[98338]

TABBOUCH v DEVLIN

SUPREME COURT OF NEW SOUTH WALES — EQUITY DIVISION

EINSTEIN J

10–12, 20 June 2008 — Sydney

[2008] NSWSC 600

Sale of land — Notice to complete — Whether notice valid — Whether notice waived — Where contract permits party to serve Notice to Complete calling for completion within 14 days of service — Where Notice to Complete required completion "on or before 3 pm" on 14th day after service — Where, prior to date specified in Notice to Complete, parties arrange to settle on a date after the day specified in the Notice to Complete — Where purchaser purports to terminate prior to agreed settlement date.

Deposit — Whether plaintiff purchaser could have recovered deposit — (NSW) Conveyancing Act 1919 s 55(2A).

On 26 October, the first and second defendants agreed to sell and the plaintiff agreed to buy land situated at Minto. The total deposit was $61,500. Completion was to take place on 7 December 2004. Special condition 6 of the contract provided:

> Completion of the contract shall take place within the time provided for in cl 15 herein [42 days]. Should completion not take place within that time, then either party shall be at liberty to issue a Notice of Completion calling for the other party to complete the contract within fourteen (14) days from the service of this notice, such period of fourteen (14) days being deemed reasonable and sufficient and in this regard time shall be of the essence.

Special condition 19 of the contract provided that the vendors would attend to the removal of various items from the land.

Completion did not take place by 7 December 2004 and, on 8 December 2004, the third defendant, being conveyancers acting for the plaintiff, sent to solicitors acting for the vendors a notice to complete requiring completion to take place before 3 pm on 22 December 2004. Subsequently the third defendant sent notices advising that settlement was booked for various dates, the last of these being 23 December 2004. The plaintiff was concerned that the defendants would not be able to comply with special condition 19 and wished to terminate. On 23 December 2004, but prior to the arranged time for settlement, the third defendant sent to solicitors acting for the vendors purporting to terminate the contract for failure to complete by the date in the Notice to Complete.

On 17 January 2005, the plaintiff engaged a representative of the fourth defendant solicitors to advice on the plaintiff's legal rights. On 1 February 2005, the fourth defendant affirmed the validity of the Notice to Complete.

The vendors subsequently resold the property. The vendors refunded to the plaintiff the amount of $26,300 in return for the plaintiff's withdrawal of a caveat on the title. The plaintiff initially sought relief against the first and second defendant vendors but later abandoned that claim. Instead, it pursued claims against the third and fourth defendants.

Held:

(i) That, because the vendors and purchaser had agreed that settlement would take place on a date after the day specified in a Notice to Complete, time had ceased to be of the essence and could only be made of the essence by service of a new Notice to Complete.

(ii) (Obiter) That the Notice to Complete served on 8 December 2004 was invalid. By specifying a time of 3 pm on the fourteenth day after service of the notice, special condition 6 did not operate to deem the time to be reasonable. Although special condition 6 did not preclude the possibility that a shorter time might be sufficient, in this case the time given was insufficient in the circumstances.

Senavale Pty Ltd v Nolan (2000) NSW ConvR 55-948; [2000] NSWSC 619; BC200003874, folllowed.

(iii) That the plaintiff purchaser would not have succeeded in an application against the first and second defendant vendors to recover the deposit, there being no circumstances making it inequitable for them to retain the deposit.

(iv) That the plaintiff's loss was caused by the negligent advice of the third defendant. By the time the fourth defendant was engaged to act, the loss had already occurred.

(v) That, in light of the above, and the difficulty of having any judgment against the first and second defendants satisfied, the plaintiff had not failed to mitigate his loss by abandoning his claim against the first and second defendants.

L Chan instructed by *Colin Daly Quin* for the plaintiff.

J Gooley instructed by *Maccullum Lawyers* for the third defendant.

G Butterfield instructed by *Marsden Group* for the fourth defendant.

Einstein J.

The proceedings

[1] These proceedings concern a conveyancing transaction and the intricacies of the problems which may arise:

i. where the contract permits a party to issue a notice to complete calling for completion within 14 days from the service of the notice [special condition 6];
ii. where the contract deems such a period of 14 days as reasonable and sufficient to make time of the essence; and
iii. where the notice to complete issued by the purchaser required completion "on or before 3 pm" on the 14th day after service of the notice, which was in fact the last day within which completion was permissible.

[2] The interesting question of principle involves whether or not special condition 6 of the contract, although providing for the giving of 14-days notice, may be characterised as "a facultative provision" only, such that it should not be read as exclusively defining the period of notice that could be specified in a notice to complete capable of being issued pursuant to the contract. A submission has been put that such approach may be said to be appropriate when qualifying words such as "if and only if" or "but not otherwise" are not used so as to qualify the need for 14 days to complete in every instance.

[3] There are number of other interrelated issues which fall for determination in the somewhat complex web of causes of action and cross claims flowing from an essentially simple conveyancing transaction.

The facts

[4] In what follows I proceed to set out the findings of fact, noting that:

i. the first defendant's, Mr and Mrs Devlin, were at all material times the registered proprietors of the house and land situated at 229 Eagle View Rd, Minto;
ii. the plaintiff, Mr Tabbouch was the purchaser under a contract exchanged on 26 October 2004;

[5] MLG Conveyancing [which is the second defendant and itself a cross defendant] carried on the business of a licensed conveyancer. The Marsden Group, which is the fourth defendant, carried on business as a legal practice.

[6] In about October 2004 for Mr Tabbouch retained MLG Conveyancing to act for him on the purchase of the property.

[7] The following were among the terms of the contract:

i. the completion date was 42 days after the date of the contract, that is 7 December 2004 (see p 1);

ii. the parties must complete by the Completion Date and, if they do not, a party can serve a notice to complete if the party is otherwise entitled to do so (cl 15);

iii. the purchase price was $615,000.00 (see p 1);

iv. the Deposit was $61,500.00 (see p 1) payable as to $1,537.50 by the 26 October 2004 and as to the balance being $59,962.50 before 5 pm on the expiration of the "cooling off" period (see special condition 18);

v. the "cooling off" period was agreed to be 10 days (special condition 17);

vi. the vendors would attend to the removal of all car parts, the 5 or 6 disused cars, the truck and the caravans and attend to the mowing of the grounds and clean the inside of the dwelling (special condition 19);

vii. a document under or related to the contract could be served if it is sent by facsimile to the party's solicitor (cl 20.6.5).

[8] Further, special condition 6 of the contract provided that:

> Completion of the contract shall take place within the time provided for in clause 15 herein. Should completion not take place within that time, then either party shall be at liberty to issue a Notice of Completion calling for the other party to complete the contract within fourteen (14) days from the service of this notice, such period of fourteen (14) days being deemed reasonable and sufficient and in this regard time shall be of the essence.

[9] On 8 December 2004 MLG Conveyancing sent by facsimile a Notice to Complete to the solicitors for the Devlins. The Notice to Complete required completion to take place "on or before 3 pm, at the office of the Law Society of New South Wales, 170 Phillip St, Sydney on Wednesday, 22 December 2004 and in this respect time is of the essence of the contract of Sale".

[10] Despite the issue of the Notice to Complete, arrangements were made to settle the sale on a number of occasions. The evidence in this regard is that arrangements were made by MLG Conveyancing and the solicitors for the Devlins to settle as follows:

i. on 14 December 2004 MLG Conveyancing wrote to the solicitors for the Devlins and confirmed that settlement had been booked for 17 December 2004. Settlement did not occur on that latter date.

ii. on 16 December 2004 MLG Conveyancing wrote to the solicitors for the Devlins and confirmed that settlement had been booked for 21 December 2004. Settlement did not occur on that latter date.

iii. on 20 December 2004 MLG Conveyancing wrote to the solicitors for the Devlins and confirmed that settlement had been booked for 23 December 2004 — this was 1 day after the time set in the Notice to Complete. Settlement did not occur on that latter date.

[11] It seems clear enough from the evidence given by Mr Tabbouch [as well as the file notes taken by Ms Winten] that:

i. there had been many difficulties encountered because the Devlins had not taken steps to remove the car parts, the disused cars, the truck and the caravans and otherwise to comply with the terms of special condition 19;

ii. Mr Tabbouch had met with Mr Devlin on about 20 December and they had agreed that settlement would take place on 23 December;

iii. Mr Tabbouch remained anxious that the contract be terminated if possible, having had enough of trying to negotiate with the Devlins for items which should have been rectified by them pursuant to the contract.

[12] On or about 23 December 2004 MLG Conveyancing advised Mr Tabbouch that he was legally entitled to terminate the contract and obtained instructions from him to issue a notice of termination to the Devlins.

[13] On 23 December 2004 there was an exchange of correspondence between MLG Conveyancing and the solicitors acting for Mr and Mrs Devlin:

a) MLG Conveyancing notified the Devlins that the plaintiff had terminated the contract because of the vendors failure to proceed to settlement in accordance with the terms of the contract, read together with the terms of the notice to complete;
b) the solicitors acting for the Devlins received the facsimile and telephoned MLG Conveyancing to ask what the plaintiff was prepared to accept;
c) the solicitors acting for the Devlins then sent a facsimile to MLG Conveyancing in which they:
    1. referred to their earlier telephone discussions of that day;
    2. noted that the purchaser agreed to settle at 11.30 am on 23 December despite the notice to complete expiring on 22 December;
    3. noted that the purchaser was making arrangements to keep certain items on the property [for example a container] and to have other items removed prior to settlement;
    4. stated that both of those matters would in their opinion void the notice to complete, if it were a valid notice;
    5. stated that the notice to complete was not valid in form and in substance, in particular referring to the fact that the purchaser had only allowed 14 days including the date of service and making plain that the notice to complete required 14 days, not including the date of service, in order to be valid;
    6. observed that there was no evidence that the purchaser was ever ready willing and able to complete since the vendor still had the opportunity to provide vacant possession;
    7. submitted that even if there were some items on the premises, this did not entitle the plaintiff to rescind;
    8. asked that MLG urgently contact the writer upon receipt of the facsimile with MLG's instructions as to whether the purchaser could settle at the appointed time or later in the day, since they would need to notify the parties;
    9. made the point that the purchaser took the risk that if he did not complete, he could be sued for damages and costs or alternatively specific performance of the contract.

[14] On 17 January 2005 Mr Tabbouch engaged a representative of the Marsden Group to give legal advice with respect to his legal rights under the contract.

[15] On 27 January 2005 the Marsden Group advised the Devlins' solicitors and the vendors' agent that the Marsden Group had taken over the carriage of the matter from MLG Conveyancing.

[16] On 1 February 2005 the Marsden Group reaffirmed the validity of the Notice to Complete.

[17] The Devlins later resold the property.

[18] The Devlins have refunded to Mr Tabbouch an amount of $26,366.00 "in return for withdrawal of Caveat AB310738 registered on title". An issue arises concerning whether or not this arrangement constituted a waiver of the plaintiff's claims concerning the balance of the deposit moneys.

The plaintiff's claims

[19] Mr Tabbouch:

i. originally pleaded alternative cases against the Devlins:
   a) claiming that he had validly terminated the contract and was entitled to the return of the outstanding deposit from the Devlins; or
   b) alternatively claiming that he was entitled to repayment by the Devlins of $35,134.00 pursuant to s 55(2A) of the Conveyancing Act 1919 (NSW).

[20] However at the commencement of the final hearing Mr Tabbouch's counsel announced that Mr Tabbouch had abandoned his claims to relief against the Devlins. At the same time it should be noted that the case advanced for Mr Tabbouch was that:

i. his purported termination of the contract on 23 December 2005 had been invalid;
ii. he would not have been entitled to the s 55 (2A) relief against the Devlins.

[21] The abandonment of these claims was further sought to be justified upon the basis that pursuing the Devlins was a lost cause as they had never appeared [an order for substituted service having been made against Mr Devlin]; they had never filed any defence; and they had never filed any evidence. It was submitted that the evidence before the court permitted an inference that the Devlins were at all material times relevantly impecunious.

[22] In consequence the only claims which were pressed were the alternative cases pursued against MLG Conveyancing and against the Marsden Group.

[23] The basis of the alternative case against MLG Conveyancing is as follows:

i. MLG Conveyancing owed to Mr Tabbouch a duty to act with all due care, skill and diligence;
ii. It was an implied term of the retainer of MLG Conveyancing by Mr Tabbouch that MLG Conveyancing would exercise all due professional skill, care and diligence when acting for Mr Tabbouch;
iii. If the Notice to Complete or notice of termination were invalid, then such invalidity was caused by MLG Conveyancing's breach of the above implied term of the retainer and by its breach of duty;

   [The particulars being:
   (a) failing to issue a valid notice to produce;
   (b) terminating the contract based upon non compliance with an invalid notice to complete;
   (c) advising the plaintiff that he was legally entitled to terminate the contract and obtaining instructions from the plaintiff to issue a notice of termination on the first and second defendants]

   [consensual leave being granted to the plaintiff to amend paragraph 23 of the Amended Statement of Claim to insert particular (c)]

iv. Such breaches resulted in Mr Tabbouch suffering loss and damage in the amount of $35,134.

[24] The basis of the alternative case against the Marsden Group is as follows:

i. The Marsden Group owed to Mr Tabbouch a duty to act with all due care, skill and diligence;
ii. That was an implied term of the retainer of the Marsden Group by Mr Tabbouch that the Marsden Group would exercise all due professional skill, care and diligence when acting for Mr Tabbouch;

iii. If either the Notice to Complete or notice of termination were invalid, then the affirmation by the Marsden Group of the validity of the Notice to Complete and the notice of termination constituted a breach by the Marsden Group of the implied term and a breach of duty;
iv. Such breach resulted in Mr Tabbouch suffering loss and damage in the amount of $35,134.

MLG Conveyancing's defence

[25] In its defence to the amended statement of claim, MLG Conveyancing:

i. denies that Mr Tabbouch has suffered loss and damage through the negligence and/or breach of implied term of MLG Conveyancing;
ii. pleads in answer to the whole of the Amended Statement of Claim that if Mr Tabbouch suffered loss and damage as alleged then such loss and damage was caused or contributed to by Mr Tabbouch's negligence [said to be Mr Tabbouch's failure to complete the purchase and failure to recover the whole of the deposit from Mr and Mrs Devlin];
iii. alternatively MLG conveyancing contends that if Mr Tabbouch suffered loss and damage, such loss and damage was caused or contributed by his failure to mitigate his loss [the contention being that the failure to mitigate was constituted by his failing to complete the purchase; failing to recover the whole of the deposit from the Devlins and/or failing to bring and maintain these or other proceedings against the Devlins in circumstances where there were reasonable prospects of success against the Devlins].

The Marsden Group's first cross-claim

[26] On 16 November 2007 the Marsden Group filed the first cross-claim against MLG Conveyancing seeking contribution pursuant to s 5 of the Law Reform (Miscellaneous Provisions) Act 1946 (NSW) and contribution at common law and in negligence.

The principles

[27] Close questions with respect to the issue of notices to produce have a particular longevity in terms of the authorities. Among the many authorities commonly referred to are *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327; BC5300690 and *Michael Realty Pty Ltd v Carr* [1977] 1 NSWLR 553.

[28] There are many occasions when valid notices to complete may be given, and given either when provisions similar to special condition 6 are present in the contract or even when no such provision was made at all. The court is always engaged in the question of assessing the reasonableness of whatever time be furnished for completion: cf *Lohar v Dibu*. The differences in relation to the circumstance where a provision such a special condition 6 is present and the situation where there is no such special condition is no more than that the parties in the former situation have consensually agreed to be bound by a 14 day notice to complete as being reasonable and sufficient.

[29] It is trite that in a conveyancing context it is possible for a vendor, having first purported by notice to make time of the essence of a contract and thereafter purported to terminate the contract for failure to comply with the time so delimited, to then, without prejudice to the claimed validity of the termination, give a second notice purporting to make time of the essence of the contract. Such a second notice is properly construed as an " offer to start up again" [that is to say as an offer to re-instate the contract, being an offer capable of being accepted by the purchaser]: *Lohar Corporation Pty Ltd v Dibu Pty Ltd* (1976) 1 BPR 9177.

[30] In *Michael Realty* Mahony JA observed as follows:

A notice to complete will, normally, be necessary to achieve the result that the vendor is in breach of the contract, and that the breach is of such a kind as to warrant the purchaser terminating the contract at law. The relevant obligation is the obligation to settle. In one sense, there has been a default by the vendor in that, let it be assumed, a reasonable time for settlement has already expired, but there has been no settlement. But that alone does not put the vendor in breach, and in such a breach as entitles the purchaser to terminate at law. The obligation upon a vendor to settle is dependent and concurrent: he will not normally be in breach unless the purchaser also tenders performance of the obligations to be performed by him on settlement. I have recently discussed the authorities in this regard in *Philip Maurice (Realty) Pty Ltd v Impala Properties Pty Ltd* (Court of Appeal, June 1977, unreported. Case settled. Judgment not delivered).

Before a vendor will be in breach for failure to complete, it will be normally necessary for the purchaser to call upon him to settle and to settle at an appropriate time. Thus, accepting that a reasonable time for settlement had already passed, a purchaser could not, nevertheless, put the vendor in breach by attending unannounced at the vendor's premises and demanding settlement. This is one of the cases in which, having regard to the relative positions of the parties, a party is entitled to appropriate notice to perform his obligations, or notice of the details of performance, before he can be put in breach: the principle is illustrated by such cases as *Vyse v Wakefield* (1840) 6 M & W 442; 151 ER 491 and *Canning v Temby* (1905) 3 CLR 419; [1905] HCA 45. See also *Panoutsos v Raymond Hadley Corporation of New York* [1917] 2 KB 473 and *Peter Turnbull and Co Pty Ltd v Mundus Trading Co (A'sia) Pty Ltd* (1954) 90 CLR 235. If a purchaser sued a vendor for breach by reason of the vendor's failure to complete, he would normally fail, unless he established that, by an appropriate notice and otherwise, he had satisfied those conditions precedent to, or concurrent with, the vendor's obligation to complete.

It is this function which, in such a case, a notice to complete may perform at law. Once there be established a breach of the vendor's obligation to complete, then, upon the basis that at law time is prima facie of the essence in relation, at least, to completion by settlement: *Falconer v Wilson* [1973] 2 NSWLR 131], the purchaser will have established a basis at law for termination of the contract.

In determining what is appropriate notice to complete, in so far as the notice is to serve this function at law, the essential question is not what time does the purchaser in fact need to do that which is necessary for completion, and is in fact not yet done. At law, a party is not entitled to rely upon his own wrong or default. Given that a reasonable time for completion has already elapsed, the function of a notice specifying a time for completion is, at law, prima facie to enable a party, who is assumed to be in an appropriate state of readiness to perform his obligations, to do those things, eg, have ready the appropriate conveyance and title deeds, relevant for the performance of those obligations.

But the purchaser, if he desires effectively to terminate the contract, must also do what, in equity, will be seen as a sufficient reason for refusing specific performance. In general, equity will order specific performance, notwithstanding that a plaintiff is in breach as to a provision as to time, unless the circumstances over and above the mere breach make it unjust or inequitable to do so: see, eg *Holland v Wiltshire* (1954) 90 CLR 409; [1954] ALR 822]. But non-compliance with a notice effectively making time of the essence for completion will normally be seen as a reason for refusing specific performance. The notice to complete, therefore, serves this function in equity.

Equity has, of course, always required that such a notice give a reasonable time for completion. But, again, the stipulation as to time is, in such a case, not directed to securing performance of the contract. It is directed to giving such a time that, at the end of the time specified, it would be inequitable or unjust for specific performance to be ordered. The time is, therefore, to be calculated by reference, inter alia, to the interests of the party giving the notice, and the inequity of maintaining him effectively bound by the contract thereafter.

Where a purchaser gives such a notice with the purpose of procuring specific performance, the position, though not the same, is analogous. It is not necessary to consider the circumstances in which a purchaser will obtain an order for specific performance, notwithstanding that the vendor is not yet in breach, or in such a breach as would warrant termination at law. It will normally be significant to put a vendor in breach at law, if only for considerations touching costs of the proceedings in equity. An appropriate notice to complete will, of course, achieve this purpose.

It may be seen, then, that the purpose of such a notice to complete is not simply to achieve the performance of the contract; it has purposes apart from this. It follows, therefore, that it is not inconsistent with the purpose of such a notice that it may, on occasions, give less time than is required to do what is outstanding under the contract.

[31] Glass JA put the matter as follows:

(1) Where the contract fails to make time of the essence, failure to complete by the time fixed for completion is at law, but not in equity, an essential breach, which entitles the purchaser to rescind.

(2) The vendor will, however, be guilty of an essential breach, in equity also, if he fails to complete within the time limited by a valid notice to complete. For such breach the purchaser may validly rescind.

(3) A notice to complete will not be valid unless, inter alia, it limits a time for completion which is, in all the circumstances, reasonable. In determining the reasonableness of the time limited, the court should consider, not merely what remains to be done by the vendor at the date of notice, but all the circumstances of the case.

(4) The question whether the time limited by the notice is, in all the circumstances reasonable, is identical with the question whether equity would consider it just and equitable to relieve the vendor who fails to complete at the expiration of the notice, and to grant specific performance at his instance.

(5) It follows that the question whether it is reasonable to allow the vendor less time than he needs to prepare for completion is a correlative of whether it is just and equitable to hold the purchaser to the contract for as long as the vendor requires before he will be able to complete.

(6) All the circumstances of the case in light of which these questions are to be decided include, but are not confined to, the delay of the vendor and the urgency of the purchaser's need to complete. Other variants of the behaviour of vendor and purchaser, the categories of which cannot be determined in advance, may raise circumstances which make it unjust and inequitable to allow the defaulting vendor as much time as he needs.

In my opinion, each of these propositions is consonant with principle, and is supported by the authority of the decision in *Stickney v Keeble* [1915] AC 386; [1914] All ER Rep 73]. It follows that there is no principle of law that the notice to complete must always limit a period which is sufficient to meet the preparatory needs of the party in default. The so called principle urged upon us by counsel for the vendor was, in my opinion, reduced to an absurdity by the following example advanced by counsel for the purchaser. Suppose the vendor on the day fixed for completion, whereon vacant possession is to be given, grants a lease for 1 year. Unless the purchaser is inexorably obliged to wait out the year, unable to complete and unable to rescind, the principle cannot apply with the universality claimed for it.

[*Michael Realty Pty Ltd v Carr* [1977] 1 NSWLR 553 at 566]

Decision

[32] In truth the carefully argued question of whether or not the notice to complete was effective to make time of the essence, likely does not have to be determined because of the arrangement which was reached between Mr Tabbouch and Mr Devlin. That arrangement reached on 20 December to settle on 23 December meant that, in the circumstances:

i. the anterior notice to complete, had it been valid, simply fell away;

ii. the anterior notice to complete, if it had been invalid, was not now invested with some new-found validity.

[33] It is not possible to interpret the arrangement reached between Mr Tabbouch and Mr Devlin as implicitly amounting to an acceptance by the Devlin parties that time was to be required as of the essence in respect of the new date [the 23 December].

[34] All that one can read into the arrangement is that there was an intention by both parties, reached on 20 December, that settlement would take place on 23 December. That arrangement is entirely consistent with the need, if settlement did not take place on that date, for Mr Tabbouch, by a new notice to complete, to make time of the essence. Such a further notice to complete may well [in light of the anterior delays in the purchaser complying with the terms of special condition 19 and settling on the several occasions when this had been anticipated] not have required to give a period of 14 days in which to complete. The issue is always about reasonableness of the time delimited by a notice to complete and one of the factors to be taken into account will be whether an earlier notice to complete had been issued but was waived: compare *Lohar Corporation Pty Ltd v Dibu Pty Ltd* (1976) 1 BPR 9177; *Stickney v Keeble* [1915] AC 386 at 419; [1914] All ER Rep 73; *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 at 134; *Clark v Donald* [unreported, Supreme Court of New South Wales, Wootton J, 19 December 1974].

[35] Mr Gooley, counsel for MLG Conveyancing submitted, as I understood him, that:

i. either time had become of the essence of the contract at 3 pm on 22 December 2004 by reason of the giving of the notice to complete and the failure of the Devlins to complete by that time on that day, or;

ii. time had become of the essence as at the end of that day by reason of the giving of the notice to complete and the failure of the Devlins to complete on that day;

iii. the circumstance that the parties had arranged to complete at 11.30 am on 23 December 2004 did not constitute any impediment to Mr Tabbouch terminating the contract earlier that morning;

[The argument was that this was because Mr Tabbouch had ascertained earlier that day that the Devlins had not, even at that late stage, sought to comply with the terms of special condition 19 and obviously would not have been able to do so by 11.30 am on that day].

[36] I found it difficult to follow the logic of this set of propositions because they did not appear to recognise at least the following matters:

i. it is trite that a valid notice to complete binds both parties so that there can be no failure to comply with such a notice until the time that allows for completion has run its full course;

ii. even if, contrary to the holding in these reasons, the proper characterisation of the arrangement between Mr Tabbouch and the Devlins to complete at 11 am on 23 December 2004 was an implicit acceptance by the Devlin parties that time was to be regarded as of the essence in respect of the new date [or, in other words, amounted to an extension of the original notice to complete up to and including 11 am on 23 December], yet still that arrangement would bind both parties and would not permit Mr Tabbouch to precipitously trump the arrangement by terminating the contract before the arranged time for settlement had arrived.

[37] Effectively Mr Gooley's argument fails from the fallacy of the undistributed middle:

i. It seeks to suggest that the notice to complete, having made time of the essence at 3 pm on 22 December, time remained of the essence the next day;

ii. It seeks to rely in justification of Mr Tabbouch's termination of the contract the next morning on an amalgam of:

a) the continuing effect of the notice to complete having made time of the essence on the previous day;

b) an argument that the enquiries made by Mr Tabbouch on the following morning which uncovered the failure of the Devlins to comply with the special condition, meant that there was an anticipatory breach by the Devlins which could be relied upon to sustain the termination of the contract.

[38] It is not to the point that it may have been apparent to the purchaser on the morning of 23 December that the vendors appeared hopelessly unable to comply with special condition 19 by 11.30 am that morning. That may have constituted a form of anticipatory breach capable of being acted upon, had the original notice to complete:

i. been valid when given;

ii. not fallen away by reason of the arrangement for completion to take place on 23 December.

[39] However the original notice to complete had fallen away on the making of the arrangement and Mr Tabbouch had to make time of the essence by a further notice to complete, even giving a very limited time in which to complete. This was not done.

[40] The vendors in light of the new arrangement were entitled to proceed upon the basis that if they did not complete at 11.30 am on 23 December, the contract would remain on foot unless and until:

i. a valid notice to complete was served and the vendors failed to complete within the requisite time so delimited; or

ii. the period of time across which the vendor had failed to complete was itself in all of the circumstances, plainly such as to show that the vendors had no intention of completing [in effect amounting to a repudiation of the contract]: compare *Carr v Berriman* per Fullager J at 349, which circumstance would permit the purchaser to terminate out of hand without requiring to rely on a notice to complete.

[41] The problem for the third defendant is that even had time been made of the essence by the notice to complete [as to which see the reasons below], Ms Winten did not give any advice to Mr Tabbouch to the effect that the above-described arrangement would have had the effect that time was no longer of the essence, so that Mr Tabbouch could not any longer terminate the contract without giving a new notice to complete which would make time of the essence again.

[42] That failure [and indeed her advice that determination of the contract would be valid] amounts to the reason why the third defendant is liable to Mr Tabbouch.

Was the notice to complete on 22 December valid when given?

[43] While it is no longer necessary to determine this issue, it was closely argued, and I therefore propose to answer the question.

[44] The third defendant has contended that given the wording of special condition 6 of the contract:

i. a shorter period could still have been used;

ii. in the current circumstances, there was no evidence that the Devlins ever regarded a few hours less than a full 14-day period as being unreasonable and insufficient and given the fact that several arrangements were made to settle within the notice to complete period, the prescribed time was not unreasonable.

[45] Theoretically, of course, the special condition, although obviously likely intended by the parties to be utilised, was not an exclusive method binding either party in terms of its perceived otherwise entitlement to give a notice to complete in a shorter time: compare *Byrne v Gagie* (1991) NSW ConvR 55-604; BC9101501. But in this case the

circumstances would not have justified the giving of any notice to complete which delimited a time less than was required by the special condition to be given.

[46] In The Standard Contract for the Sale of Land in New South Wales Professor Butt observes as follows [at 15.28]:

> Where a notice to complete specifies only a date for completion, it is not clear whether the recipient must complete by the end of ordinary business hours on that day, or whether the recipient has until midnight of that day. Normally, in commercial matters the "midnight rule" applies [*Keys-Arenas v Carr* (1982) 2 BPR 9498; NSW ConvR 55-068 (McLelland J), 55069 (Court of Appeal); *Ex parte Robertson* [1983] 1 Qd R 526; *Afovos Shipping Co SA v Pagnan* [1983] 1 All ER 449; *Rightside Properties Ltd v Gray* [1975] Ch 72; [1974] 2 All ER 1169]. However, in England it has been held that in conveyancing matters the "end of business hours rule" applies [*Commodities and Services International SA v Clemence Properites (Grays Inn) Ltd* (unreported, Walton J, High Court, Eng, 1986; noted [1991] Conv 476]. But as a practical matter, the giver's solicitor is not required to wait back after normal business hours just in case the recipient or the recipient's solicitor arrives to complete, no firm appointment having been made" [*Raco v Grove Homes Pty Ltd* (1974) 2 BPR 9411].

[47] In *Senavale Pty Ltd v Nolan* (2000) NSW ConvR 55-948; [2000] NSWSC 619; BC200003874 Macready M held as follows at [26] and [27]:

> [26] In calculating the period of days "within" which something has to be done, the first day is excluded and the person has until the end of the final day. See *Lester v Garland* (1808) 15 Ves 248; 33 ER 748, *Dodds v Walker* [1981] 2 All ER 609; *Carr v Keys v Arenas* (1982) NSW Conv R 55-069 and *Mission Corporation Ltd v Telecom Auckland Ltd* [1994] 2 NZLR 357. Taking service to be on 23 March one thus excludes 23 March and the 14 days required by special condition 2(b). Accordingly, sufficient time was allowed to make time of the essence for 6 April.
>
> [27] However, the notice required completion by 3.00 pm on the 6th and, accordingly, I would have thought that this would be premature as time in respect of this calculation does not expire until the end of the 6th. It is possible for a notice to complete to make time of the essence for a particular time of day (see *Karangahape Road International Village Ltd v Holloway* (1989) 1 NZLR 83 and *Lowe v Evans* [1989] 1 Qd R 295) although the usual rule is that a notice to complete makes time of the essence for a day. See *Paclyn Pty Ltd v GP Harris Real Estate Pty Ltd* (1987) 4 BPR 9267.

[48] In my own view the notice to complete which was issued could not be relied upon in terms of its validity, if the basis for so doing required compliance with special condition 6 [which if complied with, would result in the time delimited by the notice to complete being deemed reasonable and sufficient to make time of the essence]. As held by Macready M, the giving of the 3 pm time for completion was simply premature.

[49] In *M & L Hazelton Pty Ltd v Woodfield* (1982) 2 BPR 9558, McLelland J dealt with contracts for sale of land in the usual form which provided that completion would take place within 30 days from exchange, and if not, then "either party may serve upon the other a notice to complete requiring settlement within 14 days and such time limited shall be accepted as being a good and sufficient time". At the expiration of the 30 days the vendor gave a notice to complete allowing 14 days from the date of the notice, but, because the notices were not received until 4 days later, only 10 days were in fact given. The vendor purported to terminate the contract and the purchaser sought specific performance.

[50] His Honour observed as follows:

> it is necessary to have regard to the precise language used in each case. It is significant that in the present case the subjects of time for completion, giving of notice to complete, and the time to be limited by such a notice, are dealt with in a single composite and prima facie comprehensive provision in each contract. The distinct impression one gains in reading this provision is, firstly, that the expression "within 14 days" was intended to be a shorthand way of saying "within a

period of not less than 14 days" and, secondly, that it was intended to define the period to be fixed for completion in any notice to complete given by either party after the expiration of the initial period of 30 days. In other words I think that it is implicit in this provision that a notice to complete given in the circumstances postulated must allow a period for completion of not less than 14 days.

[51] That analysis is indistinquishable from the present case and I agree with it. [compare *Doyle v Howey* (1990) 6 BPR 13,401; (1990) NSW ConvR 55-545; BC9001967]

[52] Further, the matter inheres in fairness to the vendors, where, having received a notice to complete which was precise in its terms, they were entitled to assume that they could take the whole of the time which the notice to complete stipulated in readying themselves for completion by the date and time nominated. This is all about giving reasonable notice: compare *Lohar*.

[53] In the circumstances of this case it is plain that had the special arrangement not been entered into, the Devlins were entitled to disregard the notice to complete, treating it as having no potency whatever [except as possibly justifying the giving of a later notice to complete with a shorter period of time being given, the giving of the original invalid notice to complete being one of the factors to be taken into account in terms of whether or not the later notice to complete delimited a reasonable period].

Conclusion

[54] The issue of the notice to complete was ineffective to make time of the essence in the circumstances. It did not do so.

[55] It is not impossible that, in some circumstances of a very unusual nature, a purchaser who gave such a notice to complete could be able to prove that the vendors had, after receiving the notice, been guilty of repudiatory behaviour entitling the purchaser to rescind the contract even before the date and time stipulated for completion in the notice to complete. However, this case does not exhibit any such circumstances.

The potential for a claim under section 55(2a) of the Conveyancing Act

[56] The third defendant claims that, had the Devlins been pursued by Mr Tabbouch in terms of an application pursuant to s 55(2A) of the Conveyancing Act, such an application would have been successful.

[57] The history, scope and purpose of s 55(2A) of the Conveyancing Act were considered by Powell JA in *Benyon v Wongala Holdings Pty Ltd* (1999) 9 BPR 16,781 at 16,785; [1999] NSWCA 66; BC9901062 and it has been held that the jurisdiction pursuant to that section is wider than one to be exercised only if there is unconscionable conduct. The court needs to consider generally the conduct of the parties: *Schindler v Pigault* (1975) 30 P & Cr 328 at 336–7.

[58] There is no substance to the third defendant's above-described claim. It rests upon the misconceived proposition there were special or exceptional circumstances showing that it would have been unjust or inequitable for the Devlins to retain the deposit:see generally *Lucas & Tait (Investments) Pty Ltd v Victoria Securities Ltd* [1973] 2 NSWLR 268; *Poort v Development Underwriting (Vic) Pty Ltd* [1976] VR 779 and *Poort v Development Underwriting (Vic) Pty Ltd (No2)* [1977] VR 454.

[59] The simple fact is that Mr Tabbouch was at fault in:

i. first having purported to make time of the essence of the contract by a notice which did not have that effect;

ii. then proceeding to substitute a new arrangement prior to the arrival of even the time which had purported to be delimited in the notice to complete, which new arrangement meant that the notice to complete, even had had been valid upon issue, was now rendered otiose;

iii. then proceeding not even to honour the new arrangement but instead terminating out of hand before the time fixed for settlement under the new arrangement.

[60] None of this suggests an entitlement in the contractor to obtain relief under s 55(2A) of the Act. It has not been shown that in circumstances it would have been unjust or inequitable for the Devlins to retain the deposit.

The claim that the loss was not caused by mlg conveyancing

[61] This claim rests upon the proposition that MLG Conveyancing's conduct was not causative of any loss to Mr Tabbouch. MLG seeks to move the liability for the loss of recovery of the deposit to the new solicitors, the Marsden Group, who commenced to act for Mr Tabbouch when MLG Conveyancing cease to act for him. While it is true that Mr Tabbouch was given various options by the new solicitors, the evidence given by Mr Searle was that he had not been able to advise Mr Tabbouch as to whether or not the notice to complete had been valid nor as to whether or not the purported determination of the contract by Mr Tabbouch was valid. All that Mr Searle appears to have been in a position to do, was to put various alternatives to an already bewildered Mr Tabbouch. Mr Seale himself was shortly required to indicate to Mr Tabbouch that he was unable to continue giving advice due to a conflict of interest, caused by the association between his firm and MLG Conveyancing.

[62] The real cause of Mr Tabbouch's loss and damage had already taken place when Ms Winton had given incorrect advice to him: that is to say, had advised that the notice to complete had been valid and that the termination had been valid. Those were the matters which caused the loss of an entitlement to the return of the deposit. By the time that Mr Tabbouch was told that MLG Conveyancing could no longer act for him and that he had to go to a new firm, that damage/loss had already occurred and was irrecoverable.

Failure to mitigate

[63] Nor is there any substance in the proposition that the case exhibits a failure by Mr Tabbouch to mitigate any loss or damage.

[64] It was put by the third defendant that the failure to mitigate was constituted by Mr Tabbouch having failed to pursue the claim against the Devlins in the circumstances. Much was made of the fact that at the commencement of these proceedings, Mr Tabbouch had abandoned his claim that the Devlins were liable to refund the deposit moneys and that the first occasion when the third and fourth defendants learned that this claim was to be abandoned was when the hearing began.

[65] The proposition which was put was that no explanation had been offered as to why that claim had been discontinued. The submission was that the failure to pursue the Devlins was a calculated risk taken by Mr Tabbouch, in circumstances where he knew that the Devlins had filed no evidence in opposition to the claim brought.

[66] The issue is arid in light of the findings that, even had the case against the Devlins been pursued, it would have failed.

[67] During the hearing evidence was adduced by Mr Tabbouch to the effect that Mrs Devlin is an un-discharged bankrupt as from March 2006. Unsuccessful attempts had been made to serve the statement of claim on Mr Devlin, and in due course orders for substituted service were made and complied with. Mr Daly, the plaintiff's solicitor, had never been able to locate or speak to Mr Devlin. Furthermore, a purchaser's index search

at the Land and Property Information Register, seeking to establish whether any property was currently owned by Mr Devlin and whether any property had previously been owned by him, disclosed that there was no current real properties owned and that there previously had been four properties owned.

[68] To my mind this evidence in the light of the whole of the general circumstances permits of a proper inference that even had Mr Tabbouch had a viable case against Mr and Mrs Devlin, the further pursuit by the Mr Tabbouch of either Mr or Mrs Devlin in terms of these proceedings would have been unlikely to yield any success in terms of a monetary order which could be enforced.

[69] As already observed, the matter is otiose in mind of the reasons already given. But to the extent that close argument took place in terms of the suggested failure to mitigate, the evidence which was adduced satisfied me that Mr Tabbouch had a proper basis for giving up any claims to relief against the vendors.

Contributory negligence

[70] There is no substance in the contention that Mr Tabbouch contributed to any loss he sustained. He was in the hands of MLG Conveyancing and took their advice. That advice was incorrect. It was given negligently and in breach of the duty of care owed to Mr Tabbouch. He suffered loss in the form of the deposit moneys now claimed.

Conclusion

[71] Mr Tabbouch has succeeded in his claims against the third defendant.

[72] Mr Tabbouch has failed in his claims against the fourth defendant.

Short minutes of order

[73] The parties are to bring in short minutes of order on which occasion costs may be argued.

Orders

Plaintiff's case against third defendant made out. Plaintiff's case against fourth defendant not made out.

L BENNETT MOSES

