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Re: Heritage Homes of De La Warr, Inc. v. Alexander, et al.
C.A. No. 1399-K
Date Submitted: May 5, 2005

Dear Counsel:

I.

Petitioner Heritage Homes of De La Warr, Inc. ("Heritage Homes") sold two adjacent lots to Respondents Barbara H. Alexander and M. Kevin Sartell (the "Sartells") in a subdivision known as Lexington Mill that it was developing in Kent County, Delaware. The Sartells agreed, without plans and specifications or pricing, that Heritage Homes would build a home for them. Heritage Homes held an option to repurchase the lots if the Sartells

did not build within three years.[1] The Sales Agreement, under the heading of "Additional Terms," provided: "It is agreed and understood by the sellers that purchasers have three years from the date of settlement to begin construction of their home." Other terms governing the construction of a dwelling by Heritage Homes were set forth in paragraph 2 of the Lexington Contract:

> The parties agree that Seller shall build and construct and furnish all labor and materials for a single family residence to be erected in accordance with the plans and specifications to be provided as soon as practical, which plans and specifications shall be incorporated herein. It is further agreed:
>
> a. A detailed construction agreement shall be executed at a later time, as soon as practical, and shall be incorporated herein as part of this agreement.
>
> b. The price for the construction of the residence shall be to be determined, to be paid out in accordance with the construction agreement, and/or the construction loan agreement, to be incorporated herein.[2]

[1] The parties executed two agreements: (1) the Agreement of Sale, dated August 16, 1997 (the "Sales Agreement"), Pet'r's Op. Br. Ex. 1; and (2) the Lexington Mill Agreement of Sale and Construction Agreement, dated August 17 (with no year specified but, presumably, 1997) (the "Lexington Contract"), Pet'r's Op. Br. Ex. 2. The two agreements to the extent possible will be interpreted in harmony.

[2] The phrase "to be determined" was handwritten.

The Lexington Contract, at paragraph 3, reads as follows: "Buyer agrees that in the event Buyer is unable to commence construction for any reason not attributable to Seller, Buyer agrees [sic] to re-convey the subject lot at the same price as sold to Buyer, within 30 days of receipt of Seller's request to re-convey."

The Sartells, six months after acquiring the lots, offered to re-convey them to Heritage Homes. Heritage Homes took the position, a position consistent with the terms of the Lexington Contract, that it was under no obligation to repurchase the lots; it simply would hold an option after three years that could be exercised in its discretion to reacquire the lots. The Sartells attempted to sell the lots. In the interim, Heritage Homes filed this action and lodged a notice of lis pendens. This Court ordered cancellation of the notice of lis pendens and both lots were sold. The buyers of one lot (Lot 36) contracted with Heritage Homes for the construction of a dwelling. The other lot (Lot 37) remains vacant. The Sartells sold the two lots for a total of $91,750, $6,750 more than the $85,000 they had paid to Heritage

Homes for the two lots. Heritage Homes contends that the Sartells were unjustly enriched by that amount.[3]

II.

Heritage Homes has moved for partial summary judgment. Summary judgment is appropriate if the material facts are not in dispute and the moving party is entitled to judgment as a matter of law.[4] Where entitlement to comparable relief is clear, the non-moving party may also obtain summary judgment in its favor.[5]

III.

Heritage Homes' right to recover under the option agreement depends, of course, upon its enforceability.[6] By reading the two agreements in

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[3] After the filing of this action, Heritage Homes offered to reacquire the lots for the original purchase price.

[4] *See, e.g., Daisy Const. Co. v. Mumford & Miller Concrete, Inc.*, 2005 WL 1653943, at *2 (Del. Ch. June 30, 2005).

[5] *See Continental Ins. Co. v. Rutledge & Co., Inc.*, 2000 WL 268297, at *1 (Del. Ch. Feb. 15, 2000) (citing *Stroud v. Grace*, 606 A.2d 75, 81 (Del. 1992)).

[6] With the transfer of title to the lots to others, equitable relief is no longer available because the transferees are not parties. A similar problem confronts Heritage Homes with respect to its efforts to obtain a declaration that Lots 36 and 37 are subject either to the terms of the Sales Agreement/Lexington Contract or to the Declaration of Restrictions governing Lexington Mills. Pet'r's Op. Br. Ex. 4. The current owners of those lots are necessary parties to any proceeding focused on determining their responsibilities and

concert, one can conclude that the option to repurchase vested in Heritage Homes after the Sartells had not erected a dwelling on Lot 37 within three years of their acquisition of that parcel.[7] The option held by Heritage Homes, by its terms, may be exercised at any time, *i.e.*, there is no period within which the option must be exercised. The Sartells assert that this indeterminate exercise period causes the option provision to contravene the rule against perpetuities.

> The rule against perpetuities provides that:
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> no interest is good unless it must vest, if at all, not later than 21 years after some life in being at the creation of the interest. The

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duties as lot owners. Thus, any relief sought by Heritage Homes in the nature of a declaration establishing its rights as against the current lot owners, who are fairly characterized as indispensable parties, is precluded by Court of Chancery Rule 19. These claims will be dismissed, under Court of Chancery Rule 19, thirty (30) days from the date of this letter opinion, unless Heritage Homes has sought to add them as parties. It should be noted that it is not clear that there is a justiciable controversy between Heritage Homes and the current lot owners, especially with respect to the owner of Lot 36 for whom Heritage Homes has built a dwelling.

[7] The time within which the Sartells were obligated to initiate construction was firmly fixed by the Sales Agreement at three years from closing. *But see, e.g., Ryland Group, Inc. v. Wills*, 331 S.E.2d 399, 402 (Va. 1985) ("An option contract creates no present vested interest; instead the holder of an option has an executory interest by virtue of the possibility that he may obtain a future right to purchase certain real property." (citations omitted)); *Cent. Delaware County Auth. v. Greyhound Corp.*, 588 A.2d 485, 488 (Pa. 1991). As discussed below, the resolution of this claim does not depend on when the option right vested; instead, it depends on the unlimited period during which the option may be exercised.

> purpose of the rule is to promote free alienation of land and therefore it should be rigidly enforced. The rule is not concerned with the duration of an interest in land, but rather the time of vesting of that interest. It is not enough that the contingent event may happen or even probably will happen within the time limit of the rule; if it can possibly happen beyond a permissible period, the grant is void.[8]

The rule, part of the common law, carries the command of law and is not merely a rule of contract construction.[9] This matter, of course, involves application of the rule to an option which has no limit on the period within which it can be exercised.

> Options are regarded as having the effect of creating a future interest, depending upon the contingency of the exercise of the option. If it is possible that the option might not be exercised within the limits of the time allowed by the Rule Against Perpetuities, the option is void. Since in this case no time is given for the expiration of the option, it is void as against the Rule Against Perpetuities.[10]

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[8] *Robinson v Carriage House Assocs., Inc.*, 1990 WL 212278, at *3 (Del. Ch. Dec. 18, 1990) (citations and internal punctuation omitted), *aff'd*, 596 A.2d 1378 (Del. 1991); *see also Smith v. Smith*, 747 A.2d 85, 88 (Del. Ch. 1999).

[9] *Stuart Kingston, Inc. v. Robinson*, 596 A.2d 1378, 1383 (Del. 1991).

[10] *Emerson v. Campbell*, 84 A.2d 148, 153 (Del. Ch. 1951). *Cf. Pathmark Stores, Inc. v. 3821 Assocs., L.P.*, 663 A.2d 1189, 1191-92 (Del. Ch. 1995).

The Court in *Pathmark Stores* drew no distinction between rights of first refusal and options to purchase for purposes of rule against perpetuities analysis. Thus, the Court in *Pathmark Stores* concluded that the ruling in *Stuart Kingston*, that "a purported right of first refusal which could be exercised indefinitely violate[s] the rule against perpetuities,"

Because Heritage Homes, as a corporation, has an existence of unlimited duration[11] and because the Lexington Contract is binding upon the Sartells' "heirs, executors, administrators, successors or assigns" without any time limitation in which the option must be exercised, it is "impossible to determine that this option might not be exercised, if at all, within the period prescribed by the rule against perpetuities."[12] The failure of the option's drafter to account for the rule against perpetuities renders the option unenforceable. Accordingly, the Sartells are entitled to partial summary judgment establishing that they are not bound by Heritage Homes' option to reacquire the lots and that Heritage Homes has no claim for damages under the option.

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is equally applicable to options to purchase. *Pathmark Stores*, 663 A.2d at 1192 (citing *Stuart Kingston*, 596 A.2d at 1385).

[11] "Because it exists perpetually, a corporation cannot be used as a measuring life for purposes of the rule." *Stuart Kingston, Inc.*, 596 A.2d at 1383.

[12] *Emerson*, 84 A.2d at 153. In voiding the option at issue in *Emerson*, the Court observed that "options are usually considered as 'property' and are therefore assignable." *Id.*

IV.

Heritage Homes also argues that it was damaged when the Sartells decided not to contract with it to erect a dwelling on the parcel. When the parties entered into their agreement, they clearly understood that Heritage Homes would be building a single-family dwelling for the Sartells. The Lexington Contract sought to assure that Heritage Homes would build the dwelling by (1) an express agreement between the Sartells and Heritage Homes requiring the Sartells to use Heritage Homes as their contractor, and (2) allowing Heritage Homes to reacquire the property if the dwelling had not been built within three years.[13] The question is whether the obligation of the Sartells to contract later with Heritage Homes for construction of the dwelling is defined with sufficient specificity as to provide an independent and additional basis for an award of money damages.[14]

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[13] This approach, if properly implemented, would have enabled Heritage Homes to obtain the economic benefits of constructing a dwelling for either the Sartells or, if they did not build, for the subsequent owners of the lot, after repurchase and resale.

[14] Implicit in this contract, as in any contract governed by Delaware law, is the covenant of good faith and fair dealing. *See Frontier Oil Corp. v. Holly Corp.*, 2005 WL 1039027, at *28 (Del. Ch. Apr. 29, 2005). Although Heritage Homes noted its belief that the Sartells never seriously sought to negotiate a construction agreement with it, Heritage

The Lexington Contract provides, in part, that Heritage Homes will build a residence "in accordance with the plans and specifications to be provided as soon as practical. . . ."[15] The parties also agreed that "[a] detailed construction agreement shall be executed at a later time, as soon as practical . . . ," and that "[t]he price for the construction of the residence shall be 'to be determined' to be paid out in accordance with the construction agreement, and/or the construction loan agreement. . . ."[16]

Clearly, these provisions reflect nothing more than a bare agreement to agree, one whose terms are so indefinite as to make the entire effort nugatory. It is a well-settled principle of Delaware law that "an agreement to agree in the future without any reasonably objective controlling standards" is unenforceable.[17] Here, the provision does no more than merely memorialize the parties' intent to come to an agreement for the construction

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Homes has not pursued a claim under the theory of breach of the implied covenant of good faith and fair dealing.

[15] Pet'r's Op. Br. Ex. 2, at ¶ 12.

[16] *Id.*

[17] *Hammond & Taylor, Inc. v. Duffy Tingue Co.*, 161 A.2d 238, 239 (Del. Ch. 1960); *see also Hindes v. Wilmington Poetry Soc'y*, 138 A.2d 501, 504 (Del. Ch. 1958) (holding "that the provision with respect to the payment of royalties is legally indefinite because it is nothing more than an agreement to agree at a later time and no agreement or implied standards are operative to make such future action definite").

of a residence, leaving negotiation of all material terms for a later date. Delaware law requires that, "to be enforceable, a contract to enter into a future contract must specify all its material and essential terms, and leave none to be agreed upon as the result of future negotiations. . . ."[18] Among its flaws is the failure to specify with any reasonable certainty the type of house

[18] *Raisler Sprinkler Co. v. Automatic Sprinkler Co. of Am.*, 171 A. 214, 219 (Del. Super. 1934).

An equally troubling prospect confronting this Court is the uncertainty inherent in calculating Heritage Homes' damages were the Court to find the provision enforceable. Under Delaware law, "[t]he material terms of a contract will be deemed fatally vague or indefinite if they fail to provide a reasonable standard for determining whether a breach has occurred and *the appropriate remedy*." *Independent Cellular Telephone, Inc. v. Barker*, 1997 WL 153816 (Del. Ch. Mar. 21, 1997) (citing *Restatement (Second) of Contracts*, § 33(2), at 92 (1981) (emphasis added)). Unlike the agreement in *Independent Cellular*, the provision at issue in the present case affords Heritage Homes a shaky foundation, at best, on which to base its claim for monetary damages. This Court knows of no reasonably reliable method of calculating damages based on a hypothetical house to be built in accordance with non-existent construction plans and no agreed upon price. The only provision that could conceivably serve as a basis for an award—the interlineation specifying that "minimum house size [is] to be 3,000 [square feet] total living space"—is made with reference to the first dwelling Heritage Homes built. Pet'r's Op. Br. Ex. 1, at "Additional Terms." The sentence preceding this term clearly states the parties' original understanding and agreement that only one dwelling would erected by Heritage Homes, which did in fact occur. As for serving as a means of calculating damages for the failure to construct a second dwelling, this would constitute an impermissible extension of the parties' bargained-for terms to a hypothetical second dwelling whose specifications were not negotiated, much less anticipated, by the parties. Thus, in addition to presenting no reasonably objective controlling standards, this contract provision has been drafted in such a way as to offer no reasonable means of redress even if breach could be proved.

to be built,[19] the material terms to govern construction, or, most importantly, the price of such construction. No reasonable person could find this provision a sufficient delineation of material terms,[20] and, thus, it is not definite enough to be enforceable.[21] Accordingly, the Sartells are entitled to

[19] The Preamble of the Lexington Contract provides that the development is "designed to be a quality subdivision in which all of the homes are esthetically homogeneous. . . ." This, however, not only is a mere statement of intent which is non-binding, but also it fails to delineate with any reasonable certainty the type of house which would satisfy this requirement.

[20] *See Litle v. Waters*, 1992 WL 25758 (Del. Ch. Feb. 11, 1992) (holding that "[a]lthough vagueness and indefiniteness are matters of degree, no reasonable person could find that the alleged agreement at issue contains a sufficient delineation of the material terms . . ." (citations omitted)).

But see Echols v. Pelullo, 377 F.3d 272 (3rd Cir. 2004) (applying Delaware law). The Third Circuit in *Echols* held enforceable a contract for exclusive-promotion rights for a boxer with an open price term. The boxer could choose whether to participate in contests proposed by the promoter. The majority in *Echols* concluded that, with respect to that particular contract defining an ongoing relationship, the Delaware Supreme Court would not hold price (or compensation) a material term such that its absence would render the otherwise valid contract unenforceable. The facts presented here clearly do not implicate *Echols*' reasoning. Heritage Homes and the Sartells entered into a "one-shot" agreement for construction services that does not warrant the policy exception recognized in *Echols*. Unlike in *Echols*, price is a material term here because, if the Lexington Contract were enforceable, the parties would have been obligated to perform, and there existed no history of a commercial relationship between the parties. Moreover, the agreement-to-agree sponsored by Heritage Homes lacks the requisite specificity with respect to several material terms in addition to price.

[21] It may well be that the parties did not intend for damages to be a remedy in the event the Sartells did not go forward with their plans for construction of a home. Instead, the consequences of abandoning that course would to be a simple reconveyance of the lots at cost. Thus, the only reason the issue of damages ever arose is the failure of the parties' agreed-upon remedy, the option provision, under the rule against perpetuities.

partial summary judgment as to any claim asserted by Heritage Homes based on the failure of the Sartells to use the services of Heritage Homes for the construction of a dwelling.[22]

IT IS SO ORDERED.

Very truly yours,

/s/ John W. Noble

JWN/cap
cc: Register in Chancery-K

[22] These conclusions obviate the need to resolve several other questions posed by Heritage Homes' motion: (1) whether the option survived delivery of the deeds for the lots under the doctrine of merger and (2) whether Heritage Homes' building of one dwelling on Lot 36 satisfied any right to build an additional dwelling on Lot 37.