

Time of Acceptance / Expiry of Offer to Buy

In this case a clause in the offer to purchase had read:

"this offer is irrevocable and expires at noon on the 8th November 2003."

The offer was however only accepted by the seller on 12 November 2003.

After acceptance, the parties both believed that the agreement was binding but when called upon to sign their transfer documents the seller failed to comply. The buyer then brought an application to Court to compel the seller to pass transfer.

As part of her defense the seller raised the point that she had accepted the offer four days after it had lapsed and that accordingly her acceptance did not give rise to an agreement of sale.

The Judge drew a distinction between the situation where the buyer who made the offer did not accept the seller's late acceptance and stated that it was obvious that in these circumstances no agreement would come into being. The Judge distinguished the current case however on the basis that here the buyer who made the offer had elected to accept the late acceptance.

The Judge went on to find that it was only within the power of the person whose offer had been accepted out of time to rely on the late acceptance to avoid the contract, therefore the person who had made a late acceptance was bound by the agreement.

To reach this conclusion the Judge interpreted the clause in the agreement which made the offer acceptable only for a limited period to be a stipulation for the exclusive benefit of the buyer, which benefit the buyer could then waive. On this basis the Judge held that the buyer had an opportunity to decide, after the late acceptance, to either accept or reject the acceptance, which decision had to be made within a reasonable time.

The Judge found further support for his reasoning in the fact that the agreement had stipulated that the acceptance of the seller would be binding notwithstanding the fact that the acceptance was not communicated to the buyer. The Judge interpreted this to mean that the specific date of acceptance was not that important to the buyer. This was also borne out by the fact that when the buyer was advised of the seller's acceptance, he did not enquire as to the date on which the offer had been accepted but took steps to proceed immediately with the transaction.

The Judge therefore found that the buyer's decision to treat the acceptance of the offer as effectual was good in law and accordingly a binding agreement had resulted.

My problem with the Judges' findings are that, if the stipulation in the contract making the offer valid for a fixed period was a stipulation for the exclusive benefit of the offerer, which benefit he could elect to waive, this waiver should have taken place before such stipulation resulted in the offer lapsing. From the written judgment however it is impossible to tell whether this point was ever argued.

The net result of the judgment is that if an offer to purchase is accepted by a seller after the offer has expired, only the buyer can rely on that late acceptance to avoid the agreement and the buyer must decide whether or not he is going to proceed with the sale within a reasonable period of time after the late acceptance has come to his attention. The buyer's decision to proceed with the agreement can be deemed from his conduct.

To deal with this new slant on the law, buyers and agents can do one of two things.

The first option would be merely to be aware of the possibilities and decide what you wish to do if and when the situation arises.

The second and most probably the better option would be to amend the offer by making it clear that a late acceptance will not give rise to a binding agreement. I suggest the following clause:

"This offer is open for acceptance until _____ (time) on _____ (date) at which time it will lapse. Should the offer be accepted thereafter such acceptance will not give rise to a binding Deed of Sale."

This clause will make it clear what the buyer's intention for setting the deadline is and will remove all doubt about the consequences of such a late acceptance.

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