

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	1
QUESTIONS PRESENTED	1
STATEMENT OF THE FACTS	2
STANDARD OF REVIEW	10
LEGAL ANALYSIS	11
The trial court prejudicially erred in ruling, as a matter of law, that there was no material breach of contract by the proposed buyer of a parcel of real property when the buyer insisted that a deed be prepared, signed, delivered and <i>actually successfully recorded</i> before the seller was paid despite the complete lack of any recordation contingency in the contract.....	11
There Was Prejudicial Error in the Trial Court’s Ruling, as a Matter of Law, that the Property Should be Sold to the Proposed Buyer Instead of a Back-Up Buyer Despite the Fact that the Initial Buyer Never Tendered Performance as Required by the Terms of the Contract.....	14
The Contract the Trial Court Ordered the Parties to Follow Violates the Rule Against Perpetuities.....	17
CONCLUSION	23

TABLE OF AUTHORITIES

CASES

STATEMENT OF THE CASE

This case involves a residential real estate transaction in which there was an initial contract and a “back-up” contract on the property. The back-up contract became binding if the initial contract was voided or released. The initial buyers failed and refused to settle pursuant to their contract and the buyers who have a valid back-up contract now wish to purchase the property. The seller wishes to close on the back-up contract.

The Circuit Court ordered specific performance of the contract with the initial buyers despite the fact that the initial buyers attempted to insist upon terms not found in the contract and further refused to perform under the contract as required. Both the seller and the back-up buyers appealed.

QUESTIONS PRESENTED

1. Did the trial court prejudicially err in ruling, as a matter of law, that there was no material breach of contract by the proposed buyer of a parcel of real property when the buyer insisted that a deed be prepared, signed, delivered and *actually successfully recorded* before the seller was paid despite the complete lack of any recordation contingency in the contract?

2. Was there prejudicial error in the trial court’s ruling, as a matter of law, that the property should be sold to the proposed buyer instead of a back-up buyer despite the fact that the initial buyer never tendered performance as required by the terms of the contract?

3. Given that the contract the Circuit Court ordered the parties to perform is unenforceable because it violates the Rule Against Perpetuities, was there prejudicial error in nevertheless ordering that the seller sell to the initial proposed buyer instead of the back-up buyer who was ready, willing and able to settle at a higher price?

STATEMENT OF THE FACTS

Appellant Catherine Bartos and Appellees Paul Abbott and Elaine Barker entered a contract dated April 24, 2004 which contemplated the sale of certain real property located in St. Mary's County Maryland from Appellant Bartos to Appellees Abbott and Barker. *See* E. 0684. The contract is not a standard form Maryland Association of Realtors contract, but a form document obtained by one of the parties without the assistance of a real estate agent. *See id.* The contract identified the property as "Lot 15 and one-half (1/2) of Lot 14, Section 1, Plat 2/66, Cornfield Harbor (13945 Cornfield Harbor, Dr., Scotland, MD)." *See id.* The April 24, 2004 contract contains very few terms which could be considered contingencies and provides that the property is sold "as-is." *See id.*

The April 24, 2004 contract was amended by way of an addendum dated June 24, 2006. *See* E. 0629. The June 24, 2004 addendum provides for settlement within "7 months of the date of this signed agreement or as soon as the Purchasers are able to obtain a building permit...." *See id.* Seven months after the June 24, 2004 date fell on January 24, 2005.

On October 22, 2004 Appellant Bartos entered a "back-up" contract to convey the same property to Appellants John M. Zupancic and Cheryl R. Gordon. *See* E. 0632. Said contract was conditioned upon the failure of Abbott and Barker to successfully close under their contract with Mrs. Bartos. *See id.*

A settlement on the contract between Appellant Bartos and Appellees Abbott and Barker was scheduled for Friday, January 21, 2005 - just two days before the seven-month period in the addendum was set to expire. E. 0087-0088 (testimony of settlement

attorney); E. 0639 (addendum). Pursuant to instructions provided by Barker, Mrs. Bartos arrived early at the Law Offices of Harris and Capristo in St. Mary's County (Mrs. Bartos lived at the time in Montgomery County, Maryland) for what was scheduled to be a 4:00 p.m. settlement. *See* E. 0447-0448. Mrs. Bartos never met with Ms. Barker or Mr. Abbott, in any formal settlement setting that day. *See id.*; E. 0093-0095; E. 0448. Instead, Mrs. Bartos only sat or stood in the lobby and kitchen area of the law office. *See* E. 0516. There is no dispute that there came a time shortly after 5:00 p.m. when Mrs. Bartos acknowledged receipt of a handwritten memorandum from the settlement attorney and that shortly thereafter she departed the building. *See* E. 0647.

Both Mr. Harris and Mrs. Bartos agree that Mrs. Bartos was presented by the settlement attorney with only one (1) settlement document, a HUD-1 Settlement Statement. *See* E. 0449-0450. The HUD-1 was dated February 21, 2005, contained a tax adjustment as of February 21, 2005, indicated that the D.O.D. ("date of disbursement") was February 21, 2005 and consequently reflected that the net proceeds to be received by the Seller were less than those to which the Seller was otherwise entitled. *See* E. 0648.

Mrs. Bartos testified that she stated to the settlement attorney, "This is wrong." *See* E. 0452. Thereafter, according to Mrs. Bartos, the settlement attorney, "turned around, went somewhere and came back with the letter of Friends of Cornfield Harbor." *See* E. 0452.

When asked whether she tried "to discuss the fact that the document was misdated," Mrs. Bartos responded as follows:

Mr. Harris paid no attention to any conversation I tried to have with him. He just turned around, went back, got this letter from Friends of Cornfield

Harbor and then he told me that — to sign the settlement sheet and that the funds are going to be escrowed. And I said that I didn't want that and it was — that was the end of the conversation.

See E. 0453-0454.

It was after this encounter with the settlement attorney that Mrs. Bartos requested a writing, which was provided by the settlement attorney, which provided that, “[D]isbursement of the settlement proceeds per attached HUD-1 will be made on January 24, 2005, after recording the deed of conveyance for the above-referenced property and verification that no “lis pendens” action has been filed in the Circuit Court for St. Mary’s County, Maryland that would affect the title and the above-referenced property.” *See* E. 0647; E. 0454.

The referenced “Cornfield Harbor letter” was the second of two (2) letters to Plaintiffs Abbott and Barker concerning their proposed redevelopment of the subject property, apparently in conflict with what certain unnamed neighbors believed appropriate for the site. *See* E. 0645; E.0667. The letter falsely claimed that a lis pendens action had already been filed in connection with the property, and threatened a lawsuit against Abbott and Barker. *See id.* Mrs. Bartos testified that the settlement attorney told her that he had “checked it out,” and that, “there was no lis pendens.” E. 0453. Likewise, the settlement attorney testified to the same effect. E. 0091.

The settlement attorney was aware early on the morning of January 21, 2005, that Mrs. Bartos desired to receive good funds at settlement, a practice common in St. Mary’s County and, absent language to the contrary in the Contract, a standard requirement between Buyer and Seller. *See* E. 0446-0447. When his office called the Seller to inquire

about a death certificate for her late husband on the morning of January 21, 2005, the office failed to disclose that there was a potential title issue and that funds would not be disbursed that day, even though Mrs. Bartos expressly stated that she expected to receive certified funds at settlement. *See* E. 0446. In fact, Mr. Harris testified at trial as follows:

Q: ...if there was no letter from Friends of Cornfield Harbor and the settlement had gone as you had originally planned, would you have provided Mrs. Bartos with a check dated January twenty first?

A: I would not.

See E. 0153.

Relying on her request that she receive good funds at settlement, and unaware that an issue had arisen which could have prevented disbursement of funds that afternoon, Mrs. Bartos traveled approximately one hundred (100) miles for settlement. Upon her initial meeting with the settlement attorney she stated that she was prepared to execute a deed if she received payment. In this regard, Mr. Harris testified at trial as follows:

I believe that Mrs. Bartos started out by saying I want my check and if I can't get one, I'm not settling. I really didn't get past that point. I would like to believe that if she had been given a check dated for January twenty first, two thousand and five, that she could have taken to the bank and cashed that night, based on her statements to me, she would have settled.

See E. 0152.

It was later that day that the settlement attorney received direction from Abbott and Barker not to disburse funds until: 1) an investigation into the filing of a law suit was completed; and 2) the deed was signed, delivered and recorded. These conditions do not appear in the contract, and were imposed unilaterally for the first time on Friday, January 21, 2005, by Plaintiffs and their settlement attorney. Settlement Attorney Harris testified as follows regarding the additional conditions imposed on Mrs. Bartos at settlement:

Q: (Mr. Guenther) Did you (Mr. Harris) discuss at any time that day any option in regard to how the settlement could be consummated?

A: (Mr. Harris) Yes. I explained to her that we could sign the papers, I could wire transfer the — her proceeds to her on Monday after I went to record or if she wasn't comfortable with that, I could overnight deliver a — her proceeds check to her. She would receive it on Tuesday. All of that was predicated on my ability to record the documents, being the deed; on the twenty fourth and verifying that in fact at the time of the recording no — no law suit had been filed against her or Mr. Abbott and Mrs. Barker as had been alleged to have been done in the January twentieth letter from the Friends of Cornfield Harbor.

Q: Did you explain to Mrs. Bartos why you were not in the position to give her a check on that day?

A: Yes. I — I told her I was concerned about the threatened lawsuit and that the letter was detailed, it appeared to me somebody had done a lot of work and made — made an effort to articulate their position. It talked about neighbors, multiple people, people being upset. It looked like to me that somebody was serious so I felt that the best approach was to verify that that law suit had not been filed.

See E. 0095.

After being told by Mrs. Bartos that she wanted to receive a check when she signed the deed, the settlement attorney informed the Plaintiffs:

A: I advised Mr. Abbott and Ms. Barker of her (Mrs. Bartos) position to see if their position was going to change or they wanted to ask me questions as to what should have been done or could be done. They reaffirmed to me their willingness to close this transaction without a building permit and the parcel of record issue not being resolved, but they believed it was in their best interest not to authorize the disbursement of the proceeds until the deed was recorded.

I conveyed that to Mrs. Bartos, we talked about it some more, we didn't get very far and it didn't settle.

I didn't want any misunderstandings about what I was trying to tell her. I made it clear to her, she could sign the papers, she would get her money on Monday provided that when I recorded that deed, there was no lis pendens action filed and I wanted to make that clear.

See E. 0097-0098.

Mrs. Bartos left the Law Offices of Harris and Capristo on Friday afternoon, January 21, 2005, having been told expressly by the settlement attorney, both verbally and in a hand-written memorandum penned by him, that she would not receive payment for the sale of her property until she first executed and delivered a deed, the deed was recorded and the settlement attorney had confirmed not only that no law suit had been filed against her, or against her property, but that no law suit had been filed against Mr. Abbott and Ms Barker. These conditions were not in the Contract and they were conditions which Mrs. Bartos would not accept. So long as these extra-contractual conditions were imposed by the settlement attorney, she had no obligation to execute a deed which would transfer her property to the Plaintiffs.

Assuming, arguendo, that the settlement attorney was justified in withholding payment for the property until January, 24, 2005, as was set forth in his handwritten letter, such a delay was a de facto rescheduling of the settlement date. Yet the settlement attorney failed to inform Mrs. Bartos that she was expected to return on Monday; nor did she indicate any understanding that she should or intention to do so:

Q: (Mr. Harris) Did Mrs. Bartos, in addition to what you already testified to, indicate what her intentions were in regard to coming back or somehow settling on January twenty fourth of two thousand five?

A: It wouldn't be fair for me to say that she said anything about that because I don't have any recollection that I told her she could do that on the twenty fourth. I do know this, I did tell her that this contract was not required to be settled until January twenty fourth.

Q: Did she give you any indication on whether or not she would be willing to come back to settle?

A: I just don't know whether we even talked about it. So, I don't know.

See E. 0100 (overruled objection omitted).

Denise Raley, the settlement coordinator from the Office of Harris and Capristo, telephoned Mrs. Bartos at 9:00 a.m. on Monday morning, January 24, 2005. However, Mrs. Bartos was not informed of any change to the conditions imposed by Mr. Harris on Friday afternoon. Denise Raley had not been present nor had any discussion with Mrs. Bartos the afternoon of Friday, July 21, 2005. At trial, she testified that she had spoken with Mr. Harris prior to calling Mrs. Bartos:

Q: And what specifically did he [Mr. Harris] tell you to do?

A: To the best of my recollection just to give her a call to see if she could meet someone, Cassie, who was our runner at that time, at the Courthouse to execute the deed. We would in turn run the title forward, if everything appeared to be fine, we could give her her check.

See E. 0219; see also E. 0122.

When Mrs. Bartos reiterated her position based on the conditions established by Mr. Harris on the previous Friday, Denise Raley said “Have a great day” and hung up the phone. Finally, the testimony of Mrs. Bartos at trial sheds additional light on her refusal to accede to conditions not imposed by the contract:

Q: (Mr. Lacer) Did Mr. Harris invite you to meet with Mr. Abbott and Ms. Barker at any time?

A: No.

Q: Did Mr. Harris review the HUD one settlement sheet with you and explain it to you?

A: No, sir.

Q: Did Mr. Harris at any time ask you if you had any questions he could answer for you?

A: No, sir

Q: Did Mr. Harris at any time, other than the HUD one, give you any settlement documents to review or take with you?

Mr. Guenther: Asked and answered, Your Honor.

The Court: The HUD one and nothing else.

A: That right, nothing else.

Q: Did Mr. Harris ever explain what other settlement documents he had prepared for you?

A: No, sir.

Q: On January twenty first, did Mr. Harris ever tell you he wanted to reschedule settlement for January twenty four?

A: No, sir.

Q: On January twenty first, did Mr. Harris ever tell you not to leave his office?

A: No, sir.

Q: At any time did Mr. Harris ever recommend that you consult your own attorney?

[overruled objection omitted]

A: No, sir.

Q: On January twenty first, two thousand and five, before you left Mr. Harris' office, did he ever say to you there was more he wanted to go over with you that afternoon?

A: No, sir.

Q: On January twenty fourth, two thousand and five, when you received a call from Mr. Harris's office, did anyone say you would meet with an attorney if you went to the Courthouse?

A: No, sir.

Q: On January twenty fourth, two thousand and five, when you received the call from Mr. Harris' office, did anyone tell you the documents from January twenty one had been changed or corrected in any way?

A: No, sir.

See E. 0516-0518.

The Foregoing clearly demonstrates that no formal attempt was made to reschedule settlement for Monday, January, 24,2005, and that none of the unilateral conditions imposed by Abbott and Barker on Friday, January 21, 2005 had been changed or withdrawn.

On Monday January 24, 2005, at approximately 3 p.m., a lawsuit was filed *by the settlement attorney* on behalf of Abbott and Barker against Mrs. Bartos. This suit had obviously been prepared in advance of this time, suggesting that the settlement attorney had been retained by the buyers to file suit even before January 24, 2005. Moreover, the settlement attorney testified that he accepted a \$2,500 check from the plaintiffs, on whose

behalf he filed suit. *See* E. 0143-0145. This was apparently a retainer in connection with the lawsuit as the check, which is in evidence, was written by Appellee Barker to settlement attorney Harris with, “retainer-Bartos” in the subject line. *See* E. 0678 (check). The check is dated, “1-21-05” - the day of the settlement and three days before the seven-month date set in the addendum was to expire.

Appellants Zupancic and Gordon were named as interested parties and filed their own declaratory judgment action seeking to have their contract enforced given the failure of the appellees to settle under their contract with Mrs. Bartos.

The Circuit Court ruled that, despite all of the forgoing, the contract had not been violated by Abbott and Barker and the property should be transferred to them. *See* E. 0698. This appeal followed.

At this point, Mrs. Bartos desires to sell the property to the back-up purchasers, Appellants Zupancic and Gordon, who want to buy the property.

STANDARD OF REVIEW

The matters raised on appeal by Appellants Zupancic and Gordon are legal conclusions reached by the trial court as well as matters of contract interpretation and, thus, they are reviewed *de novo*. *See, e.g., Friendly Finance Corp. v. Orbit Chrysler Plymouth Dodge Truck, Inc.*, 378 Md. 337, 343 n. 5, 835 A.2d 1197 (2003); *Moore v. Myers*, 161 Md.App. 349, 375, 868 A.2d 954, 969 (2005); *United Services Auto. Ass'n v. Riley*, 393 Md. 55, 79, 899 A.2d 819, 833 (2006); *Towson University v. Conte*, 384 Md. 68, 78, 862 A.2d 941, 946 (2004); *Sy-Lene v. Starwood*, 376 Md. 157, 163, 829 A.2d 540, 544 (2003).

LEGAL ANALYSIS

- I. **The trial court prejudicially erred in ruling, as a matter of law, that there was no material breach of contract by the proposed buyer of a parcel of real property when the buyer insisted that a deed be prepared, signed, delivered and *actually successfully recorded* before the seller was paid despite the complete lack of any recordation contingency in the contract.**

The initial contract entered between Bartos as the seller and Abbott and Barker as the buyers provides the sole remedy for any failure to provide good title:

It is understood that the title is to be good of record or sale will be declared off and deposit returned to purchaser. However, a reasonable time shall be allowed the Seller to correct any defects reported by the title examiner.

See E. 0684 (Sales Contract dated April 24th, 2004). There is no other mention of remedies for either Seller or Purchasers in the event that good title is not conveyed. *See id.*

Thus, a plain reading of the Contract provides that in the event there was an actual cloud on title at closing, either the Purchasers could go through with the settlement or the sale could be declared, “off,” thus voiding the contract.

“Maryland follows the objective law of contract interpretation and construction.”

Owens-Illinois, Inc. v. Cook, 386 Md. 468, 496, 872 A.2d 969, 985 (2005); *Taylor v.*

NationsBank, N.A., 365 Md. 166, 178-79, 776 A.2d 645, 653 (2001); *Wells v. Chevy Chase*

Bank, F.S.B., 363 Md. 232, 251, 768 A.2d 620, 630 (2001). As the Court of Appeals has explained:

A court construing an agreement under this test must first determine from the language of the agreement itself what a reasonable person in the position of the parties would have meant at the time it was effectuated. In addition, **when the language of the contract is plain and unambiguous there is no room for construction, and a court must presume that the parties meant what they expressed.** In these circumstances, the true test of what is meant is not what the parties to the contract intended it to mean, but what a reasonable person in the position of the parties would have thought it meant.

Consequently, the clear and unambiguous language of an agreement will not give [way] to what the parties thought that the agreement meant or intended it to mean.

Garfink v. Cloisters at Charles, Inc., 392 Md. 374, 392-393, 897 A.2d 206,217 (2006).

Here, the relevant contract clearly provides that if the plaintiff in fact believed that there may be a cloud on title resulting from the “Friends of Cornfield Harbor” letter,¹ then the plaintiffs’ options were to tender performance and settle despite this issue or to declare the contract null and void, keeping the deposit.² Neither occurred.

Instead, at closing on January 21, 2005, the plaintiffs/buyers demanded that Mrs. Bartos execute a deed conveying the property, but that she wait to be paid until: 1) the purchasers or their agent are assured that no lawsuit has been filed against the seller or the property or against purchasers stemming from the purchasers proposed plans to remodel the improvements on the property; and 2) thereafter, a deed is recorded. *See* E. 0093; 0095. This was contrary to the plain language of the contract in that: 1) the contract had no recording contingency; and 2) the contract did not require Mrs. Bartos to bear the risk of signing and tendering a deed and waiting for days thereafter to *potentially* be paid. Thus, instead of tendering performance as required under the contract,³ the plaintiffs/buyers insisted on a different procedure and demanded a procedure to which they were not entitled.

¹ The title insurance binder had been completed and, had the transaction gone through, title insurance would have issued because there was in fact no lawsuit affecting the property.

² Had the plaintiffs settled and a cloud on title later arisen, they could arguably have addresses this issue subsequent to the sale through appropriate litigation.

³ When the promised acts are capable of simultaneous performance, each duty of performance is constructively conditioned upon conditional tender of the other. *See* Contracts, John D. Calamari and Joseph M. Perillo, West Publishing Co. 1970, p.244.

The settlement attorney gave Abbott and Barker the opportunity to disburse funds and complete settlement without the new requirements at issue here, but Abbott and Barker refused. *See* E. 0107; 0129; 0134. Instead, Abbott and Barker instructed the settlement attorney not to disburse until conditions which were not contained in the Contract had been met. *See* E. 0093. Not unsurprisingly, Mrs. Bartos desired to be paid for the property at the same time she transferred the property. *See* E. 0097-0098. Moreover, she wished to proceed as required under the Contract. *See* E. 0097. The contract only provides that good title be transferred contemporaneously with payment – not that title transfer, an investigation about a potential lawsuit ensue and then actual recordation occur all prior to payment.

Of course, absent any contract provisions to the contrary, recordation is not a precondition to the transfer of title in Maryland. *See* Md. Code, Real Prop. § 3-201. In fact, Plaintiffs, own expert witness, John Weiner, Esquire, stated such at trial:

Q: In your expert opinion, when does title transfer between two parties? Is it the — is it at the time of the recording of the deed in the land records?

A: No. As to the two parties? No, it doesn't — doesn't require recording to transfer title to — as to the parties.

Q: Okay. What is required to transfer title between two parties?

A: Signing of the deed and any other settlement documents that are required as part of the settlement.

Q: And is there a delivery requirement on that as well? To the receiving party?

A: Yes.

Q: Are there any other requirements you know of to transfer title between two parties?

A: No.

E. 0383-0384.

Given the forgoing, there was no requirement, either under the contract or otherwise, for Mrs. Bartos to provide an executed deed days prior to payment, for Mrs. Bartos to accept as a new contract contingency, an investigation into whether a lawsuit had been filed regarding the property and, further, for Mrs. Bartos to accept as yet another new contingency that the deed actually be recorded before she is even paid. As a result, Mrs. Bartos was well within her rights to insist on the performance anticipated in the contract - contemporaneous payment with no extra contingencies.

II. There Was Prejudicial Error in the Trial Court's Ruling, as a Matter of Law, that the Property Should be Sold to the Proposed Buyer Instead of a Back-Up Buyer Despite the Fact that the Initial Buyer Never Tendered Performance as Required by the Terms of the Contract.

Despite filing a multi-count Complaint, the plaintiff in this case prevailed only on a count for specific performance. As the Court of Appeals has held:

The general rule is well established in this State that in order to be entitled to specific performance of a contract for the sale of real estate, the purchaser must be 'ready, desirous, prompt and eager' to consummate the contract, whether or not time is of the essence thereunder. See *Doering v. Fields*, 187 Md. 484, at 488-489, 50 A.2d 553, at 554-555; *Garbis v. Weistock*, 187 Md. 549, 51 A.2d 154; *Vincenti v. Kammer*, 189 Md. 523, 530, 56 A.2d 688; *Triton Realty Co. v. Frieman*, 210 Md. 252, 256, 123 A.2d 290; *Chapman v. Thomas*, 211 Md. 102, at 108, 126 A.2d 579, at 582 (rule recognized, not found applicable); and Miller, Equity Procedure, § 661.

Silver Holding Corp. v. Sheeler, 231 Md. 35, 37, 188 A.2d 562, 563 (1963). Likewise:

There can be little doubt that one seeking the execution of a contract must, as a general rule, be able to show that he has fully, not partially, performed everything required to be done on his part, or, under some circumstances, that he is ready and desirous to comply with the contract on his part, and has the ability to perform it. *O'Brien v. Pentz*, 48 Md. 562; *Raith v. Cohen*, 142 Md. 38, 50, 119 A. 700; *DeCrette v. Bonaparte*, 139 Md. 252, 262, 114 A. 880; *Suburban Garden Farm Homes Corp. v. Adams*, 171 Md. 212, 218, 188 A. 808; Miller, Equity Procedure, § 659.

Clayten v. Proutt, 227 Md. 198, 203, 175 A.2d 757, 760 (1961).

In order for Abbott and Barker to require Defendant Bartos to perform, Abbott and Barker must have satisfied all of the requirements placed on them under the Contract. In fact, they did not do so. The HUD-1 settlement sheet presented to Mrs. Bartos at settlement did not reflect the terms of the addendum to the Sales Agreement which she had previously executed on June 24, 2004. *See* E. 0648. The addendum required settlement on or before January 24, 2005 (unless a building permit had not been acquired - a requirement the plaintiffs waived at settlement - *see* E. 0097), while the settlement sheet executed by the plaintiffs at settlement and proffered to Mrs. Bartos reflected a settlement on the subject property as of February 21, 2005.⁴ *See* E. 0648. This change is significant because a later date affects the taxes to be paid and the resulting disbursements to be made. If Mrs. Bartos were to settle under the new contract, she would have had to cover the taxes on the property for an additional month. This violated the contract terms and, specifically, Abbott and Barker's obligation to close by January 24, 2005.

Another violation by Abbott and Barker of the plain language of the contract was the fact that the payment called for under the contract was never paid into the settlement attorney's account. Instead, the settlement attorney merely held uncashed personal checks. *See* E. 0116-0117. As a result, the settlement attorney was not in a position to act as a trustee and guarantor of the funds. This protection, due Mrs. Bartos, was denied her. Moreover, the fact that the funds at issue never made it into the settlement attorney's

account demonstrates that Abbott and Barker were not able to close at settlement because the settlement attorney was not in a position to write any disbursement checks.

Abbott and Barker directed the settlement attorney not to disburse until all of the following unilaterally-imposed conditions had been met: 1) the demand for an investigation regarding whether a lawsuit had been filed; 2) the addition of a recordation contingency; 3) the requirement for Mrs. Bartos to make initial tender and wait days to be paid; and 4) the change in the final settlement date. Furthermore, Abbot and Barker did not ensure that their funds had been deposited into the settlement attorney's trust account. Thus, Abbott and Barker failed to tender the payment required under the contract at settlement. Instead, Abbott and Barker insisted on conditions which were not part of the contract.

As the Court of Special Appeals has held:

We quite recently defined “tender” as “an offer to perform a condition or obligation, coupled with the present ability of immediate performance, so that if it were not for the refusal of cooperation by the party to whom tender is made, the condition or obligation would be immediately satisfied.” *Chesapeake Bay Distributing Company v. Buck Distributing Company, Inc.*, 60 Md.App. 210, 214, 481 A.2d 1156 (1984), quoting 15 Williston, *A Treatise on the Law of Contracts*, § 1808 (3d ed. 1972). To be valid and effective, *i.e.*, to relieve the debtor of the obligation to pay costs, interest and attorney's fees after the date of tender, **a tender “must be either in the exact amount due, or a larger amount without requiring the making of change”**, 5 A. Corbin, *Treatise on Contracts*, § 1235 (1964). *See James v. Hogan*, 154 Neb. 306, 47 N.W.2d 847, 853 (1951); *Delashmutt v. Keller*, 43 Or.App. 83, 602 P.2d 312, 314 (1979), **and unconditional**. 15 Williston, *supra*, at § 814; *Mayor and City Council of Baltimore v. Hook*, 62 Md. 371, 379 (1884); *Heighe v. Sale of Real Estate*, 164 Md. 259, 265, 164 A. 671 (1933); *First National Bank of Davis v. Britton*, 94 P.2d 896, 898

⁴ The change was apparently desired by Abbot and Barker because they wished to go to a February Board of Appeals meeting related to the building permit for the property before finally closing.

(Okla.1939); *Ford Motor Credit Company v. Goings*, 527 P.2d 603, 607 (1974). **Thus, a tender which contains a condition “which would prejudice the creditor's right [, i.e., one] that a payment shall be taken in full discharge”, is conditional.** 15 Williston, *supra*.

Platsis v. Diafokeris, 68 Md.App. 257, 262, 511 A.2d 535, 537 - 538 (1986).

Abbott and Barker were unwilling to perform under the contract, that is, to tender full payment for the property at settlement. Furthermore, they imposed conditions precedent which were not set forth in the contract, not agreed to by the parties and consequently not enforceable. As a result, their rights under the contract are extinguished and the judgment in their favor should be reversed. *See Plitt v. McMillan*, 244 Md. 450, 454, 223 A.2d 772, 774 (1966); *Vincent v. Palmer*, 179 Md. 365, 373, 19 A.2d 183 (1941); *Ady v. Jenkins*, 133 Md. 36, 38, 104 A. 178 (1918); *see also* Williston on Contracts (rev. ed.), s 1455; Corbin on Contracts, s 1104.

III. The Contract the Trial Court Ordered the Parties to Follow Violates the Rule Against Perpetuities.

“As a formulation of the Rule Against Perpetuities [the Court of Appeals has] adopted Professor Gray's statement that ‘**[n]o interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.**’” *Dorado Ltd. P'Ship v. Broadneck Dev. Corp.*, 317 Md. 148, 152, 562 A.2d 757 (1989) (quoting *Fitzpatrick v. Mer.-Safe, Etc. Co.*, 220 Md. 534, 541, 155 A.2d 702 (1959)). The rule “‘is not a rule that invalidates interests which last too long, but interests which vest too remotely.’” *Arundel Corp. v. Marie*, 383 Md. 489, 495, 860 A.2d 886 (2004) (quoting *Fitzpatrick*, 220 Md. at 541, 155 A.2d 702).

The Rule Against Perpetuities (“RAP”), specifically applies in cases, such as this one, involving a contract to purchase property and a complaint for specific performance:

Historically, the Rule was usually applied to grants or devises made by deed or by will. In recent years, however, [the Court of Appeals] ha[s] extended the Rule to include equitable rights in real property created by contract and enforceable by specific performance.

Arundel Corp., 383 Md. at 495, 860 A.2d 886 (citations omitted); *see also Cattail Associates, Inc. v. Sass*, WL 2639872, *5 -7 (Md.App., 2006). The Court of Appeals has held that, “if a contract creates an equitable right in real property, enforceable by specific performance, the contract is subject to the Rule.” *Dorado*, 317 Md. at 152, 562 A.2d 757.

The Court reasoned:

[W]hen the purpose of a contract is to transfer legal title in land, then legal title must vest within the period of the Rule Against Perpetuities. Otherwise, there would be the distinct possibility that a contract would render title uncertain. After the signing of the contract, the seller retains legal title until the deed is properly executed and delivered. Until that point, the seller's interest is fettered by the possibility that it will be required to relinquish title to the purchaser. Between the signing and execution of the contract, the owner of legal title would be reluctant to make the most effective use of the property....For a land sales contract to be valid under the Rule, therefore, legal title must vest in the purchaser within a life in being plus 21 years.

Id. at 153-54, 562 A.2d 757.

In the present case, the contract the trial court ordered the parties to follow unequivocally violates the Rule Against Perpetuities. As noted above, the contract consists of a one-page form document and a ½ page addendum. Said addendum provides as follows:

The settlement date will be 7 months from the date of this signed agreement or as soon as the Purchasers are able to obtain a building permit, which they shall diligently pursue.

See 0629.

Obviously, the contract permits the purchasers to close on the contract at an indeterminate time in the future, which may well be outside of the “life in being plus 21 years” standard. Lest there be any question about the meaning of this portion of the contract, *the Appellees themselves* wrote a letter to Mrs. Bartos, the owner, telling Mrs. Bartos to, **“understand that...the contract allows for us to have as much time as is necessary to obtain a building permit.”**⁵ See E. 0672. The fact that the Appellees have “as much time as is necessary to obtain a building permit” before they must close is precisely why the contract violates the Rule Against Perpetuities.

The Rule Against Perpetuities requires that the interest to be conveyed “*must vest, if at all, not later than twenty-one years after some life in being at the creation of the interest.*” “*Dorado*, 317 Md. at 152, 562 A.2d 757 (quoting *Fitzpatrick*, 220 Md. at 541, 155 A.2d 702) (emphasis added). “The Rule is applied to determine whether the interest could vest beyond the permissible period, based on the *possibility* of events, not *actual* events.” *Arundel Corp.*, 383 Md. at 496, 860 A.2d 886. “A future interest is invalid unless it is absolutely certain that it must vest within the period of perpetuities. Probability of vesting, however great, is not sufficient.” W. Barton Leach, *Perpetuities in a Nutshell*, 51 Harv. L.Rev. 638, 642 (1937). See also *Tiffany, supra*, at § 395.

The Court of Special Appeals recently discussed the application of the RAP in circumstances similar to those presented in this case:

⁵ The plaintiffs attempted to waive the requirement for a building permit at the settlement table. Nevertheless, the contract at issue was unenforceable when written because it

In *Dorado*, Broadneck Development Corp. agreed to sell 112 lots to Dorado L.P. Settlement was contingent on Broadneck's obtaining "sewer allocations" from the county. *Dorado*, 317 Md. at 150, 562 A.2d 757. When, due to a government moratorium on sewer allocations, the sale had not been completed, Dorado brought a declaratory judgment action. *Id.* at 151, 562 A.2d 757.

The Court of Appeals stated that it was "immaterial" that Dorado had obtained equitable title by execution of the contract. *Id.* at 156, 562 A.2d 757. "If legal title might not vest within a life in being and 21 years, then the contract is invalid under the Rule Against Perpetuities." *Id.* The Court therefore concluded that the contract was unenforceable because it violated the rule:

Settlement is contingent upon a county sewer allocation. It is uncertain when, if ever, Broadneck will obtain the sewer allocation. It is conceivable that it could occur after a life in being plus 21 years.

Cattail Associates, Inc. v. Sass, WL 2639872, 5 -7 (2006) (citing *Dorado Ltd. Partnership v. Broadneck Development Corp.*, 317 Md. 148, 562 A.2d 757 (1989)). Like the sewer allocation at issue in *Dorado*, "[i]t is uncertain when, if ever [the Appellees] will obtain the [building permit]," and, therefore, "[i]t is conceivable that it could occur after a life in being plus 21 years." *See id.* Therefore, here, as in *Sass* and *Dorado*, "the contract is invalid under the Rule Against Perpetuities," and, "the contract was unenforceable because it violated the rule." Therefore, the Appellants respectfully suggest that the trial court's judgment enforcing this contract should be overruled.

The RAP issue was not raised below. Maryland Rule 8-131(a) provides that, "Ordinarily, the appellate court will not decide any other issue unless it plainly appears by the record to have been raised in or decided by the trial court, but the Court may decide such an issue to guide the trial court or to avoid the expense and delay of another appeal."

contained this provision. Having been void *ab initio* as a result of the RAP, the contract was never enforceable and did not become so do to the waiver at the settlement table.

However, Rule 8-131 is not fatal to this Court’s consideration of the RAP argument.

The Court of Appeals has held that:

The second sentence of Rule 8-131(a) sets forth the general proposition that an appellate court *ordinarily* will not consider an issue that was not raised or decided by the trial court.” *Id.* **The prohibition, however, is not absolute.** *Id.* We concluded that, based on the plain language of the Rule, “*an appellate court has discretion to excuse a waiver or procedural default and to consider an issue even though it was not properly raised or preserved by a party.*” *Jones*, 379 Md. at 713, 843 A.2d at 783.

General Motors Corp. v. Seay, 388 Md. 341, 361-364, 879 A.2d 1049, 1061 - 1062 (2005);

Jones v. State, 379 Md. 704, 843 A.2d 778 (2004).

The foregoing begs the question of when an unpreserved issue may be considered on appeal. The Court of Appeals has addressed this question as well:

Md. Rule 8-131(a) grants the Court discretion to decide an unpreserved issue.... “there is no fixed formula for the determination of when discretion should be exercised, and there are no bright line rules to conclude that discretion has been abused.” *Jones*, 379 Md. at 713, 843 A.2d at 784. **We set forth two questions that an appellate court should ask itself when deciding to exercise its discretion: (1) whether the exercise of its discretion will work unfair prejudice to either of the parties; and (2) whether the exercise of its discretion will promote the orderly administration of justice.** *Jones*, 379 Md. at 714-15, 843 A.2d at 784....By way of example, we noted that, with respect to the parties, **a new argument presented by the State would work unfair prejudice to a criminal defendant if its validity depended upon evidence not adduced at the trial level.** In such a case, an appellate court's consideration of the argument would be an abuse of discretion under Rule 8-131(a) because it would be manifestly unfair to the defendant who had no opportunity to respond to the argument with his own evidence to the contrary. Similarly, unfair prejudice may result if counsel fails to bring the position of her client to the attention of the lower court so that that court can pass upon and correct any errors in its own proceedings. In addition, the reviewing court should look to the reasons for the default or waiver. **The court should consider whether the failure to raise the issue was a considered, deliberate one, or whether it was inadvertent and unintentional.** *Jones*, 379 Md. at 714, 843 A.2d at 784 (internal citations omitted).

General Motors Corp. v. Seay, 388 Md. 341, 361-364, 879 A.2d 1049, 1061 - 1062 (2005);
Jones v. State, 379 Md. 704, 843 A.2d 778 (2004).

Simply put, the failure to raise an argument at the trial level is no bar to raising the argument on appeal provided that no unfair prejudice will result to the parties and consideration of the issue will promote the orderly administration of justice. These standards have been further clarified by the example offered by the Court of Appeals. Namely, unfair prejudice may result by the presentation of a new argument on appeal if “its validity depended upon evidence not adduced at the trial level.”

In the present case, if the Court applies the rule against perpetuities, no unfair prejudice will result to the parties and consideration of the RAP issue will promote the orderly administration of justice. The application of RAP is the quintessential example of an argument that need not be preserved below under *General Motors* and *Jones*. The *only* evidence either party might present relevant to the application of RAP is the contract itself. This is because the entire analysis under the RAP begins and ends with the plain language of the contract. Once the contract is in evidence, *as it was in this case*, there is nothing else the court or any parties need in order to apply RAP or determine that it does not apply. Therefore, the validity of the RAP argument does not depend upon evidence the plaintiffs were precluded from presenting at trial by the failure to preserve this argument.

Moreover, the application of the RAP here will clearly promote the orderly administration of justice. The rule itself is one of paramount public purpose, adopted to serve no less a goal than the abolition of dynasties. The rule against perpetuities seeks to increase the mobility of the individual upwards through the ranks of society as well as to

protect our free market economy through preservation of the ability to buy and sell real property. The Court of Appeals has held that:

By voiding future interests that might vest too remotely, the rule against perpetuities facilitates the alienability of property, helps prevent uncertain title, and encourages owners to make effective use of their property.

Arundel Corp., 383 Md. at 495, 860 A.2d 886 (citations omitted). Given the paramount public importance of the RAP, its application here will clearly promote justice.

Finally, there is no evidence nor even any reason to believe that the failure to raise the RAP issue below was a considered, deliberate one. This issue was recognized for the first time by the undersigned when retained post-trial for purposes of the appeal. While neither the undersigned nor the firm now representing the Appellants served as trial counsel, trial counsel's failure to raise the RAP issue appears entirely inadvertent and unintentional as contemplated in circumstances in which the requirement of preservation has not been applied by the courts. *See General Motors Corp. v. Seay*, 388 Md. 341, 361-364, 879 A.2d 1049, 1061 - 1062 (2005).

CONCLUSION

For the foregoing reasons, the Circuit Court's Judgment should be reversed with a mandate to enter judgment in favor of John M. Zupancic and Cheryl R. Gordon enforcing their contract to purchase the subject property.

CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that the forgoing Brief was prepared with proportionately spaced type and has a typeface of 13 points, Times New Roman, and I hereby certify that two copies of the forgoing were sent via first class mail, postage prepaid, on the 27th day of October, 2006, to: Adam M. Spence, Esquire, 105 West Chesapeake Ave., Suite 400, Towson, Maryland 21204 and Christopher T. Longmore, Esquire, 22738 Maple Road, Suite 101, Lexington Park, Maryland 20653.

Cary J. Hansel