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CONTRACT LAW

I. Right to Set-Off of Interim Interest in Specific Performance Action Clarified

In *Windham v. Honeycutt*[1] the South Carolina Court of Appeals clarified South Carolina law regarding the set-off of interim interest on the purchase price of property against the fair rental value of the property pursuant to a specific performance decree. In addition, the court indirectly provided guidance about what is required for an appellate court's review of an award of special damages.

In August 1979 Windham entered into a written contract with Honeycutt in which Honeycutt agreed to sell Windham thirty acres of land for $115,000 with a down payment of $60,000.[2] Honeycutt later refused to convey the property, and Windham obtained a decree from the court for specific performance of the contract. The supreme court affirmed the specific performance decree of the trial court and remanded for a hearing to determine the amount of special damages.[3]

At the damages hearing a special referee recommended that Windham receive the rental value of the land during the period of delay, reimbursement for the costs he incurred in boarding his horses and dogs during this period, and the monetary loss he suffered as a result of being forced to sell his horses before the conveyance for less than fair market value.[4] The referee also recommended that the court reject Honeycutt's request for the set-off and dismiss his counterclaim.[5] The trial court adopted the recommendations of the referee and Honeycutt appealed.

Honeycutt asserted that the trial judge should have subtracted the interest that could have been earned on the purchase price during the interim from the fair rental value of the property awarded to Windham. The court of appeals agreed and fol-

1. 290 S.C. 60, 348 S.E.2d 185 (Ct. App. 1986).
2. *Id.* at 62, 348 S.E.2d at 186.
3. Windham v. Honeycutt, 279 S.C. 109, 302 S.E.2d 856 (1983).
4. 290 S.C. at 62, 348 S.E.2d at 186.
5. *Id.*

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lowed the majority rule:

> An award of fair rental value . . . cannot be correctly characterized as special damages; rather, the award is in the nature of an accounting, by which a court of equity seeks to place the parties in the same position as if the conveyance had been made when due. To achieve this, the court will award the fair rental value of the property to the purchaser on the one hand and, on the other, interest on the unpaid purchase price to the vendor. One cannot be awarded without the other. "The fruits of possession and the interest are mutually exclusive—there is no right upon the part of either [the purchaser or the vendor] to have both."[6]

Windham, while acknowledging this general rule,[7] relied on apparently misleading dicta in *Shannon v. Freeman*[8] and *Farr v. Sprouse*[9] to argue that the court should not award interest on the purchase price when the vendor intentionally delays the performance of a sales contract.[10] The court of appeals ignored

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6. *Id.* at 62-63, 348 S.E.2d at 186 (citations omitted) (brackets in original) (quoting Bembridge v. Miller, 235 Or. 396, 408, 385 P.2d 172, 178 (1963)).

7. Windham's brief provided the following overview of the issue in South Carolina:

> [I]t is admitted that the general rule of offsetting the interest of the purchase price against the rents and profits derived from the land in a suit in equity involving specific performance has been followed in South Carolina. In the early case of Rutledge v. Smith, 6 S.C. Equ. [sic] (1 McCord. Eq.) 399 (1826), the South Carolina Supreme Court overruled the chancellor's holding that a purchaser who receives rents and profits after the vendor has refused to fulfill the contract of sale is not required to setoff the interest on the purchase price. The Court ruled that a purchaser who takes possession and remains in the uninterrupted enjoyment of the land, or who receives the rents and profits must pay interest.

Brief of Respondent at 3.

8. 117 S.C. 480, 109 S.E. 406 (1921).

9. 133 S.C. 93, 130 S.E. 210 (1925).

10. In *Farr v. Sprouse* the defendant purchaser bought a two-acre parcel of land and took possession. The land, however, was subject to a mortgage, and before the plaintiff could secure a release of the parcel to give the title to the defendant, the plaintiff arranged to have his land sold at public auction. At the auction the defendant purchased a 52.8 acre tract including the two acres that he had contracted to purchase. The trial court found that the defendant still was bound to pay for the two acres in accord with the original contract. On appeal, however, the court wrote that "[t]he defendant, not being able to get title to the 2 acres of land, through no fault on his part, should not be charged with interest on the purchase price." 133 S.C. at 98, 130 S.E. at 211.

In *Shannon v. Freeman* the rents and profits were not an issue. The court, however, affirmed and reprinted the master's holding. The court stated as follows:

> Should the plaintiff be required to account to the defendants for interest? This question was not argued before the Master, but the Master is of the opinion

these confusing precedents[11] and simply adopted the general rule which provides as follows:

> An offset for interim interest on the purchase price will be allowed even where the vendor was at fault in delaying the conveyance; however, to prevent the vendor from profiting by her wrong doing, the offset will be limited in that the vendor cannot recover any excess of interest over rents and profits.[12]

In avoiding a prolonged discussion of old, confusing South Carolina cases, the court of appeals established that South Carolina follows the majority rule.[13]

> that the purchaser is not liable for interest. The Master finds that the delay in the performance has been due to the default of the defendants; that the defendant, Mrs. Freeman, as trustee for herself and the other defendants, has remained in possession of the land, refusing to deliver possession to plaintiff, and retaining for herself and the other defendants such benefits or profits as go with the possession of this land. As the land is vacant, it may be, and very probably is, the case that there has been no income therefrom. But of this defendants cannot complain. Such benefit, if any, as grows out of possession of this land they have retained over the protest of plaintiff. Where the delay in performance is imputable to the vendor, he is not entitled to interest.

117 S.C. at 492, 109 S.E. at 410.

11. The appellant in her brief stated, "In a jurisprudence as rich as South Carolina's, where a topic as common as interim interest has been the subject of reported litigation since 1797, inevitably some troublesome dicta will find their way into the reports and the digests. The subject at bar is no exception." Brief of Appellant at 14. The appellant's brief also noted and analyzed the following facts of *Shannon*:

> Freeman agreed to sell a lot in the City of Greenville to Shannon. Freeman failed to perform. Shannon sought specific performance. The vendor remained in possession during the litigation. Since the vendor was in default, he sought no affirmative recovery of interim interest. . . . Since the land was vacant and unproductive, the purchaser did not seek interim rents and profits. Although the vendor in default understandably sought no affirmative recovery of interest, the master in equity took it upon himself to declare that "[w]here the delay in performance is imputable to the vendor, he is not entitled to interest." It is true, of course, that the vendor in default is not entitled to an *affirmative recovery*, even where the interest exceeds the rents and profits, and this is what the master must have meant to say.

Id. at 14-15 (citations omitted) (emphasis in original).

The appellant asserted that because *Farr* was a case at law, and not for an accounting after specific performance, the present appeal did not present an opportunity to decide whether the dictum in *Farr*, given the unique facts of *Farr*, was right or wrong. *Id.* at 17-18.

12. 290 S.C. at 63, 348 S.E.2d at 186. Another exception to awarding interim interest is that interest is not awarded when the purchaser gathers the money, notifies the vendor that the money is idle and subject to his command, and the purchaser thereafter earns nothing from the fund. Rutledge v. Smith, 6 S.C. Eq. (1 McCord Eq.) 399 (1826).

13. *See* Annotation, *Specific Performance: Compensation or Damages Awarded*

Although Honeycutt succeeded in obtaining an offset of the interest, the court did not rule on Honeycutt's other two arguments. Honeycutt argued that she should be entitled to recover both the costs of repairs, maintenance, and improvements that she made on the property, and the amount of taxes and insurance that she paid during the period in which closing was delayed.[14] The court, noting a split of authority,[15] did not decide these issues because the record was insufficient to allow an intelligent review.[16]

Honeycutt also argued that the trial judge erred in awarding special damages to Windham for expenses incurred in boarding his dogs and horses during the delay, and for the loss incurred in the sale of the horses. She claimed that she did not know at the time she entered into the contract that Windham was planning to keep dogs and horses on the land, or that he would be forced to sell his horses if closing were delayed.[17] The court recognized the general rule that "in addition to ordering specific performance, a court may award special damages resulting from a refusal to convey or delay in conveying real property according to the terms of the contract."[18] The court defined special damages as "those that may reasonably be supposed to have been in the contemplation of both parties, at the time of contracting, as the probable result of a breach."[19] The court, however, did not pursue the matter further because the question was not properly before the court.[20]

Augustus M. Dixon

Purchaser for Delay in Conveyance of Land, 7 A.L.R.2D 1204 (1949).

14. 290 S.C. at 63, 348 S.E.2d at 187.

15. Annot., *supra* note 13, at 1227-29.

16. The court stated, "The burden is on the appellant to furnish a sufficient record on appeal from which this court can make an intelligent review . . . . This court will not consider facts that do not appear in the transcript of record." 290 S.C. at 63-64, 348 S.E.2d at 187 (citations omitted).

17. 290 S.C. at 64, 348 S.E.2d at 187.

18. *Id.* (citations omitted).

19. *Id.*

20. The court wrote,

> [T]he exceptions to the special referee's report are based solely on grounds that there was no evidence that such damages were incurred. As far as the record before us shows, the trial judge never considered whether the award of special damages was anticipated by the parties; therefore, this issue is first raised on appeal. It is well settled that a question not presented before or passed upon by the special referee or trial judge is not properly before this court.

Id.

II. REQUIREMENTS FOR WAIVER OF TIME PERIOD IN OPTION CONTRACT TO PURCHASE LAND CLARIFIED

Generally, in contract law, an obligor can waive a condition of a contract or option if the condition is not "a material part of the agreed exchange."[21] While this general rule previously may have existed by implication in South Carolina contract law, the South Carolina Court of Appeals now has explicitly recognized the rule. The court of appeals held in *Edwards v. Rouse*[22] that an optionor[23] may waive his right to require exercise of an option within the time period stipulated in the contract.

Edwards concerned a dispute over a real estate option contract. Vanderhorst (optionor) granted a thirty day option to Liebenroud to purchase a tract of land. The day after the parties executed the option contract, Liebenroud assigned the rights to the option to Edwards. One day after the option expired, Edwards' attorney sent a letter to the optionor purporting to exercise the option. The optionor later met with Edwards' attorney several times and assisted in settling the title to the land. Shortly after assisting in settling the title, but before the contract was performed, the optionor died. After the optionor died, the optionor's heirs continued to assist the attorneys with the title examination. Later, the heirs informed Edwards' attorney that they did not wish to sell the land and refused to honor the contract. The heirs argued that Edwards failed to exercise the option before it expired. Edwards sued for specific performance of the contract.The master in equity, the circuit court, and the court of appeals refused to recognize the lapse of the option as a bar to specific performance. Instead, all three bodies held that the optionor had waived his right to strict compliance with the time requirement and that a valid contract existed between Vanderhorst and Edwards. Thus, the heirs were bound by that contract.

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21. *See* RESTATEMENT (SECOND) OF CONTRACTS § 84(1)(a) (1981).

22. 290 S.C. 449, 351 S.E.2d 174 (Ct. App. 1986).

23. An "optionor" is the grantor in an option contract. WEBSTER'S NEW INTERNATIONAL DICTIONARY 1711 (2d. ed. 1936).

The general rule concerning waiver of a time restriction in an option is as follows: "[A]n optionor may, expressly or by voluntary acts of conduct, waive a requirement of a contract of option to purchase, that exercise of the option shall be made within a limited time, thereby excusing, under the general principles of waiver, a delay of the optionee in that regard."[24] Although South Carolina courts traditionally have required strict compliance with time limitations in option contracts, *Edwards* was the first case which allowed the court to address the waiver of a time requirement in an option contract.[25]

Dargan v. Page[26] illustrates South Carolina law concerning the timeliness of the exercise of an option. *Dargan* involved an option to purchase timber from a tract of land. The option had to be exercised within thirty days of the date on which it was granted. The optionee, after failing to exercise the option within the stated limit, sued for specific performance. The supreme court held that "[t]he time element expressed in [an option] must be strictly complied with, or relief by way of specific performance will be denied."[27] *Dargan* differs from *Edwards* in one material respect: *Dargan* contained no evidence of a waiver of the time requirement. The testimony in *Dargan* revealed that the optionor "considered that the option had expired and that he was not bound thereby."[28] *Edwards*, however, contained evidence of waiver on the part of the optionor. In *Edwards* the master in equity and the circuit court found that the optionor's conduct constituted a waiver of his right to insist on exercise of the option within the thirty day period.[29] The court of appeals affirmed this finding.[30] The optionor demonstrated his belief that the time restriction in the option was not material and, thus, could be waived.

Edwards modified but did not overrule *Dargan*. The law in South Carolina still requires strict compliance with the terms of an option. The rule is modified, however, in cases when the *op-*

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24. 17 AM. JUR. 2D *Contracts* § 61 (1964).

25. *See* Cotter v. James L. Tapp Co., 267 S.C. 647, 657, 230 S.E.2d 715, 720 (1976) (conduct not sufficient to constitute a waiver).

26. 222 S.C. 520, 72 S.E.2d 705 (1952).

27. *Id.* at 526, 73 S.E.2d at 708.

28. *Id.* at 531, 73 S.E.2d at 710.

29. 290 S.C. at 450-51, 351 S.E.2d at 175.

30. *Id.* at 452, 351 S.E.2d at 177.

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tionor expresses a clear desire to waive strict compliance with a term. If there is evidence of waiver, the courts are likely to recognize the parties' desire to change the terms of the option. If there is no evidence of waiver, *Dargan* will still apply and strict compliance to the terms of the option will be required.

Peter Mathews Thomas