IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

Lewes Investment Company, LLC, a Delaware limited liability company,	)	
Plaintiff,	)	C.A. No. 2893-MA
v.	)	
The Estate of Frances B. Graves, The Frances B Graves Revocable Trust dated June 14, 2002, William D. Graves, an individual, Ann Bar Stubbs, an individual, Mahlon H. Graves, Jr., an individual, and Dean M. Graves, an individual,	)	
Defendants.	)	

MASTER'S REPORT

Date Submitted: December 1, 2011
Draft Report: March 22, 2012
Final Report: September 24, 2012

Pending before me is a complaint for recission of a real estate contract based on allegations of false representation, breach of contract, and breach of the covenants of good faith and fair dealing. A two-day trial was held in August 2011, during which an oral motion to dismiss the complaint for lack of subject matter jurisdiction was made.[1] A draft report was issued following post-trial briefing, in which I recommended that the motion to dismiss be denied, and judgment on the merits be found in favor of Plaintiff Lewes Investment Company, L.L.C. ("Lewes Investment"). Exceptions were taken to my draft report. Defendant's arguments are the same as have been posed to this Court in several previous rounds of briefing. I believe that I have adequately addressed these arguments in my draft report and, therefore, I am adopting my draft report as my final report without further modification.

I. FACTUAL BACKGROUND

Lewes Investment is the successor in interest to Ivy Partners III, L.L.C. ("Ivy Partners"), a Delaware limited liability company that entered into an agreement to purchase two parcels of land from the Estate of Frances B. Graves, the Frances B. Graves Revocable Trust dated June 14, 2002, William D. Graves, Ann Barr Stubbs, Mahlon H. Graves, Jr. and Dean M. Graves

[1] Plaintiff also moved to amend its pleadings to conform to the evidence, but subsequently withdrew its oral motion.

(collectively, the "Defendants" or the "Graves Family"). Tax parcel number 3-34 5.00 176.00 ("Parcel 176") and tax parcel number 3-34 5.00 177.00 ("Parcel 177") contain a total of approximately 88.4 acres of land located in Sussex County, Delaware, and are known as the Graves Farm. The Graves Farm is located west of the Five Points intersection at U.S. Route 1 and State Route 9 in Lewes, Delaware. The parties entered in an agreement of sale of the Graves Farm on or about July 26, 2004.[2]

The agreement of sale ("Agreement") was drafted by Defendants' attorney, George B. Smith, who also solicited interested parties to bid on the Graves Farm. Defendants accepted Ivy Partners' offer to purchase the Graves Farm for $13 million and, upon execution of the Agreement, Ivy Partners furnished an initial deposit of $10,000. Pursuant to the Agreement, Ivy Partners had five days after the effective date of the Agreement to order a title insurance commitment. Ivy Partners then had five days following its receipt of the commitment to send Defendants a list of all title objections and exceptions disclosed in the commitment that interfered with the proposed development and were not acceptable, i.e., title defects. Defendants thereafter had ten days to notify Ivy Partners of their unwillingness or inability to deliver good and marketable title, at which point Ivy Partners had the option to terminate the Agreement and have its deposit returned with interest. Defendants' failure to notify Ivy Partners of their inability or unwillingness to deliver good and marketable title within the ten-day period constituted Defendants' agreement to deliver good and marketable title at the closing "subject only to the Permitted Encumbrances."[3]

The Agreement also called for an additional deposit to be paid after the expiration of a 90-day feasibility period which, together with the initial deposit, equaled five percent of the purchase price.[4] Closing was to occur within 18 months of the effective date of the Agreement; however, Ivy Partners had the option to extend the closing date for up to an additional six months by paying Defendants a nonrefundable fee of $25,000 for each month during the extension period, which fees were in addition to the purchase price of $13 million.

On August 23, 2004, Ivy Partners' attorney, James Fuqua, timely notified Smith that a title search had revealed the Graves Family only owned a 7/8th tenancy-in-common interest in Parcel 176, which contained approximately 3.32 acres of land along Route 9, and that the remaining 1/8th tenancy-in-common interest was owned by third parties.[5] Defendants did not respond to Ivy Partners within the ten-day period or at any time thereafter that they were unwilling or unable to deliver good and marketable title at closing. On October 22, 2004, Ivy

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[2] Joint Trial Exhibit 2.
[3] *Id.* at ¶ 4(b).
[4] Lewes Investment had 90 days after the effective date to investigate the feasibility (economic, physical or otherwise) of developing the Graves Farm. Lewes Investment had the right to terminate the Agreement before the expiration of 90 days, and its deposit would be returned without further obligation under the Agreement. *Id.* at ¶ 7.
[5] Joint Trial Exhibit 6.

Partners assigned all of its rights, title and interest in the Agreement to Lewes Investment.[6] On October 24, 2004, Lewes Investment made the required additional deposit of $640,000.[7] On October 21, 2005, Lewes Investment exercised its right to a six-month extension of the closing pursuant to paragraph 3(a) of the Agreement, and paid at total of $150,000 to secure a six-month extension of the closing to July 26, 2006.[8] On June 29, 2006, Richard Stout, one of the three members of Lewes Investment, held a meeting with Smith and the Graves Family to request an extension of the July 26 closing date.[9] Stout needed more time to obtain preliminary approval of the development project, and preferred closing on the deal after he had worked out several issues with Sussex County and various State agencies. The Graves Family offered Lewes Investment a 12-month extension contingent upon payment of additional monthly fees.[10] At the end of this meeting, Stout learned that the attorney for the Graves Family had yet to take any steps to cure the title defect.[11]

By letter dated July 25, 2006, Lewes Investment's Virginia-based attorney, Wayne G. Tatusko, notified Smith of his client's concern that the Graves Family would be unable to close on July 26, 2006:

> Closing of the purchase and sale of the Property under the Agreement was to have been held no later than July 26, 2006. Purchaser could not in good faith continue with its closing preparations as Purchaser became aware that Seller still did not have good and marketable title to the Property. It is Purchaser's assumption that, because time is not of the essence for the closing of the purchase and sale of the Property, Seller may be entitled to a reasonable adjournment of the closing date in order to cure this title defect. It is our understanding that no steps have been taken up until this time to begin to effect any cure. If Seller is entitled to such an adjournment of the closing date, such adjournment would in no event exceed thirty (30) days.
>
> Purchaser continues to desire to purchase the Property on an acceptable basis. Purchaser cannot, however, continue to expend the significant money, time and energy necessary to perfect its plans for the development of the Property and to prepare for the closing of the purchase of the Property while Purchaser is aware that a significant title defect exists that may not be cured or curable. Seller has had almost two years to cure this title defect. Seller's failure to cure the title defect in that extended period of time makes it reasonable for the Purchaser to assume that Seller will not have cured the title within the next thirty (30) days.

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[6] Ivy Partners was owned by Greg Ivanoff, who later joined with Richard Stout and Neal Teague, owners of Stout and Teague Company, a Washington, D.C.-based property development and management company, to form Lewes Investment. Trial Transcript on August 22, 2011, at 14-15.
[7] Joint Trial Exhibit 8.
[8] Joint Trial Exhibit 10.
[9] Joint Trial Exhibit 11.
[10] *Id.* at 126-128.
[11] *Id.* at 131-137.

> Section 2 of the Agreement provides that Purchaser will be entitled to the return of its deposit if Seller is unable to deliver good title. In addition, Section 14 of the Agreement provides that if Seller fails to perform the terms and conditions of the Agreement, Seller will reimburse Purchaser for all Purchaser's out-of-pocket expenses. That Section further provides that Purchaser shall have any and all remedies available to it in equity and in law. Accordingly, Purchaser would be entitled to the return of all monies paid to Seller by Purchaser as deposits and extension fees, together with the substantial costs and expenses incurred by Purchaser in good faith over the past two years. These amounts would exceed $1,000,000.
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> In lieu of exercising its remedies under the Agreement, Purchaser would prefer to negotiate a mutually acceptable extension of the Agreement. We trust that Seller can appreciate that Purchaser cannot prudently incur additional expenses in its development efforts in the absence of complete assurance that the defect in title has been cured. In the absence of a mutually acceptable extension, Purchaser is left with no alternative but to exercise the remedies under Section 14 of the Agreement.[12]

Rather than respond directly to Tatusko, Smith sent Fuqua a letter dated July 31, 2006, in which Smith stated:

> I must remark that you and I spoke prior to July 26, and you agreed to prepare an agreement that would "toll" the closing date and address open issues. I never received anything from you. I subsequently called Karen to discuss the title issue on the 1/8 of the 3.32 acres, left a message and never received a call back. When I called her today, she said she gave that message to you because you had the file. I had finished my review of our searches and was ready to attempt to resolve the open title issue. .... To move this along, can we meet sometime this week in person to match what you have with what I have and, hopefully, agree on how to resolve the title issue. Although there are lots of reasons why your client cannot or will not proceed to closing at this time, it appears that the only "seller problem" is the Carpenter title issue. Assuming it can be resolved quickly, my clients will expect either a speedy closing or an extension along the lines of what was offered to Rick Stout on June 29, 2006.[13]

Tatusko subsequently sent a second letter to Smith, which was dated August 28, 2006, and stated in part:

> As noted in our previous letter to you, Seller may have been entitled to a reasonable adjournment of the closing date. If Sellers were entitled to such an adjournment, that time has now expired. Accordingly, Purchaser is entitled to a full restitution under the Agreement. .... In light of Seller's failure to meet the requirements of the Agreement, Purchaser must put on hold its efforts to obtain the entitlements necessary for the development of the Property. Purchaser cannot continue its negotiations with the relevant governmental agencies nor resume any expenditure of

[12] Joint Trial Exhibit 13.
[13] Joint Trial Exhibit 14. Tatusko was sent a copy of this letter.

additional sums of money unless it can agree with Sellers on a mutually acceptable course of action for the purchase and development of the property.[14]

Stout and Neal Teague, another member of Lewes Investment, met with Smith and the Graves Family on September 19, 2006, to get a progress report on their efforts to cure the title defect and to discuss a possible extension of the Agreement.[15] On September 26, 2006, Smith sent a memorandum to Stout by e-mail attachment, in which he outlined a proposed extension agreement starting September 19, 2006, for three years or 30 days after final site plan approval, whichever was earlier.[16] The e-mail stated: "Rick – Here is a very simple memo that hits the high points. If you and Neal agree, you will then need to flesh it out in an agreement. At that time, I have more extensive language but it can wait for your acquiescence to these major points."[17] There is no evidence in the record that Lewes Investment ever responded to the terms outlined in Smith's memorandum. In a letter dated February 12, 2007, Smith informed Fuqua that the 1/8th interest in the 3.32 acres formerly owned by the Carpenter family had been deeded over to the Graves Family.[18] In a letter to Stout dated April 2, 2007, the Graves Family through new counsel asserted that Lewes Investment had breached the contract by failing to settle and purchase the property in July 2006. The Graves Family offered Lewes Investment a 30-day extension to bring the contract to settlement or else they would declare the contract in default and retain the deposits.[19] This litigation followed.

II. Procedural Background

Plaintiff filed its complaint against Defendants on April 12, 2007. Defendants filed an answer and counterclaim on May 25, 2007, and Plaintiff replied to the counterclaim on June 14, 2007.[20] After some discovery was conducted, on December 1, 2008, Defendants filed a Motion to Dismiss pursuant to Chancery Court Rule 41(e) for lack of prosecution.[21] I issued an oral bench draft report denying the motion on January 21, 2009. No exceptions were taken, and a final order was issued by the Court on February 23, 2009.[22]

After further discovery, Plaintiff filed a Motion for Summary Judgment on November 11, 2009.[23] Following briefing and oral argument, on March 4, 2010, I issued an oral bench report concluding that Defendants had materially breached the Agreement by failing to have good and

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[14] Joint Trial Exhibit 15.
[15] Joint Trial Exhibit 16.
[16] Joint Trial Exhibit 17.
[17] *Id.*
[18] Joint Trial Exhibit 22.
[19] Joint Trial Exhibit 23.
[20] Defendants counterclaimed for breach of contract, alleging that the title dispute was a nonmaterial issue and did not excuse Plaintiff from completing the contract. As relief for the alleged breach, Defendants sought liquidated damages as provided in paragraph 13 of the Agreement. Docket Nos. 7 & 8.
[21] Docket No. 20.
[22] Docket No. 26.
[23] Docket No. 36.

marketable title to Parcel 176.[24] I therefore recommended that summary judgment be granted in favor the Plaintiff. Defendants took exception to my draft report. Following briefing on the exceptions, I withdrew my draft report in order that a trial might be held on the issues of materiality of the breach and whether time was of the essence as to the closing date.[25] A two-day trial took place in August 2011. After Plaintiff rested its case, Defendants moved to dismiss the complaint for lack of subject matter jurisdiction. Plaintiff then moved for leave to amend its complaint to conform to the proof and seek specific performance. Both parties objected to each other's motion. I reserved decision on the merits and motions, and ordered post-trial briefing.

III. Motion to Dismiss

Defendants have moved to dismiss the complaint for lack of subject matter jurisdiction under Chancery Court Rule 12(b)(1). According to Defendants, Plaintiff has abandoned its rescission claim and is only seeking monetary damages. Since Plaintiff has an adequate remedy at law, their argument goes, this Court does not have jurisdiction to hear this matter. Plaintiff argues that it properly plead an equitable claim for rescission based upon Defendants' misrepresentation that they owned all of the land that they had agreed to sell. According to Plaintiff, testimony supporting its breach of contract claim is no different from what is necessary to prove its rescission claim. Furthermore, Plaintiff argues that the clean-up doctrine set forth in *Wilmont Homes v. Weiler*, 202 A.2d 576, 580 (Del. 1964), allows the Court to adjudicate all related claims, including those based in law, especially when judicial efficiency and economy are considered.

This case has been in litigation for nearly five years. In spite of having filed a motion to dismiss for lack of prosecution and having responded to a motion for summary judgment, Defendants never addressed the issue of lack of subject-matter jurisdiction until the pretrial conference in August 2011, and then not even in the form of a formal motion. A two-day trial has now taken place, and under the clean-up doctrine this Court has the discretion to grant the relief necessary to a party even if it involves providing a legal remedy such as monetary damages. *Getty Refining and Marketing Co. v. Park Oil, Inc.*, 385 A.2d 147, 150 (Del. 1978). To transfer this action to a court of law at this stage of the proceedings would be contrary to judicial efficiency and economy, and would further delay the resolution of this case. Therefore, the motion to dismiss for lack of subject matter jurisdiction should be denied.

IV. The Issues at Trial

A. The Parties' Contentions:

Lewes Investment argues that the Graves Family was unable to convey good and marketable title to Parcel 176 because they did not own the entire parcel in fee simple. The Graves Family

[24] Docket No. 45.
[25] Docket No. 56.

only owned an undivided seven-eighths interest in Parcel 176, and third parties owned the other undivided one-eighth interest. The missing one-eighth interest rendered title to Parcel 176 unmarketable, and this constituted a material breach of the Agreement by Defendants. Lewes Investment argues that even though Parcel 176 contained only 3.32 acres, it was material to the Agreement because all of the Graves Farm was important, and Parcel 176 was an integral part of the proposed development. Furthermore, non-resolution of the title defect would have had adverse consequences for financing the purchase of the Graves Farm. Lewes Investment also argues that the Graves Family failed to cure the title defect despite having been given a reasonable amount of time to do so. Whether or not the Agreement specified that time was of the essence as to the closing, Lewes Investment now argues that timely performance became essential once Tatusko notified Smith by letter dated July 25, 2006, that the Graves Family had 30 days to cure the title defect. The Graves Family's own expert, Robert Gibbs, Esquire, testified that he could have resolved the title defect problem within a month's time if Smith had asked him for advice. According to Lewes Investment, the Graves Family's conduct was unreasonable because they did nothing and said nothing after being given 30 days to solve their title defect problem.

The Graves Family denies that they breached the Agreement. They argue that time was not of the essence as to settlement, and that they were permitted to cure the title defect within a reasonable time as long as they held good and marketable title at the closing. According to the Graves Family, the resolution of the title defect in February 2007 was reasonable in light of the following circumstances: (1) Lewes Investment's admission that time was not of the essence in its July 25, 2006 letter; (2) Stout's repeated requests to extend settlement and threat to pull out of the Agreement if the July 26th closing date was not extended; (3) the fact that Lewes Investment was only in the preliminary stages of developing the Property; (4) Lewes Investment was not financially prepared to settle on July 26; (5) Lewes Investment did not make any formal arrangements for settlement on July 26; (6) Lewes Investment completely ignored the title issue for one and a half years; (7) Lewes Investment continued to seek a settlement extension in September 2006; (8) Stout spoke of the title issue being "resolved at some point" in September 2006; and (9) Lewes Investment had its design engineer continue working on the project through March 2007.

The Graves Family also argues that the title defect was not material because Stout told them during the meeting on June 29, 2006, that Lewes Investment "might be able to find a way to work around [the title defect] if it gets to be [] a real problem."[26] The Graves Family now argues that excluding one-eighth of 3.32 acres in the sale would have minimally deprived Lewes Investment of the benefit of its bargain. Furthermore, they argue that Stout's statement shows that the defect was not material to Lewes Investment, that the State could have exercised its

[26] Joint Trial Exhibit 11 at 133-34.

eminent domain power to create an access road across Parcel 176,[27] and that Lewes Investment could have been compensated fully at settlement for the missing one-eighth interest. The Graves Family calculates that interest was worth less than $60,000, a nominal amount when compared to the $13 million contract price. Finally, the Graves Family argues that they were in a position to substantially perform their obligations under the Agreement; i.e., they could have conveyed 99 per cent of the Graves Farm, or 87 out of 88 acres, if the parties had been required to settle on July 26, 2006. Lewes Investment would have been entitled to compensation for the defect, but not, as sought here, for rescission of the contract.

B. Analysis:

To understand the issues surrounding the title defect, it is necessary to describe in some detail the land that was the subject of the Agreement. The boundaries of the Graves Farm extend from Route 9 southeast to encompass land on the other side of Beaver Dam Road.[28] The southeast corner of the Graves Farm abuts an unimproved 19.5-acre parcel owned by the Delaware State Housing Authority ("DSHA"), which in turn abuts two residential subdivisions on its southern and eastern sides. Parcel 176 is a triangular-shaped sliver of land that, starting at the northwest corner of the Graves Farm, extends in a northeasterly direction along Route 9 for about 1000 feet.[29] Opposite the Graves Farm on the northern side of Route 9 is the Vineyards development project, a small subdivision, and other small private properties. Further east along Route 9 and closer to the Five Points intersection is a historic district called Belltown.

After the Agreement was executed and Ivy Partners' interest was assigned to Lewes Investment, Stout and the other members of Lewes Investment determined that the highest value for the Graves Farm would be achieved through a mixed-use zone, i.e., a zone that allows both commercial and high-density residential development. Since the Graves Farm is zoned agricultural and lies outside the sewer district, it would have to be rezoned to permit such development. Stout attended a preliminary state land use planning ("PLUS") meeting to discuss Lewes Investment's proposed development with State and Sussex County officials. Based on the discussions at this meeting, Stout understood that DSHA was having difficulties in building low- and moderate-income housing on its 19.5 acre parcel because of objections from neighbors. Lewes Investment subsequently approached DSHA with a proposal to acquire the 19.5 acres, and to integrate a moderate-income housing project with its private development. In February 2005, DSHA granted Lewes Investment the right to acquire the State's parcel, and Lewes Investment's design engineers created a plan that allocated 20 percent of the density to low- and moderate-

[27] The record shows that during its preliminary stages of developing the Property, Lewes Investment had negotiated with the Delaware Department of Transportation ("DelDOT") to design a spur road through Parcel 176 to provide access to the "new" Route 9. The access road originally had been designed so as to cross diagonally through the Graves Farm. Trial Transcript on August 22, 2011, at 173-174.
[28] Joint Trial Exhibit 1.
[29] Trial Transcript on August 22, 2011, at 176.

priced housing that would be identical in physical structure to the market-rate housing, and would be distributed throughout the combined 108 acres of the two properties.[30]

At the first PLUS meeting, Stout also learned that the State wanted to improve the alignment of the Five Points intersection on Route 1 to ease traffic congestion. In order to avoid harming the historic district of Belltown, DelDOT was proposing to move Route 9 to where Beaver Dam Road is presently located. The proposed relocation of Route 9 would result in the creation of a cul-de-sac at Belltown. In order to provide the residents of Belltown and other nearby properties access to the "new" Route 9, DelDOT proposed building a spur road through the Graves Farm. After negotiations with Lewes Investment and its engineers, DelDOT ultimately approved the design of a spur road through Parcel 176.[31]

On October 21, 2005, Lewes Investment exercised its right to extend the closing date of January 26, 2006, for six months.[32] The development project was going to be more complicated than anticipated because the State had asked Lewes Investment to assist Sussex County in drafting a moderate-income housing ordinance.[33] As the extended July 26 closing date approached, Lewes Investment continued to meet with various State and County agencies to resolve outstanding issues. The real estate market was entering a slow period, and Lewes Investment was aware that major homebuilders were expressing some concerns about the market. Lewes Investment was in the process of negotiating with Discover Bank to obtain financing for the project, and the bank required an appraisal of the properties being developed.[34] An appraisal valued the Graves Farm and the DSHA parcel together at $14.1 million.[35] On behalf of Lewes Investment, Fuqua's office was preparing for settlement, and a first draft of the deeds had been prepared.[36] Fuqua had met with Smith on November 29, 2004, to discuss the title defect. Since that time, however, Fuqua knew only that the defect had not been cured because no new deeds had been recorded as of June 2006.[37]

On June 29, 2006, Stout met with Smith and the Graves Family. The meeting was tape-recorded by Mahlon Graves. Most of the conversation centered on Stout's request for an extension of time for settlement in order to obtain preliminary site plan approval of Lewes Investment's project.[38] The Graves Family conditioned their agreement to an extension on payment of $50,000 per month for the first six months, with $25,000 applied toward the deposit and $25,000 paid as an extension fee. If Lewes Investment needed more time, it would then

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[30] *Id.* at 36-37; Joint Trial Exhibit 24.
[31] Joint Trial Exhibit 24. Trial Transcript on August 22, 2011 at 174, 180.
[32] Joint Trial Exhibit 10.
[33] Trial Transcript on August 22, 2011, at 43.
[34] Joint Trial Exhibit 11 at 18, 23.
[35] Id. at 24.
[36] Trial Transcript on August 22, 2011 at 221.
[37] *Id.* at 217, 220-21.
[38] Joint Trial Exhibit 11.

have to pay the Graves Family $80,000 per month, split 40-40.[39] Stout indicated that he would have to talk with the other members about the proposed terms of the extension agreement. Stout then asked about the title defect. Smith replied:

> There's an issue about the Carpenter piece. And – and I thought it was resolved, and we got a call late last week from I think it was Kate in [Fuqua's] office ... And so we – we've pulled that search out. I've not had a chance to talk to Bill and the family about it.[40]

After Smith assured Stout that he was going to have good title to the whole thing, Stout acknowledged that good title was a requirement, and then stated:

> If it is really a problem, there might be a way for us ... we haven't worked around it because we've just assumed when we sent the concern and we didn't get an answer, that it was something that you could solve, but this – this is something we might be able to find a way to simply work around.... [41]

Thereafter, the following exchange took place between Smith and William ("Bill") Graves:

> Smith: Bill, you and I should probably talk about this. I just dug this out again. It sat there for, when was [Fuqua's letter], August of 2004. So it was two years old. I – I thought they had put it to bed."
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> Bill: I did, too. I [inaudible] what you're saying.
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> Smith: And so I just have to find time to read it and do a search.[42]

After the June 29 meeting, there was apparently no further communication between the parties until Tatusko sent Smith the July 25th letter, giving the Graves Family 30 days to cure the title defect.[43] Smith responded by writing Fuqua on July 31 regarding a conversation that allegedly had occurred prior to July 26, in which Fuqua had agreed to prepare an agreement that would "toll" the closing date and address open issues.[44] At trial, Fuqua testified that he had been out of the office for health reasons starting May 26 until about July 15, and denied having any conversation with Smith about tolling the Agreement.[45] At trial, Smith testified that an informal extension had been reached by the parties during the summer of 2006. However, Smith conceded that the Agreement he had drafted did not permit informal extensions; an amendment to the Agreement had to be in writing and executed by the parties.[46] In his July 31st letter, Smith also proposed meeting with Fuqua during the following week to compare notes and agree on

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[39] *Id.* at 126-128.
[40] *Id.* at 132-33.
[41] *Id.* at 134.
[42] *Id.* at 136.
[43] Joint Trial Exhibit 13.
[44] Joint Trial Exhibit 14.
[45] Trial Transcript on August 22, 2011, at 224-26.
[46] Trial Transcript on August 23, 2011, at 39.

how to resolve the issue. There is no indication in the record that any such meeting occurred. At trial, Bill Graves testified that he had assumed that Smith was addressing the title problem after the June 29 meeting.[47] Only after the July 26 closing date had passed did Bill Graves start to look into the issue himself. He went to a cemetery in Lewes and found some Carpenter gravestones, and then called a cousin who recalled another cousin named Foster Carpenter living in Maryland. About a month and a half after he started to look for the missing heirs to Parcel 176, Bill Graves located five individuals who together owned the 1/8th interest in Parcel 176.[48]

Tatusko's August 28th letter notified Smith that the time to cure the title defect had expired, and that Lewes Investment was now entitled to full restitution under the Agreement. In this letter, Tatusko also stated that Lewes Investment "still would like to negotiate a mutually acceptable agreement with Sellers for the purchase of the property, *but any agreement between Purchaser and Sellers will have to take into account all factors currently affecting the property.*"[49] (emphasis added). Consequently, on September 19, Stout and Teague met with the Graves Family at Smith's office in Georgetown. This meeting was also tape-recorded.[50] Smith and Bill Graves explained that they were in the process of negotiating with the two family branches that owned one-eighth interest in Parcel 176. If the parties could not agree on a price, the Graves Family was considering filing a petition for partition in this Court. Even if the parties could agree on a price, however, Court approval would be needed for the sale because one of the owners was under a guardianship. While discussing the process of a partition sale at the September 19th meeting, the following exchange took place:

> Smith: Well, my hope would be that once it's advertised and all, that if people start talking to you about it, unless you really have some die hard enemies in the area, that you'd say to them, "Look, this is a screw-up that happened back in '55 and this is how we have to do it. I hope you won't go there and try and buy it." I mean, I represent, from time to time, Preston Schell and lots of other developers, and I'm going to tell them stay home.

(Laughter)

> Dean Graves: What difference does it make if anybody shows up? We're just going to outbid them anyhow. We'd just be paying ourselves.
>
> Smith: Well, you hope so. You hope so. But let's say someone says, "I'll pay $4,000,000.00 for that 3.32 acres." Are you going to outbid them then?
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> Mahlon Graves: I'll sell.

(Laughter)

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[47] *Id.* at 136.
[48] *Id.* at 137.
[49] Joint Trial Exhibit 15.
[50] Joint Trial Exhibit 16.

Smith: Well, then, now you have a problem with your contract purchaser, because your contract purchaser wants that 3.32 acres to make their project go.

Ann Stubbs: But he just said it might be just a little yucky.

Mahlon: It's on a corner. It is on a corner. It's an impressive design; it's on the corner.

Stout: We said all along that we probably-

Ann: Why are we getting so upset?

Stout: -probably a way to resolve this in some form. In other words, we've got to deal with the Highway Department that's again, all our agreements are at this point conceptual and subject to other things. So it's all, you know, there's room to move pieces around. But it strikes me that, I mean, this is my two cents, if you can go through it in a fairly simple form and clean it up, that's probably the right thing to do, 'cause it sooner or later its gotta be cleaned up.[51]

The discussion continued regarding Lewes Investment's desire to put the project "back on track one way or another."[52] Stout proposed a three-year extension in order to obtain final approval for the project and to keep the $13 million price in place.[53] Alternatively, Stout suggested that the Graves Family could remarket the Property, and if they found a deal they liked, Lewes Investment would be willing to be released provided its money was returned.[54] Stout also suggested a third option where the price would be less than $13 million, with settlement to occur after preliminary approval was obtained and the title defect cured.[55] At one point in the discussion, Stout referred to Tatusko's letters:

> There's an issue here of what happens in our contract, and obviously our letters speak for themselves of saying, "Gee, if this cannot be resolved at some point," you know, we got a title bust, "then we want to have our money back." At some point you have to make the decision about where, you know, what you do, and of course, the consequences of what you do make a big difference. Our consequences don't look necessarily quite as dire as they looked a few months ago, and that's just, you know, part of where things are.[56]

Later, as Smith asked Stout whether Lewes Investment would be willing to pay interest "more or less" in the amount it had previously paid for a three-year extension, Dean Graves interrupted with a question for Stout:

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[51] Joint Trial Exhibit 16 at 12-13.
[52] *Id.* at 18.
[53] *Id.* at 18-20,23-28.
[54] *Id.* at 31, 34.
[55] *Id.* at 34.
[56] *Id.* at 31.

Dean: What incentive do we have to give you three years?

Stout: Pardon me?

Dean: What incentive do we have to give you three years monetarily?

Stout: Well, because you're – here's your incentive – I hope this will go over all right. Your incent [sic] – your choice is otherwise – I mean if you were to simply say, "Look, we think the contract's over," we'd end up in a legal fight. So that's probably not good for either of us, but it's something you could choose.

The real issue for you then is what's the value of the property to the next guy and how long will it take anyone else to move forward on this. And that's why I'm saying – I'm trying to open up and at least say if you think there's somebody at a higher price or shorter timeframe package that you like better, I'm willing to give you the right to get it. If you needed a little time to look at it, go ahead.

Smith: But that's not your first choice?

Teague: No.

Stout: That's not our first choice.

Teague: We don't do these things to just get out. I mean we want to do these things. (Laughter)

Smith: Let him answer my question then. Up until this point, because you couldn't go to closing on the original date, you had been paying a not insignificant amount of interest every month, through June. So my question is either from today or from the day we get the title resolved – I mean that's a negotiation – are you willing to either resume or increase the interest payment until you go to settling?

Stout: Well, let me make this clear, I'm not willing to increase it, which has been I think our position.

Smith: And we've had the $50,000.00 versus $25,000.00 discussion.

Stout: Right.

Mahlon: You were back in June. You were-

[Crosstalk]

Smith: He had a caveat; he had to _____.

Mahlon: You're open to it, but you had to go back to-

Stout: Right. And frankly I was assuming at the time – and I'll be matter-of-fact – I was assuming that your title was not going to be an issue. In other words, I had every reason to think your title was fine or was going to be fine within short order. And in that sense what I was willing to do to protect the million-plus dollars that we have in it is a little different than when I think there's at least some possibility of recovery. I'm trying to be obtuse around this, 'cause again, I really would like to keep us both, and I think we both benefit by finding a way not to get into a lawsuit. .....[57]

After more talk, the parties started to discuss actual numbers:

Bill: Are you willing to give us $25,000.00 a month? We can cut this real clean.

Stout: Yeah. Well that's pretty much said I'm willing to do something like $15,000.00 to $18,000.00 is what I've calculated.

Bill: Are you willing to go $25,000.00?

Stout: Under certain circumstances. Again-

Bill: You're getting three – I can give you three years. Now come on, Greg [sic]. This is a five-year deal here.

Ann: It is a five year deal.

Bill: For god's sake man.

Ann: Oh my goodness.

Stout: Well, again, if that were the only consideration, in other words there are going to be whole lot of other issues, but in and of itself could I tolerate that, I think we could then, don't you?

Teague: Yeah, I think once you've gotten the title resolved so we know we-

Bill: The title is not a problem.

Ann: No, it's not-

Bill: The title is not a problem.

[57] *Id.* at 38-40.

Teague: I believe you; I just think there's a time element that does affect how we _____ _____ parties forward.

[Crosstalk]

Stout: -and listening to that whole thing, I mean, I'm just-

Bill: But _____ a bit, _____ is going to be a snap _____ this title thing.

Smith: Well I thought we were going to get, you know.

Bill: You didn't think about this at all.

Smith: Well I thought Foster's approval was going to come through quick.

[Crosstalk]

Bill: Well you were wrong.

Teague: I think the issue, though, you've got ____ is I agree, it's not going to be a problem. But we've got to go to the State, to a bunch of other people. The further away you are from the center of the issue, the more things like that look like problems.

Smith: And I-

Teague: I would say – that's why I'm just saying if we're starting like the payments from when that's resolved, we've now got an ability to really say, "Okay, we know where we are." 'Cause the title is fundamental to any contract, it just is.[58]

The parties never agreed upon the terms for a three-year extension of the Agreement. The record shows that the title defect in Parcel 176 was not cured until February 2007.[59] Thus, the Graves Family finally obtained good and marketable title to Parcel 176 almost two and one half years after Smith first had notice of the title defect, almost six months after Smith was informed by Lewes Investment that the Graves Family had 30 days to cure the defect, and almost five months after Smith had notice of Lewes Investment's claim for restitution. Now, the Graves Family argues that there was no material breach of the Agreement on their part, and that the period of time they took to cure the title defect was reasonable under the circumstances. I disagree on both issues.

[58] *Id.* at 46-47.
[59] Joint Trial Exhibit 22.

Although the Graves Family argue that the title defect was not material because Stout informed them on June 29, 2006, that Lewes Investment might find a way to work around it, the record at trial shows that a title defect in Parcel 176 had the potential of derailing the entire development project. The preliminary site plan designed by Morris & Ritchie Associates reflected Lewes Investment's commitment to incorporate affordable income housing throughout the Graves Farm and DSHA parcel. The plan placed a higher concentration of affordable housing units in a proposed town center that would be accessible to public transportation along Route 9.[60] A complication with the preliminary design for the development arose because DelDOT was proposing to relocate Route 9 and build an access road from Belltown diagonally through the Graves Farm. After negotiations with Lewes Investment and its engineers, DelDOT eventually approved a design for an access road to be built through the western half of Parcel 176.[61] A few lots designed around a cul-de-sac in that portion of Parcel 176 would have to be eliminated. However, if Lewes Investment had not been able to acquire Parcel 176, it would have lost a great deal of land and significantly more lots because, in order to meet DelDOT's road engineering requirements, the access road would have been built through the top third of the remaining parcel.[62] Without Parcel 176, Lewes Investment would have to start the planning process anew with no guarantees that it could meet its commitment to DHSA or obtain DelDOT approval for a relocated access road.[63]

The record also shows that Lewes Investment had no reason to believe that the State would exercise its eminent domain power to create an access road across Parcel 176. According to John McBride, who was employed by Morris & Richie and worked on the Graves Farm project, the State "really frown[ed]"upon using its eminent domain power.[64] (tr. 191-92). In McBride's experience, the State always approached the developer to give up some land in exchange for getting its development approved rather than exercise its power of eminent domain.[65] In fact, Stout informed the Graves Family during their July 29, 2006 meeting that the State wanted Lewes Investment to give them a right of way to this road.[66]

If the parties had closed on July 26, 2006, the Graves Family would have been able to convey good and marketable title to Parcel 177, but not to Parcel 176. The Graves Family owned only an undivided 7/8th interest in Parcel 176, which comprised 3.32 acres. Distant relatives of the Graves Family owned the remaining undivided 1/8th interest. Under the Agreement, if the Graves Family had sold less than 88.4414 acres to Lewes Investment, Lewes

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[60] Trial Transcript on August 22, 2011, at 183-84; Joint Trial Exhibit 24.
[61] Trial Transcript on August 22, 2011, at 173-76; Joint Trial Exhibit 24.
[62] Trial Transcript on August 22, 2011, at 176-82.
[63] *Id.* at 182-87.
[64] *Id.* at 191-92.
[65] *Id.* at 196-97.
[66] Joint Trial Exhibit 11, at 135.

Investment would not have been entitled to an adjustment of the purchase price of $13,000,000.[67] Nevertheless, the Graves Family now argues that Lewes Investment could have been compensated fully, i.e., paid approximately $60,000, at settlement for the missing 1/8th interest. Once the Graves Family was notified of the title defect, however, it was their responsibility to take affirmative steps to remedy the defect in order that both parties might receive the benefit of their bargain. *See Ferrara v. Walters*, 919 So.2d 876, 886 (Miss. 2005). Lewes Investment bargained for good and marketable title of Parcels 176 and 177. The Graves Family's calculation of $60,000 as compensation for the missing 1/8th interest ignores the complications of trying to develop land with a clouded title, and fails to account for additional costs Lewes Investment would have incurred in redesigning its development plan, the time value of money tied up in a project that might take longer to come to fruition, and the risks associated with a weakening real estate market. I find that Lewes Investment would not have received the benefit of its bargain under this scenario. The Graves Family, as Smith explained to them during the September 19, 2006 meeting, could not "convey good fee-simple, absolute title to the 3.32 acres."[68] Good and marketable title to Parcel 176 was a material term of the Agreement.

The Graves Family denies that they committed a material breach of the Agreement because time was not of the essence under the Agreement as to the closing, and that they cured the title defect within a reasonable time, i.e., in February 2007. They try to shift some of the onus for the delay onto Lewes Investment, claiming that Lewes Investment completely ignored the title issue for one and a half years. The record shows that, even though it was not Lewes Investment's responsibility to cure the defect, Lewes Investment's attorney attempted to address this issue with the Graves Family's attorney in a prompt fashion without success.

After Fuqua's August 23, 2004 letter first advised Smith of the title defect,[69] Fuqua had delivered to Smith on or about October 20, 2004, a letter asking Smith to contact him regarding the missing 1/8th interest so they could discuss the matter further.[70] In light of the upcoming October 24th deadline for payment of the additional $640,000 deposit, Fuqua also asked Smith for a 15-day extension of the deadline for payment to give them time to resolve the title issue. Smith responded by e-mail dated October 21, stating that he was out of the country and would not be able to contact Bill Graves until after the deadline.[71] Lewes Investment paid the additional deposit on October 21, 2004. At trial, Smith admitted that during his deposition, he testified that he had been told by Bill Graves not to deal with the title issue until Lewes Investment was "hooked in" with the $640,000 deposit.[72]

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[67] Joint Trial Exhibit 2 at ¶ 2.
[68] Joint Trial Exhibit 16 at 10.
[69] Joint Trial Exhibit 5.
[70] Joint Trial Exhibit 6; Trial Transcript on August 22, 2011 at 212-213.
[71] Joint Trial Exhibit 7.
[72] Trial Transcript on August 23, 2011, at 74.

On November 29, 2004, Fuqua met with Smith to discuss the title dispute.[73] At trial, Fuqua testified that he brought to the meeting copies of the old Orphans Court records demonstrating that the missing 1/8th interest in Parcel 176 was owned by the children of a predeceased child of the Graves Family's predecessor in interest.[74] Smith denied that Fuqua brought the search records with him at that time. Smith testified that he had a meeting with Fuqua sometime in the spring or early summer of 2006, prior to June 29, 2006 meeting, at which time Fuqua gave Smith the Orphans Court documents.[75] However, Fuqua had been out of the office for serious health reasons from May 26 through July 15, 2006.[76] At the end of the June 29th meeting when Stout raised the title issue, Smith referred to a phone call he had received the previous week from "Kate in Jim's office," which prompted him to pull the search out.[77] Smith then told Bill Graves that he had just retrieved Fuqua's letter, and said: "It sat there for, when was Jim's letter, August of 2004. So it was two years old. I – I thought they had put it to bed."[78] If Smith had recently met with Fuqua to review the Orphans Court records, there would have been no valid reason for Smith to tell his client that he thought the matter had been resolved. The record shows that Smith ordered his own title search on November 30, 2004, the day after his meeting with Fuqua. Although Smith testified that he ordered his own title search after receiving Fuqua's August 23rd letter,[79] given the proximity of the dates, the more likely scenario is that Smith had sufficient doubts about the title after reviewing Fuqua's search records on November 29th that he ordered his own title search the following day. At trial, Smith recalled sending a copy of his own title search to Fuqua, but Fuqua testified that he never received a copy and was unaware that another title search had been conducted until after this litigation had commenced.[80]

After November 2004, on several occasions Fuqua had his title searcher check to see if any deeds had been recorded.[81] The title searcher's response was always negative. The Graves Family now argues that the delay in curing the title defect was reasonable because Lewes Investment wanted to delay the closing. In support of this argument, the Graves Family points to the fact that Lewes Investment was only in the preliminary stages of the developing the Property. However, the Agreement was not contingent upon Lewes Investment obtaining any zoning approvals.[82] The Graves Family also argues that Lewes Investment was not financially prepared to settle on July 26th, and had made no formal arrangements to settle on July 26th. The record

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[73] Trial Transcript on August 22, 2011, at 217
[74] *Id.* at 217-19.
[75] Trial Transcript on August 23, 2011, at 11, 22, 28, 36-37.
[76] Trial Transcript on August 22, 2011, at 224.
[77] Joint Trial Exhibit 11 at 132.
[78] *Id.* at 136.
[79] Trial Transcript on August 23, 2011, at 38.
[80] *Id.* at 41; Trial Transcript on August 22, 2011, at 219.
[81] Trial Transcript on August 22, 2011, at 219-20.
[82] *Id.* at 233-34.

shows that Fuqua's office was preparing for settlement,[83] Lewes Investment's real estate agent had forwarded the calculation of his commission to Smith on July 21, 2006, in anticipation of settlement,[84] and Lewes Investment was working with Discover Bank to obtain a financing commitment in anticipation of settlement on July 26, 2006.[85] Stout testified at trial that Lewes Investment was ready to settle on July 26.[86] It is true that Lewes Investment wanted to delay the closing until it could obtain preliminary approval of its project. However, the negotiations that took place on June 29, which concluded with an offer by the Graves Family to extend settlement for 12 months in exchange for monthly payments of $50,000 for the first six months followed by monthly payments of $80,000 for the next six months,[87] preceded the discussion of the title issue. During that discussion, it became evident that Smith and the Graves Family had done nothing as yet to correct the title defect even though under the Agreement the date for settlement was less than a month away.

After the June 29 meeting, Stout had further discussions with Smith and informed him that Lewes Investment would not go to settlement if the Graves Family did not have good title.[88] Stout did not know what the title problem consisted of,[89] and over the course of the next several months, Smith never gave Stout any indication that he could solve the problem.[90] According to Smith's testimony at trial, he did not do much between the June meeting and the end of July because he believed that the parties had reached an "understanding" that settlement was being postponed indefinitely.[91] Tatusko's July 25 letter gave the Graves Family an additional 30 days to cure the title defect.[92] The Graves Family now point to that letter as an admission by Lewes Investment that time was not of the essence. Lewes Investment heard nothing from Smith and the Graves Family after that letter.[93] On August 28, 2006, Tatusko sent another letter, notifying Smith that the 30-day period had expired, and that Lewes Investment was now entitled to full restitution under the Agreement.[94] Nevertheless, according to Stout, the second letter also reflected the hope that a new agreement could be reached that would meet the parties' mutual goals and avoid litigation.[95]

The transcript of September 19, 2006 meeting demonstrates that Stout and Teague were trying to work out an extension of the Agreement to complete their project and to avoid

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[83] Trial Transcript on August 22, 2011, at 221-23.
[84] Joint Trial Exhibit 12.
[85] Joint Trial Exhibit 11 at 18-22, 31, 76.
[86] Trial Transcript on August 22, 2011, at 51-52, 101-102, 114, 144-45.
[87] *Id.* at 126-128.
[88] *Id.* at 52-53, 122-23.
[89] Id. at 122-23.
[90] *Id.* at 67.
[91] Trial Transcript on August 23, 2011, at 79-80.
[92] Joint Trial Exhibit 13.
[93] Trial Transcript on August 22, 2011, at 56.
[94] Joint Trial Exhibit 15.
[95] Trial Transcript on August 22, 2011, at 59-61.

litigation.[96] During the meeting, the Graves Family and Smith discussed their efforts to negotiate with the newly-found heirs to Parcel 176, and how they were prepared to force a partition sale if the heirs proved recalcitrant.[97] One of the heirs was under a guardianship so Court approval would be needed for any transaction. No estimate was given during this discussion as to how long it might take to cure the title defect. The meeting ended with no agreement being reached about an extension. On September 26, 2006, Smith sent Stout a memorandum outlining terms of a proposed three-year extension starting September 19, 2006, whereby Lewes Investment would make extension payments at $25,000 per month, not applied to the purchase price, retroactive to July 2006, but not resumed until the title issues was resolved, at which time Lewes Investment would make the back payments and resume monthly payments.[98] After 18 months, the monthly payments would increase to $40,000, of which $15,000 would be applied to the purchase price.[99] There were apparently no further communications between the parties until Smith's February 12, 2007 letter to Fuqua informing him of the title defect being cured.[100]

For the sake of this discussion, I will assume that time was not of the essence for settlement under the Agreement. Nevertheless, Tatusko's July 25 letter gave express notice to the Graves Family that time had now become of the essence. *See Bryan v. Moore*, 863 A.2d 258, 260-61 (Del. Ch. 2004); *Tull v. Smith*, 50 A.2d 908, 910 (Del. Ch. 1946). The letter stated that title had to be cured within 30 days or else the Agreement would be terminated. Thirty days was not an unreasonable period of time under the circumstances since the Graves Family had made no effort to communicate with Lewes Investment about the title defect or to cure the title defect before June 29, 2006. Even after the June 29th meeting, little if any attempt was made to cure the defect. After Smith received Tatusko's July 25th letter, it became imperative for the Graves Family to act with utmost diligence to perfect their title to Parcel 176. *See Kittinger v. Rossman*, 112 A. 388, 390 (Del. Ch. 1921). According to the Graves Family's own expert, Robert Gibbs, Esquire, the title defect could have been resolved within 30 days.[101] After 30 days had passed, and Tatusko had sent a second letter to Smith notifying him of Lewes Investment's entitlement to damages, there was still no response from the Graves Family. No information regarding the Graves Family's attempts to cure the title defect was conveyed to Lewes Investment until the September 19th meeting.

Lewes Investment's continuing efforts to negotiate an extension agreement in September 2006, as well as the minor engineering services performed by its contractor during the fall of 2006, did not relieve the Graves Family of their obligation to cure the title defect in a reasonable time. Whether or not the August 28 letter served as a notice of termination, I find that the

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[96] *Id.* at 64-65.
[97] The heirs initially asked for $225,000 in exchange for their combined 1/8th interest. Joint Trial Exhibit 16 at 4-10.
[98] Joint Trial Exhibit 17.
[99] *Id.*
[100] Joint Trial Exhibit 22.
[101] Trial Transcript on August 23, 2011, at 84-90.

Agreement was no longer in existence by the time the Graves Family cured the title defect in February 2007. The discussion that took place during the September 19 meeting revealed that resolution of the title defect was not likely to happen in the near future. It would be unreasonable to expect Lewes Investment or any real estate purchaser to wait several months in a weakening market for a title defect to be cured, not knowing how long the task might take, without a modification of the Agreement. Therefore, I conclude that the Graves Family committed a material breach of the Agreement when they were unable to convey good and marketable title to Parcel 176 for more than five months after the 30-day grace period had expired. Lewes Investment should be entitled to the return of its deposit monies and expenses totaling $948,775.79, [102] when this report becomes final.

[102] Trial Transcript on August 22, 2011 at 68-69; Joint Trial Exhibits 25-30.