A condition precedent is a fact or event occurring after the making of a valid contract that must exist or occur before there is a right to immediate performance. 71 The seller in Fletcher was under no duty to convey the three lots until the condition precedent had occurred. In a footnote, the court found that the contract’s closing date governed the time within which the condition precedent had to be fulfilled. 72 Since time was not of the essence to the closing, the parties had a reasonable time in which the condition precedent had to be fulfilled. 73

The existence of the condition precedent misled the court in its application of waiver to the contract’s closing date. In the por-

65. Id. at 237-38, 408 N.E.2d at 1005.
66. 270 Md. at 608, 313 A.2d at 470.
67. Id. at 609, 313 A.2d at 471.
68. Id. at 623-24, 313 A.2d at 478.
69. Id. at 627, 313 A.2d at 480.
70. 314 N.C. at 390, 333 S.E.2d at 733.
71. 3 A. COBIN, supra note 4, at 628.
72. 314 N.C. at 393 n.1, 333 S.E.2d at 734 n.1.
73. Id.
tion of the opinion defining waiver, the court stated: "[C]onduct such as continuing performance with knowledge that the condition has not occurred might be questionable as the manifestation needed for a modification but sufficient for a waiver."74 This statement sheds light on how the court erred by holding that the closing date could be waived. Although the seller gave the buyer several assurances that he would comply with the contract beyond the March 10 closing date, the condition that prevented the seller from closing was the condition precedent. There was no condition that required closing to be on the closing date.75 Therefore, the only condition that fits the court's definition of waiver was the condition precedent. The court did not hold that the condition precedent was waived. In fact, the condition precedent could not be waived because the seller could not convey full title to the property until the condition was met.

The court held that the seller waived the closing date by his conduct subsequent to that date.76 Since the closing date was not a condition, the court's definition of a waiver as an excuse of a condition of a duty was inappropriately applied to the closing date.

B. A More Traditional Application of Waiver

The *Fletcher* court could have avoided holding that a closing date was a waivable condition of a duty by applying a more traditional definition of waiver to prevent the seller from contending that the reasonable time for performance began on the March 10 closing date. In North Carolina, waiver is traditionally defined as the intentional relinquishment of a known right.77 Since time was not of the essence to the *Fletcher* contract, the parties were subject to the general rule that closing be within a reasonable time.

The general rule of a reasonable time to perform after the closing date is an implied right in all land sale contracts where no expiration date has been set.78 The implied right belongs to both buyer and seller. The *Fletcher* court could have determined that

74. Id. at 394, 333 S.E.2d at 735 (quoting from E. Farnsworth, Contracts, § 8.5, at 562 (1982)) (emphasis supplied).
75. Recall that the parties in *Fletcher* did not set a specific date for the contract's expiration.
76. 314 N.C. at 395, 333 S.E.2d at 735.
the seller waived his implied right to close within a reasonable time from the closing date based on his conduct after March 10. The seller's conduct could satisfy the requirement that relinquishment of the right be intentional because the seller could expect that his oral assurances would lead the buyer to believe that time for performance had been extended beyond the March 10 closing date. Had the court found that the seller intentionally relinquished the implied right to close within a reasonable time from the March 10 closing date, the seller would have no right to assert regarding reasonable time for performance. The court could then justify its holding that a reasonable time for performance be computed from the date on which the buyer had notice that the seller was ready to convey.

C. Judicial Modification of the Closing Date

The Fletcher court held that a closing date can be waived by a seller who makes oral assurances to a buyer of his intent to perform beyond the closing date. Although a closing date should not be subject to waiver, a trial court can now apply Fletcher to avoid application of the general rule that a reasonable time for performance be computed from the closing date. By finding a waiver of a closing date based on subsequent conduct, a trial court can compute reasonable time for performance from the date that the assured party has notice that the other party is ready to close. The real impact of the Fletcher decision is to allow the trial court to modify the contract's closing date for purposes of computing reasonable time for performance, achieving what the contracting parties could not without executing a modification in compliance with the Statute of Frauds.

CONCLUSION

The Fletcher court held that a seller can waive the closing date in a land sale contract where time is not of the essence.79 Although the North Carolina Supreme Court defined waiver as an "excuse of a non-occurrence or a delay in the occurrence of a condition of a duty,"80 the court erred by applying this definition of waiver to a closing date because the date was not a condition. After finding a waiver of the closing date, the court created a new rule

79. Id. at 389, 333 S.E.2d at 731.
80. Id. at 394, 333 S.E.2d at 735.
for computing reasonable time for performance. Reasonable time for performance does not begin on the contract’s closing date in all cases.\textsuperscript{81} Rather, once a waiver of the closing date has been found, reasonable time for performance will be computed from the date that the assuring party gives notice that he is ready to close.\textsuperscript{82} This new rule allows a court to modify a contract’s closing date for the purpose of computing reasonable time for performance.

The court could have held that the seller waived his implied right to close within a reasonable time under a more traditional definition of waiver. Alternatively, the court could have simply remanded the case for further findings on the issue of reasonable time for performance from the March 10, 1981 closing date. Under either alternative the court would have avoided its confusing holding that a closing date is a waivable condition of a duty.

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\textsuperscript{81} \textit{Id.}

\textsuperscript{82} \textit{Id.}