CONVEYANCING

LECTURE ON 30 JULY 2007

**Note:** Students should read the Chapters in Lang & Skapinker and the cases referred to in the Guide. These notes are NOT a substitute for reading the text and considering the cases.

Common law

At common law the historical position is that time stipulations in contracts were always “of the essence”. That is, if a time was not met then this amounted to a breach of an essential term of the contract allowing the non-defaulting, or innocent, party to terminate for breach and claim damages.

Equity

As is often the case, equity took a different view and regarded stipulations as not being “of the essence”, and thus a breach did not allow an innocent party to terminate unless time had been made “of the essence”, either in the contract, or by a subsequent notice.

This view has now been dealt with by section 13 of the Conveyancing Act 1919. The section says:

13 **Stipulations not of the essence of contracts**

Stipulations in contracts, as to time or otherwise, which would not before the commencement of this Act have been deemed to be or to have become of the essence of such contracts in a court of equity, shall receive in all courts the same construction and effect as they would have heretofore received in such court.

Time provisions in contracts

The general position in New South Wales is that time in contracts for the sale of land is NOT “of the essence”. This is reinforced by the provisions of clause 15 relating to the completion date:

15 **Completion date**

The *parties* must complete by the completion date and, if they do not, a *party* can serve a notice to complete if that *party* is otherwise entitled to do so.
The logic behind having a standard time provision that does not make time “of the essence” is that it is very easy to end up in a matter where the completion date cannot be met for some reason unknown to either party at the time the contract was entered into. In these circumstances, time can be made “of the essence” by the issue of a notice to complete.

If time is to be essential then the best words to use are “and time is of the essence of the contract.” Variation from what have become the standard words can lead to argument concerning the meaning to be attributed to the words used.

Completion “of the essence”

What does this phrase mean? If the standard time provision is not “of the essence” then a failure to complete may be a breach of contract, but what remedy does the innocent party have? In real estate contracts, the innocent party must serve a notice to complete to make time essential before being able to terminate the contract for breach and forfeit the deposit and exercise the other remedies available for breach.

A contract in which time is essential allows an innocent party to terminate for breach immediately after the defaulting party has failed to complete in accordance with the terms of the contract. Time can be essential either:

• because the contract provisions say so, or

• because the innocent party has served a notice to complete making time essential.

Remedies

If time is “of the essence” and the purchaser defaults, the vendor can terminate the contract, forfeit the deposit and exercise the rights set out in clause 9 of the contract.

If the parties agree, the time for completion can be extended without the vendor losing the right to terminate if completion does not take place on the extended date.

The breach can be waived.

If a party, usually the vendor but not always, becomes entitled to terminate the contract for breach then either party can seek specific performance of the contract instead of electing to terminate.
A party not in breach may choose to keep the contract on foot but sue for damages for the breach.

**Failure to complete when time is not “of the essence”**.

Because the majority of contracts for the sale of land in New South Wales are not “of the essence” as to time, it is necessary to consider how a contract can be brought to completion in these circumstances.

- the most common method to bring completion to a head is for the innocent party to issue a notice to complete requiring the defaulting party to complete on a set day, whether or not a time is also set out in the notice.

Such a notice makes time essential (provided it says so) and means that a failure to complete is now a failure in an essential time and allows the innocent party to terminate the contract and forfeit the deposit and sue for damages.

There are many versions of a notice to complete, my view being that the shorter the better provided that the notice contains the essential matters required to make the notice effective. There are precedents for notices to complete in the CCH New South Wales Conveyancing Practice.

- Commence an action for specific performance of the contract. This is not a fast remedy as it requires the matter to be listed and heard by the court. It is important to consider in cases where the purchase is important to the purchaser and to lose the property, whether damages are available or not, is not a satisfactory result for the purchaser.

- Claim damages for the breach of the non essential time for completion.

**Simultaneous completion**

One of the problems often encountered in conveyancing transactions is that a vendor client also wants to complete a purchase on the same day as the sale is completed. In most circumstances the funds from the sale are needed for the purchase and a failure to complete a sale means that the purchase cannot be completed. A failure by a purchaser to complete in these circumstances leaves that purchaser vulnerable to an action for the damages suffered by the vendor.
This problem was highlighted in the case of *Raineri v Miles* [1980] 2 WLR 847.

The facts are a little complicated but can be summarised thus:

- W contracted to sell to Miles. Settlement due on 12 July 1977.
- Miles contracted to sell to Raineri. Settlement due on 12 July 1977.
- On 11 July 1977 W advised Miles that settlement could not take place, and Miles advised Raineri that he could not settle.
- On 11 July Raineri had already vacated his house in readiness for settlement and his furniture was in a truck on its way to the new house. Raineri was forced to store his furniture and find accommodation for himself and his family until settlement could take place.
- Settlement eventually took place on 11 August and Raineri sued Miles for the costs of the accommodation, storage and damages. Raineri was successful. Miles joined W into the proceedings.
- The House of Lords held that W was liable to Miles for the damages.

In his judgement Lord Edmund-Davies stated the issue as follows:

My Lords, the primary issue arising in this appeal may be thus stated: If a contract for the sale of land specifies the date for completion with vacant possession, but does not stipulate that the time is to be of the essence, and the purchaser suffers damage by reason of the vendor’s failure to complete on the specified date, is the purchaser entitled to recover compensation, notwithstanding that the delay is not such as would enable the purchaser to defeat the vendor’s action for specific performance?

After extensive consideration of the authorities the House of Lords concluded that a party is liable for damages for a breach of a non essential time provision.

It is generally best not to have essential time provisions in contracts. Failure to complete in accordance with an essential time provision gives an immediate right to terminate, forfeit the deposit and sue for damages. Failure to complete in accordance with a non essential time provision gives right to an action for damages but does not entitle an innocent
party to terminate unless a notice to complete has issued making time of the essence.

In *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286 Grace Phillips had exchanged contracts for the sale to Neeta of 202 acres of land at Luddenham. Contracts were exchanged on 4 May 1972 with completion due on 15 June 1972. The contract was subject to the vendor doing what she could to enable the purchaser to have the benefit of a milk quota. There was also a tenant in possession subject to a lease although the property was sold with vacant possession.

A dispute arose concerning replies to requisitions, the transfer of the milk quota and the tenancy. A notice to complete was issued by the vendor on 11 July 1972 requiring completion by 12 noon on 20 July and claiming damages for the delay. Completion did not take place and on 27 July the vendor rescinded the contract for the purchaser’s failure to complete.

In the Supreme Court, Holland J found that the notice to complete was not effective to determine the contract as at the date it was issued the vendor was at fault but that by the time the notice of rescission was given on 27 July, sufficient time had elapsed for the vendor to say that the purchaser had repudiated the contract. He found that the vendor was entitled to rescind the contract.

In their joint judgement in the High Court, Barwick C J and Jacobs J said:

If a party to a contract repudiates it the effect of that repudiation, both at law and in equity, is that the other party may elect to rescind and on doing so the contract is at an end. A difference which arose between law and equity was in the manner in which each regarded breaches of stipulations as to the time for performance of certain contracts. At law a failure to carry out the contract on the day stipulated, if the failure was not due to any default on the part of the other party in performance of his obligations, was a breach of the contract in one of its essential terms. In other words, time was of the essence of the contract.

... Equity took a different view of the construction and effect of a stipulation as to time. A stipulation as to time for performance of obligations was not in proceedings in equity regarded as an essential term unless the contract expressly or by implication made it so.

... In cases where the contract contains a stipulation as to time but that stipulation is not an essential term then before a notice can be given fixing a time for performance, not only must one party be in breach or guilty of unreasonable delay, but also the party giving the notice must
himself be free of default by way of breach or antecedent relevant delay. Only then may a notice be given fixing a day a reasonable time ahead for performance and making time of the essence of the contract.

In relation to such a notice given by a vendor to a purchaser the following questions must be answered: (i) Was the purchaser in breach of any term of the contract or guilty of unreasonable delay? (ii) Was the vendor himself in default by breach of any term of the contract or guilty of any antecedent relevant delay? (iii) Was the time fixed a reasonable time in all the circumstances?

The judgement then considers each of the actions of the parties and concluded that it was not open to Holland J to find that the vendor validly rescinded the contract.

**Notice to complete and Notice to perform**

In some circumstances it is appropriate to give a notice to perform and not a notice to complete. If the failure by the purchaser is a failure to submit a transfer in accordance with the contract then this does not entitle a vendor to issue a notice to complete. It does give a right to issue a notice to perform requiring the purchaser to submit a transfer.

Failure to comply with the notice to perform within a reasonable time may entitle a vendor to terminate the contract.

It is rare that a notice to perform will be issued. It is generally the case that a vendor waits until the time for completion has passed and then issues a notice to complete. It can be useful in some cases to remind a purchaser that some matters are outstanding and to hurry up.

The question was dealt with in *Louinder v Leis* (1982) 149 CLR 509 where the High Court considered this issue. A contract for the sale of land did not fix a time for completion and did not contain any provision that time was to be of the essence of the contract. It did provide that a transfer was to be submitted within 28 days from delivery of the vendor’s statement of title.

In his judgement Mason J said:

> The principal issue in the appeal is: in what circumstances is a party to a contract for the sale of land entitled to give a notice to complete making time the essence of the contract?

> ... At the outset we need to keep in mind (a) the difference between a contract which does not fix a time for completion and one which does, though not making time of the essence; and (b) the difference between a breach of an obligation to complete the contract on a stipulated date or
within a reasonable time, as the case may be, and a breach of some other obligation imposed by the contract, for example cl. 4 of the instant contract. The entitlement to give notice having the effect of making time of the essence varies in these situations.

... In the event the appeal fails. There was no foundation for the vendors giving a notice to complete on 8 February as the contract did not fix a time for completion. The existence of unreasonable delay on the part of the purchaser was an essential qualification for the giving of a notice. The findings of fact made by the primary judge negated the existence of such delay.

The case of *Sindel v Georgiou* was considered in lecture 1 on Formation of Contracts and should be reviewed with these time issues in mind.

**Requirements for valid “Notice to Complete”**

There are 4 requirements for a valid notice to complete:

1. The intended recipient must be in breach of the contract.
2. The giver of the notice must be “ready, willing and able” to complete.
3. The time allowed for completion must be reasonable at the time the notice is given.
4. There are minimum form and content requirements.

**The intended recipient must be in default**

It is not appropriate to give a notice to complete if the time for completion has not yet come and gone. See above.

**Ready, willing and able to complete**

This doesn’t mean that on the day you issue the notice you have to ready to complete, but it does mean that if you aren’t on the day the notice expires then you are in breach and will have repudiated the contract. You must, however, be free of any default under the contract.

A purchaser who has not submitted a transfer cannot be said to be “ready, willing and able”. Likewise, a vendor who has not replied to requisitions submitted within the time set out in the contract cannot
issue a notice to complete without first replying to those requisitions and allowing a reasonable time after those replies before issuing a notice.

**McNally v Waitzer** (1981) 1 NSWLR 294 deals with the issue of whether land tax has to have been paid before a notice to complete could be issued by a vendor. The court found that a liability to land tax was like a liability under a mortgage. Provided it could be discharged at completion it did not prevent a vendor from giving a notice to complete.

**Time must be reasonable**

Most contracts for sale now contain a special condition providing for the time that can be reasonable in a notice to complete. Not all clauses are the same and some are capable of more than one meaning. If you are considering issuing a notice, or have received one, read the clause carefully and determine whether you have given sufficient time or whether the other party has.

If there is not special condition concerning the time for a notice, then it must be “reasonable” in all the circumstances of the matter. There are cases saying that anything from 7 to 21 days is reasonable. If you are in this position my view is to err on the long side, never the short. In the absence of a special condition fixing 14 days as reasonable I would always give 21 days.

In **Shimden Pty Ltd v Rona** (2007) ANZ ConvR 15 the New South Wales Court of Appeal considered the effect of a purported rescission by a purchaser pursuant to a special condition or a purported termination by a vendor for failure by the purchaser to complete.

The contract for the purchase of a service station included a special condition allowing the purchaser to rescind if at the completion date the vendor was not able to provide the purchaser with a registered lease and a discharge of a covenant preventing the use of the premises as a service station. The completion date was 13 January 2004, 42 days after the contract. At 13 January 2004, the vendor did not have a discharge of the covenant although this became available subsequently.

The vendor issued a notice to complete on 21 January 2004 requiring completion on 4 February 2004 but on 2 February 2004 the purchaser gave a notice of rescission relying on the special condition and the vendor’s failure to provide a discharge of the covenant. Completion did not take place on 4 February 2004 as the vendor did not have a discharge of the covenant and the vendor’s solicitor was 5 minutes late to the settlement. The following day the purchaser’s solicitor again gave a notice of rescission but the vendor relying on the earlier notice to
complete issued a notice of termination. The purchaser argued that the contract had been rescinded.

On 18 February 2004 the vendor asserted that the earlier notice of termination was valid but fixed a further date for completion on 20 February 2004. Completion did not take place on this new date and the vendor again purported to terminate.

The trial judge found that the contract had been repudiated by both parties and that it could be taken as having been abandoned by them. He determined that the deposit should be refunded to the purchaser. The vendor appealed. In his judgement Bryson JA made the following comments in relation to the second notice to complete giving only two days notice:

Much as it was debated, it is my opinion clear beyond debate that the Trial Judge was correct in finding that the notice to complete was invalid because the time allowed was unreasonably short. The notice to complete gave the purchaser less than two business days to ready himself for settlement although he had been maintaining for 16 days that the contract was rescinded and the vendor had been maintaining for 5 days that the contract was rescinded. In all practicality, no real opportunity to settle was given.

His Honour then discussed the findings of the trial judge as to the obligation to provide the discharge of covenant and when this was required by the terms of the special condition. He said:

In my opinion the completion date referred to in Condition 45(c) is the completion date referred to elsewhere in the contract, in provisions which establish that it was 13 January 2004. The obligation to provide a registered lease and discharge of covenant at completion ... is a different subject to the matter referred to in Condition 45(c), and it is unremarkable that they should impose requirements at different times.

Bryson decided that the date at which the registered lease and discharge of covenant were required was 13 January 2004, the completion date under the contract, not the later date on which completion might have occurred except for the intervening events.

Again dealing with the issue of the second notice to complete his Honour continued:
What is a reasonable time for notice to complete does not depend upon the attitude of the recipient; the giving of a notice to complete assumes of the recipient that he has not earlier complied with the contractual obligation, and is now being required and given the opportunity to do so. The purchaser’s conduct in giving notices to terminate and repeatedly asserting their effectiveness was not repudiatory, and the notice to complete was ineffective. The purchaser’s position was based on a view of its contractual entitlements which was reasonably available; indeed in my ultimate view, it was correct.

The Court of Appeal dismissed the appeal but altered the orders to reflect the different reasoning of the Court.

The case again highlights the importance of drafting conditions that can only have one meaning, the need to carefully consider the terms of conditions if notices are to be issued, and the need to give proper times in notices to complete.

The question of what is a reasonable time in circumstances where there was no special condition providing that 14 days was a reasonable time was considered in \textit{Ng v Chong} [2005] NSWSC 270 (31 March 2005); (2005) ANZ ConvR 361. This case arose from a transaction where Mr & Mrs Ng entered into a contract to purchase a property in Sydney. After exchange they engaged solicitors and asked if their daughter could be a third purchaser. The solicitors wrote to the vendor’s solicitor who wrote “Agreed” on the letter and returned it to the purchasers’ solicitors.

On 29 August, the day settlement was due under the contract, the purchasers’ solicitors forwarded a deed of novation and a transfer showing the three names to the vendor’s solicitor. On 14 September a notice to complete was issued by the vendor’s solicitor but with only a 13 day period. Arrangements were made but the purchasers’ bank did not turn up and further arrangements were made for the next Tuesday, Monday being a holiday.

On Tuesday the vendor purported to terminate the contract. Amongst other issues, the question of the validity of the notice and the time for completion was before the court.

His Honour Hamilton J dealt with the issues as follows:

\textbf{WAS THE NOTICE TO COMPLETE VALID?}

28 As to issue (3), there were four objections taken to the validity of the notice to complete:

(1) that Mr Chong was not entitled to give the notice to complete when he
did;

(2) that the notice to complete gave only 13 as opposed to 14 days to complete;

(3) that the notice to complete was addressed in terms to only two of the three purchasers;

(4) that the notice to complete did not specify a place for completion.

...

30 In light of my finding at [27] that there was no extant breach of contract which Mr Chong was entitled to rely on at the time the notice to complete was given, for the notice to be valid the purchasers must have been guilty of unreasonable delay at that time.

...

In all the circumstances prevailing, including those set out in this paragraph, it is my view that an unreasonable delay had not occurred by 14 September 2001, some 11 days after the documents were sent to the purchasers’ solicitor and only 9 or 10 days after they were received by that solicitor. I find that an entitlement to give a notice to complete had not arisen when it was given on 14 September 2001.

...

In Castle Hill Tyres Pty Ltd v Luxspice Pty Ltd (1996) 7 BPR 14,959 at 14,964 the formula adopted by Young J (as his Honour then was) was “some special matter that can be pointed to” as to why the shorter time is reasonable. His Honour emphasised that the adequacy of time of a notice to complete must depend on all the circumstances of the particular case.

33 I cannot see any strong circumstances or special matter on the facts as I have found them in this case to justify the giving of less than 14 days notice to complete. The notice was therefore inadequate as to time.

...

Requirements as to form

The CCH practice has precedents as to the form. They are precedents and may need to be altered to suit particular circumstances. I do not propose to say any more about the form of the notice.

The case of Ng v Chong (above) also dealt with an issue as to the form of the notice. Once the Deed of Novation had been signed there were three purchasers but the notice was only addressed to two of them. After setting out his views on the issue His Honour said4:

---

4 Page 368
Here, two of the purchasers were named as addressees and one was not. The notice was also addressed by name to the solicitors, but not describing them as “the purchasers’ solicitors”. In these circumstances, it is my view that it was not unequivocally clear to whom the notice was directed. The defect constituted by the omission of one of the purchasers from the notice was not cured by the fact that the notice to complete was directed to and served on the solicitors for all the purchasers, bearing in mind that it was directed by name to two of the purchasers, but not to the third. No argument was put that any difference was made by the purchasers agreeing to take as joint tenants, if that be the situation. It is not to the point to say that the notice was likely or bound to be drawn to the attention of the third purchaser by the solicitors. It does seem likely that it would be drawn to her attention. But it may well be drawn to her attention (by reason of its lack of clarity) as a notice not directed to her and therefore invalid. What is in issue here is not the form of service, but the form of the notice. In my view, the notice to complete was defective in form for this reason also.

38 As to objection (4) concerning the place of completion, in view of the findings I have made, it is not necessary for me to determine this objection and I do not propose to do so.

39 In the result, for the reasons that I have given, I find that the notice to complete was invalid.