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# Précis Paper

## Unjust Enrichment and Termination of Contracts for the Purchase of Land

This is an interesting presentation that explores current issues relating to relief against forfeiture.

**Discussion Includes**

- Notices to complete and the right to terminate
- How can time be made of the essence?
- Contractual interpretation and mistakes
- Unjust enrichment and developers
- The return of deposits under the *Conveyancing Act 1919* (NSW)

# Précis Paper

# Unjust Enrichment and Termination of Contracts for the Purchase of Land

1. In this edition of BenchTV, Sydney Jacobs (Barrister, 13 Wentworth Selborne Chambers, Sydney), Elie Nehmetallah (Solicitor, Manfred Legal, Sydney) and Vikram Misra (Barrister, Blackstone Chambers, Sydney) discuss unjust enrichment and the termination of contracts for the purchase of land.

Notices to Complete and the Right to Terminate

2. The presenters discussed a recent matter that they ran before Pembroke J of the Supreme Court of NSW. In the matter, a developer had spent significant money in paying a deposit and obtaining development consent in respect of a property. The vendor purported to terminate the contract for alleged non-completion by the contract date.

3. Generally, it is not proper for a party to terminate a contract for the sale of land once they have issued a notice to complete, unless time is of the essence. Time is not usually of the essence in a contract for the sale of land. This is reflected in s 13 of the *Conveyancing Act 1919* (NSW) as well as cl 21.6 of the Standard Contract for the sale and purchase of land - 2016 edition (Law Society of NSW) ("Standard Contract") which provides that the time in which something must be done pursuant to the contract is fixed, but not essential. This means that if a party fails to complete by the completion date, the right to terminate does not automatically fall upon the innocent party

4. In contrast, the time for the payment of a deposit is essential under cl 2.2 of the Standard Contract. If a deposit is not paid by the specified time, the right to terminate is enlivened.

5. Parties can make time of the essence by stipulating that it is in the contract. If the contract so stipulates, and a purchaser fails to complete by the purchase date, a notice to complete can be issued. In addition, where the subject matter of the contract is one which the parties intended that time be of the essence, the court may construe time to be of the essence, for example in circumstances where the property has perishable goods or depreciating assets.

6. The issuance of a notice to complete effectively makes time of the essence. A notice to complete is designed to allow the defaulting party to rectify the default. This means that where a purchaser is in default, they will have the time specified by the notice to get their finance or other affairs in order. However a notice to complete must give the defaulting party reasonable time to rectify the default: see *O'Connor v Slattery* [1981] 2 NSWLR 477,

452; *Sindel v Georgiou* (1984) 154 CLR 661, 670. The onus of showing that the time allowed is reasonable is upon the person seeking to uphold the notice: *Fileman v Liddle* (1974) 2 BPR 9192 at 9205; *Collingridge v Sontor Pty Ltd (No 2)* (1997) 8 BPR 15, 741 at 15,750. Unless a special condition deals with what constitutes reasonable notice, some inquiries need to be made by the vendor of the purchaser's position, and the vendor needs to satisfy itself that the time allowed is reasonable in the circumstances: see *Winchcombe Carson Trustee Co Ltd v Ball-Rand Pty Ltd* [1974] 1 NSWLR 477 at 486.

7. For a vendor's notice to produce to be valid, the following requirements must be satisfied:

- The party receiving the notice must be in default;
- The party giving the notice must be ready, willing and able to complete;
- The time specified in the notice must be a reasonable time for the other party to complete; and
- The notice must leave the recipient in no doubt that performance is required and of the consequences of non-performance.

(See *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286; *Balog v Crestani* (1975) 132 CLR 289)

8. The two main remedies available to a vendor faced with non-compliance in respect of a notice to complete would be to terminate the contract or to seek specific performance. The vendor may also be able to claim damages under the terms of the contract or equitable damages under s 68 of the *Supreme Court Act 1970* (NSW). Clause 9.3.2 of the Standard Contract allows a vendor to sue for damages in the event of a purchaser's default.

9. In circumstances where a notice to terminate is issued after an invalid notice to complete has been issued, the notice to terminate automatically falls away. The purchaser is then able to elect whether or not to accept the vendor's conduct as repudiatory and whether to terminate or seek specific performance. However, the mere fact that a vendor had terminated improperly does not mean that there has been a repudiation.

<u>Contractual Interpretation and Mistakes</u>

10. In the matter in which the presenters had been recently involved, the parties and the court considered the construction of special condition 27 of the sale contract, referred to as a "holiday provision". The provision stipulated that if completion fell in the period leading up to Christmas and the New Year (19 to 30 December), it was automatically deemed to occur on 5 January.

11. An issue arose because the date provisions in the holiday clause predated the date that the contract was entered into. The dates specified were between December 2014 and January 2015, however the contract was not entered into until November 2016. When dealing with an obvious mistake of this nature, the court can, by its own volition, correct the mistake if it leads to an absurdity: *Fitzgerald v Masters* [1956] HCA 53; 95 CLR 420. The Court in this case was willing to correct the dates based on this being an obvious mistake and made a declaration that upon a true construction of the special condition, it was intended to deal with the holiday period in 2016-2017.

12. A second issue arose in relation to special condition 2, which provided that the date for completion, upon the issuing of a notice to complete, would be 14 days from that date and made time of the essence. The condition thus deemed 14 days to be a reasonable time. The issue was whether this clause should be read subject to the holiday clause.

13. The argument is best understood by comprehending the timetable pursuant to which the issue arose. On December 14, the vendor issued a notice to complete, stipulating December 30 (a date which fell within the holiday period) as the date for completion. Relying upon these dates, the vendor issued a notice to terminate on January 3.

14. This argument that was propounded was that special condition 2 ought to be read subject to the holiday clause in order to give the contract a harmonious reading: *Australian Broadcasting Commission v Australasian Performing Right Association* (1973) 129 CLR 99. Pursuant to this argument, the court would try to make sense of all of the provisions in a contract and read it as a whole, harmoniously. In *Australian Broadcasting Commission v Australasian Performing Right Association Limited* (1973) 129 CLR 99, the High Court stated (at 109-110)*:*

> *"It is trite law that he primary duty of a court in construing a written contract is to endeavour to discover the intention to the parties from the words of the instrument in which the contract is embodied. Of course the whole of the instrument has to be considered, since the meaning of any one part of it may be revealed by other parts, and the words of every clause must if possible be construed so as to render then all harmonious one with another."*

15. The Court accepted this argument and made a declaration that special condition 2 had to be read subject to special condition 27. This meant that the notice to terminate should have been issued on January 6, after the expiration of the holiday period. Because the notice to terminate was issued early, it was invalid and amounted to repudiatory conduct on the part of the vendor. This gave the purchaser the choice between continuing the contract or accepting the repudiation and having their deposit returned.

Unjust Enrichment

16. Section 55(2A) of the *Conveyancing Act 1919* (NSW) allows purchasers to seek the return of their deposit in the exercise of the court's discretion, providing:

> *In every case where the court refuses to grant specific performance of a contract, or in any proceeding for the return of a deposit, the court may, if it thinks fit, order the repayment of any deposit with or without interest thereon.*

17. Mr Jacobs discussed the difference between a claim for the return of a deposit under s 55(2A) and a claim for unjust enrichment. In a number of cases, the Court has referred to the underlying principles of unjust enrichment in circumstances where developers, having entered into a contract to purchase land and paid their deposit, undertake acts which confer a benefit on the owner of the land, such as the obtaining of development consent, or the carrying out of construction or renovations on the land. Although unjust enrichment might be seen as an underlying theme for s 55(2A) by seeking to prevent an unconscientious windfall to the vendor, unjust enrichment allows a separate cause of action to a developer/purchaser who has done something to increase the value of the land. Thus, a developer/purchaser faced with termination of a contract for the sale of land would make both a claim under s 55(2A) seeking return of their deposit, as well as a separate and additional claim of unjust enrichment, allowing the developer to argue that it had done something to confer a benefit on the vendor and it would be unjust for the vendor to retain the deposit and the benefit, such as an increase in the value of the land.

18. The High Court examined the principles underlying relief against forfeiture in the cases of *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315 and *Romanos v Pentagold Investments Pty Limited* [2003] HCA 58; 217 CLR 367, judgments which were delivered on the same day and must be read in tandem. In both cases, the High Court looked at giving relief against forfeiture to purchasers who had paid a deposit and were the recipient of a notice to complete and a notice of termination.

19. In *Romanos v Pentagold,* the contract provided for one tenth of the deposit being paid at an initial stage, and the remainder being paid upon the purchaser obtaining development consent. The purchasers defaulted on the contract by their late payment of the balance of the deposit which was paid one day late. The contract had specified that the time for the payment of the deposit was of the essence. The question that arose was whether the purchaser was entitled to relief against forfeiture in circumstances where the balance of the deposit had been paid late.

20. The trial judge, Windeyer J, described the facts giving rise to the claim as follows:

*"Between 1 December 2000 and 11 December 2000 there were discussions about release of part of the deposit or early settlement on one property to enable Mr Joseph Romanos to purchase another property. Mr Romanos was considering properties in Prospect Street and Alice Street, Harris Park, but nothing came of those discussions. It is not clear whether the plaintiff purchasers understood the vendors were entitled to release of deposit moneys. On 19 December the vendors purported to terminate the contract by notice given by a new solicitor acting for them. No notice was given prior to termination. The balance deposit was paid by the purchasers to the vendors' agent the next day."*

21. The purchasers instituted proceedings seeking specific performance of the contract and relieving them from forfeiting the deposit. Windeyer J dismissed the proceeding, but without giving specific reasons for doing so, made an order for the return of the deposit.

22. The matter was appealed to the Court of Appeal and then to the High Court. The majority in the Court of Appeal stressed that, were the termination of the contracts to stand and specific performance to be refused, the vendors would receive a "windfall" because "no doubt" the land had increased in value as it now had "the benefit of the development approval".

23. The High Court, however, reversed the decision of the Court of Appeal, finding for the vendors. The Court stated (at [21]):

*The issue may be posed by asking what in the events that had happened made it unconscientious for the appellants as vendors to rely, for an answer to the relief sought against them in the specific performance suit, upon their termination of the contracts for failure to observe an essential time stipulation.*

24. The Court continued (at [24]):

*First, no evidence had been proffered as to the effect of obtaining the development approval upon the value of the properties; the trial judge had been prepared to assume that their value with development approval was greater than the purchase price. Secondly, the contracts had required the purchasers to make application for development approval and Special Condition 22 stipulated that, in the events that had happened, the vendors were to have the use and benefit of the relevant plans and the development consent. Thirdly, the decision in Tanwar indicates that equity does not intervene in such a case to reshape contractual relations in a form the court thinks more reasonable or fair where subsequent events have rendered the situation of one side more favourable than that of the other side.*

25. Thus, in *Romanos v Pentagold*, there was nothing in the circumstances that made it unconscionable for the appellant vendors to rely on their strict contractual rights, and therefore the purchaser's claim for relief against forfeiture was denied.

26. In *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, the High Court set out the essential principles relating to relief against forfeiture. In that case, the time for completion was made of the essence pursuant to the terms of a Deed. The purchasers did not complete by the stipulated date, and the vendors sought to terminate the contract.

27. The High Court cited the case of *Legione v Hateley* (1983) 152 CLR 406, in which the Court referred to unconscionable conduct in the context of a claim for relief against forfeiture, stating:

> *[T]he material in evidence strongly indicated unconscionable conduct on the part of the vendor in seeking to insist on the rescission of the contract in circumstances where the statement of the vendor's solicitors had helped lull the purchaser into a belief that the vendor would accept completion provided it took place within a few days...*

28. The case therefore emphasises the necessary preconditions for relief against forfeiture, which fall into four categories: fraud, mistake, accident and surprise. Although the High Court indicated that these "special heads" may not disclose exhaustively the circumstances which merit equitable intervention (at [58]), these were, at a minimum, the circumstances in which it would be inequitable for the vendors to rely upon their termination of Tanwar's contract. Where accident and mistake are not involved, it will be necessary to point to the conduct of the vendor as having in some significant respect caused or contributed to the breach of the essential time stipulation. Ultimately, none of these gateways were enlivened in the case, with the result that Tanwar's appeal was dismissed.

<u>Windfall to the Vendor</u>

29. In some cases, the court may consider the increase in the value of the property due to conduct of the purchaser, such as the obtaining of development consent or works being carried out on the property, as a windfall, while in other cases the vendor is considered to have been unjustly enriched.

30. Mere windfall to the vendor is insufficient, in itself, to ground relief to the purchaser and to deprive the vendor of its right to terminate and its contractual right to declare the deposit forfeited. There must be something more to render the vendor's windfall unjust.

31. The case of *Chambers v Borness* [2014] NSWSC 890 provides an example of when windfall to the vendor will be considered sufficiently unjust to warrant the return of the deposit. In this case, the benefit conferred on the vendor was about $700,000 of improvements to the property. Pembroke J of the NSW Supreme Court found that the exercise of the Court's jurisdiction under s 55(2A) was justified as the result, stating (at [16]):

> *I think the totality of the circumstances that I have outlined render it unjust or inequitable for the vendor to retain the deposit. The disparity between the respective financial outcomes for the plaintiff and the defendant is too great. The operation of the contract is such that, if given full effect, and without allowing the plaintiff to recover the deposit, the outcome for the plaintiff would, in my view, be unjust in the circumstances.*

32. The courts have indicated that they will evaluate applications for relief against forfeiture by developers differently to how those applications will be judged if brought by individuals: see, e.g., *Romanos v Pentagold Investments Pty Limited* [2003] HCA 58; 217 CLR 367; *Sydney Developments Pty Limited v Perry Properties Pty Limited* [2016] NSWSC 515; *Carringville Pty Ltd v The Gatto Group Pty Ltd* [2003] NSWSC 123; *Mulkearns v Chandos Developments Pty Ltd (No 4)* [2005] NSWSC 511; *Clancy v Salienta Pty Ltd* [2000] NSWCA 248; (2000) 11 BPR 20,425 ; *Mulkearns v Chandos Developments Pty Ltd (No 3)* [2005] NSWSC 504 ; *Hasanovic v Polistena* [1982] NSW ConvR 55-078; *PC Developments Pty Ltd v Revell* (1991) 22 NSWLR 615. As sophisticated investors, developers are expected to be aware of the risks that come with purchasing property and the contractual terms involved in contracts for the sale of land, and are more easily able to withstand the loss of a deposit. The bar is therefore set higher for them to achieve the return of a deposit.

33. However wherever an application for relief is brought on the basis of windfall, the plaintiff must stand able to demonstrate that a property has increased in value by strong valuation evidence. In a number of cases, including *Romanos v Pentagold,* courts have has been unwilling to conclude that a property has increased in value simply because a development consent has been obtained or because time has gone by. Therefore, it is insufficient to rely on inference or conjecture that the land has increased in value; rather, expert evidence is required. However, the presenters noted that it can be difficult at times to obtain valuation of this nature in an urgent case, and thus plaintiffs may have difficulty in establishing this ground.

<u>Summary of Discretionary Factors relevant to s 55(2A)</u>

34. Finally, presenters noted the following factors relevant to the exercise of the Court's discretion under s 55(2A):

- Has the vendor received any windfall benefit? (such as the case where the vendor has in fact resold at a higher price?);
- However, even if there is no windfall to the vendor, the court may still give relief;
- Is non-completion a fault of the purchaser personally or a matter over which it had little control?
- Was the purchaser's use of the property thwarted by some factor outside the purchaser's control?
- Was there any mis-statement (even short of misrepresentation that would permit rescission) in the vendor's camp which affected the purchaser's decision?
  (see *Nelson v Bellamy* [2000] NSWSC 182 at [140ff])

In addition, the following factors were articulated in *Havyn Pty Ltd v Webster* [2005] NSWCA 182, and the other cases cited below:

- The jurisdiction conferred by s 55(2A) is wide and no limiting gloss should be placed upon its words, which allow a Court to order a deposit to be returned "if it thinks fit".
- It is not necessary for an applicant to show special or exceptional circumstances before an order under s 55(2A) can be made.
- Although the jurisdiction is wide, it is not unbounded and the Court must consider the context of a deposit and should not take adopt an approach which weakens the proper function of a deposit as an earnest for performance.
- For this reason it is important for a Court when considering the discretion under s 55(2A) to consider the terms and conditions of the contract, and the circumstances of its breach which gave rise to the forfeiture of the deposit, and to be careful to avoid characterising a deposit as a windfall merely because it is forfeited;
- Hardship to the purchaser: eg what proportion of their assets have been spent on the deposit and other associated costs? *(Havyn* at [160]) A sub-issue is whether the disparity in financial outcomes of vendor and purchaser would be too great, if the deposit were forfeit: *Chambers v Borness* [2014] NSWSC 890 at [16];
- General reasonableness of the purchaser's attitude, including whether the purchaser took up a correct legal position;
- Has the purchaser treated the giving of a deposit with 'due seriousness", having regard to its function as an earnest of seriousness? *Chambers v Borness* at [9];
- The ultimate question is whether it would be 'unjust in the circumstances' or 'unjust and inequitable' or there is 'sufficient to warrant a departure from holding the purchaser to its obligations under the contract': *Chambers v Borness* at [15];
- Resale by the vendor at a substantially higher price can be weighed in the balance (although on its own is insufficient to merit the exercise of the discretion): *Nassif & Ors v Caminer* [2009] NSWCA 45 at [68];
- Relevant to windfall is that the vendor must pay agent's commission.

## BIOGRAPHY

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Sydney completed undergraduate studies and his LLB in Cape Town, South Africa, and acquired his Masters of Laws at the University of Cambridge, before moving to Australia and working as a solicitor with Minter Ellison and then the firm which became Norton Rose Fulbright. He also spent time lecturing in the Masters of Laws program at the University of Technology Sydney and was called to the NSW Bar in 1997. His main focus is on property matters (including easements); large scale building and construction matters in the Supreme Court of NSW, but his practice also includes appearing in ICAC regarding Operation Spicer. Outside of the law, Sydney enjoys rollerblading, tennis, rock climbing and snowboarding.

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