



Précis Paper

Notices to Perform, Notices to Complete

A discussion of notices to complete and notices to perform in the context of two cases, explaining their requirements and distinctions.

Discussion Includes

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Notice to Perform, Notice to Complete

1. In this edition of BenchTV, Bridie Nolan Barrister, 12 Wentworth Selborne Chambers, Sydney) and Thomas Russell (Partner, Piper Alderman, Sydney) discuss notices to complete and notices to perform in the context of two cases, exploring their requirements and distinctions

What is a notice to complete?

2. A notice to complete is a notice issued in a conveyancing context when one of the parties has failed to complete on the due date for completion, and the other party wants to take the prerequisite steps to force the other party to complete or to put themselves in a position to terminate the contract.

How do you force a party to complete, or terminate a contract?

3. When issuing a notice to complete, the first thing to do is to ensure that all affairs on your side of the agreement are in order and that everything that you need to do under the contract has been done. If you have complied with everything required and are otherwise willing and able to complete, you can issue a notice to the other side, pointing out to them that the date for completion has passed and that they are in default, demanding that they complete by a specified date in the future and reminding them that failure to complete will entitle your client to terminate and keep the deposit.
4. A notice to complete has to be in writing. It does not have to be explicitly stated that it is a notice to complete, but it must be stated very clearly in the contents what is required of the other party. If, for instance, you forgot to head the document 'Notice to Complete', that may not be an issue. A notice to complete could be an email from one party to another, but it could be that such an email wouldn't comply with the requirements for notices in the standard form of contract. It depends on the circumstances.
5. A notice to complete has to be clear and it has to refer to the correct contract, identifying that contract with sufficient particularity so that the other party understands what it is that they're being directed to do, and what it is that they are required to do.
6. The case of *Budiyanto v KPI 6 Pty Ltd (NSWSC) 1313* the other party was not required to complete, but to comply with an obligation that arises prior to completion. In order to compel a party to do this, you need to issue a notice to perform.

Requirements of ready willingness and ability to complete

7. Anyone who issues a notice must be ready, willing and able to complete. It can be assumed that when you issue a notice to complete that somebody will be at risk of losing their deposit. It's the type of notice that's always scrutinized very carefully and subject to quite a lot of rigor from the other side and often from a barrister.
8. In the case of *K&K Real Estate Pty Ltd v Adellos Pty Ltd [2010] NSWCA 302*, Thomas Russell was acting for the vendor of a property who had issued a notice to complete and had subsequently terminated the contract in reliance on that notice. This contract was for \$5.6m dollars, and the deposit was \$560,000. It was litigated first in the Supreme Court of NSW, then the Court of Appeal, and ultimately the High Court refused special leave. The main issue in this case was whether or not the notice to complete which Mr. Russell's client had issued was valid. The main line of attack which the other party decided to run was that the issuers of the notice were themselves, as vendors, not in a position to complete at the time.
9. There were two main reasons for this. The first was that the issuers of the notice had not gone through the processes that you would expect a conveyancing lawyer to go through prior to complete, such as requesting settlement figures or serving a copy of the transfer. As a result, the other side said that they were not ready to complete. The response was that the reason these things hadn't been done is because the other party had written to them a few weeks prior to the date of completion to say they were not going to be able to complete, they needed more time and did not have the money. This correspondence precipitated a course of negotiation between the lawyers on both sides. This negotiation continued in the background. There were two threads of correspondence: one in which the parties would loudly assert their legal position, and a much more genteel thread of correspondence in the background where the parties were seeking to negotiate to see whether they could come to terms on an extension, and both of these threads of correspondence were mentioned in the judgment.

'Without Prejudice'

10. One piece of correspondence was marked 'Without Prejudice', however the court determined that wasn't without prejudice because it didn't meet the necessary tests of being without prejudice, as it wasn't an attempt to settle the dispute but was merely a request for an extension of time under the contract, with no dispute that there was no right to that extension of time.
11. It is often a pitfall for lawyers that they think that they can write 'Without Prejudice' at the top of correspondence and that somehow makes it privileged. The converse is also true, because if you forget to mark something without prejudice but it in fact ticks all of the boxes in s131 of the *Evidence Act 1995 (NSW)*, then it attracts the same privilege

notwithstanding the fact that the words 'Without Prejudice' do not appear. In many respects, the words are completely useless. If you put them on and you haven't satisfied the relevant criteria, they don't do anything. If you have satisfied the relevant criteria and you don't put them on, they're not necessary, however they are a good indicator of what the party's intentions are.

12. The Court found that they had indicated by the use of the words 'Without Prejudice' that they did not intend the ongoing negotiations to prejudice their rights under the contract, and this was one of the points found relevant to the ultimate determination. The Court said, with regard to their not being ready, willing and able to complete, that they accepted their contention that although it was true that they weren't ready, willing and able to complete, the only reason for this was that the other side had intimated to them that they would not need to be, and the Court said that in those circumstances you don't need to be ready, willing and able to complete in order to issue a notice to complete. This was one of the rare examples where it has been possible to issue a notice to complete without being ready, willing and able. It can be described as the rule in *Foran v Wight [1989] HCA 51*, a case which concerned an intimation. In *K&K Real Estate Pty Ltd v Adellos Pty Ltd* it was found on the facts that Mr. Russell's clients were justified in not preparing for completion, as there was enough of an intimation that the other side would not be able to complete.

Essential terms in a contract

13. Ordinarily a contract is full of terms which are both essential and non-essential. A well drafted contract will specify which of the terms are essential, but failure to specify a term as essential does not mean that it isn't so. In a notice to complete what is being made essential is performance or completion within a certain time. This is what the phrase 'time is of the essence' means legally speaking.

Consequences of failing to complete pursuant to a notice

14. If a party does not complete in accordance with a notice to complete, that means that you have thereby breached what has been deemed to be an essential term of the contract., and all of the consequences of breaching an essential term will flow from that. What actually happens depends on the whim of the person who has issued the notice to complete, because the person who has issued the notice does not have to terminate the contract. They have to option to terminate, or they can elect to affirm the contract and require specific performance, but ordinarily the reason you would issue a notice to complete is because you want to terminate, and in a typical conveyancing scenario this would give you the prima facie right to retain the deposit, which is typically 10%, so that there will be some compensation for the loss suffered

by the terminating party. In addition to that, there is the right to sue for damages for breach of contract, and other monies that may have been received by a stakeholder under the contract can be held as security.

Key takeaways from *K&K Real Estate Pty Ltd v Adellos*

15. When challenging a notice to complete, there are three things to consider.
 - Whether the issuer of the notice to complete is ready, willing and able to complete
 - Whether or not the way in which the notice to complete has been issued is somehow defective. There are two ways that this might happen: if it has been promised that a notice to complete will not be issued if certain things happen by a certain date, and that can happen in the course of correspondence between the parties. The second way is if the notice to complete puts limits on what needs to be done which are not prescribed in the contract. That will make the notice invalid, which is what happened in the case of *Budiyanto v KPI 6 Pty Ltd*, where there was an informal notice issued via email that said to the other party that they needed to put up a cash bond by a particular date, and that may have been a notice to perform except that the contract did not say that you have to put up a cash bond or a deposit bond. Because the notice purported to compel a particular course of action whereas the contract gave options, the notice was invalid. The same would apply to a notice to complete.
 - Whether the time stipulated within which a person is required to complete or a purchaser is required to complete is unreasonable or not in conformity with what reasonableness is construed as being under that contract. What is reasonable will be judged in all of the surrounding circumstances as well, for instance what is reasonable during the Christmas holidays might be different to what is reasonable in the middle of June. Likewise, if the parties have made known to each other from an earlier time that there are particular key dates coming up or a particular time that they need to settle, that might be relevant to the whole consideration
16. Because notices to complete are so important they are likely to be attacked if there is any option at all to do so, for instance on the grounds that it is illegible, unclear, not served in accordance with the prescriptive requirements for service of notices in the contract. It can be assumed that the other party will attempt to contest on that basis, particularly in conveyancing where faxes are still used. People issuing notices to complete would be well advised to make sure that it is issued and served strictly in accordance with the requirements of the contract, even if the practice of the parties has been to otherwise up to that point

In what circumstances is a notice to perform issued? - Contractual obligations in *Budiyanto v KPI 6 Pty Ltd*

17. A notice to perform requires an obligation within a contract to be completed, as opposed to the entire contract being completed.
18. *Budiyanto v KPI 6 Pty Ltd* involved a house purchased off the plan, with the requirement to pay the bond in the form of either a cash bond or a deposit bond. The option was taken to pay a deposit bond. This expired, and there was a requirement upon the purchaser that if the contract was extended beyond a certain date the bond had to be renewed. However there had been several extensions of the contract, but the extension had gone beyond the date that the contract had stipulated as being the final extension. The vendor tried to terminate due to the absence of the deposit bond, which was challenged on the basis of the fact that it was not an essential term of the contract that the deposit bond be renewed, and the only way that termination was possible was by the issuing of a notice to perform. None had been issued, and the purchasers sought specific performance of the contract.
19. In this case it never got to the point of completion. The vendor didn't want to complete and wanted to get out of the contract, and relied upon the purchaser's failure to replace a deposit bond as a breach of contract, and then purported to terminate. The Court said that it was not an essential breach of contract.

How should a notice to perform been issued in this instance?

20. It would have been difficult for the vendor to issue a notice to complete as the vendor's side of the contract was not in order. They had extended the contract beyond the life of the extensions, and so they themselves were in breach, entitling the purchaser to terminate it themselves and sue for damages. However the purchasers wanted to live there, and so they sought specific performance.

Take aways on notices to perform

21. A similar notion of ready willingness and ability to perform exists under a notice to perform as under a notice to complete. In order to issue a notice to perform, you yourself need to have all of your obligations under the contract in order.
22. You need to specify exactly what it is in the contract which requires performance, so that you can't require performance of a clause or obligation which does not exist. A specific obligation must be referred to.
23. You must indicate the time in which the performance is to take place, and also indicate that a failure to perform within that time will result in a termination of the contract.

The distinction between notices to perform and notices to complete

24. You cannot use a notice to complete to require a party to the contract to do anything other than complete, and it must be issued by a party who is in a position to require completion.
25. A notice to perform can be used for a whole variety of different requirements, but it cannot be a notice to complete. It too can only be issued by a party who is in a position to require performance. You do not need to be ready willing and able to complete to issue a notice to perform.
26. In summary, if you have a pre-completion obligation and you wish to compel compliance, you issue a notice to perform. However if the obligation you wish to compel is the obligation to complete, you issue a notice to complete

BIOGRAPHY

Bridie Nolan

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Bridie was called to the Bar in 2006. She maintains a broad practice traversing all areas of law. She has a particular expertise in commercial, equity, trusts, insurance, common law, insolvency, corporations and public and administrative law.

Thomas Russell

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Thomas is a leading restructuring and insolvency practitioner, as well as an expert in Personal Property Security Act (PPSA) litigation and securities enforcement. Thomas' insolvency-related work includes advice and representation to company boards, liquidators, receivers, administrators and bankruptcy trustees, with specific expertise in voidable transaction claims, remuneration and priority issues, statutory and regulatory compliance and stakeholder negotiations.

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Focus Cases

Budiyanto v KPI 6 Pty Ltd [2018] NSWSC 1313

Benchmark Link

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Cases

K&K Real Estate Pty Ltd v Adellos Pty Ltd [2010] NSWCA 302

Foran v Wight [1989] HCA 51

Parkes v Mamo [2016] NSWSC 1129

Legislation

s131 Evidence Act 1995 (NSW)