NOTICE TO PERFORM: MAKING THE CLOCK TICK LOUDER

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OUTLINE:

Notices to Complete make time for completion essential, but what of obligations that are steps on the way to completion? For example:

- Proffering a form of conveyance / assurance/ transfer
- Answering requisitions
- Seeking a DA for constructing a building on land prior to settlement (and perhaps actually doing the construction)

This seminar will consider how one ups the ante, via a Notice to Perform, if these *non-essential terms* are not punctually performed.

NOTICES TO COMPLETE v NOTICES TO PERFORM

1. There are differences between *notices to complete* contracts for the sale of land and *notices to perform particular obligations* in such contracts, which I will explore in this paper.

2. Where one party is in breach of an obligation, then depending on whether the obligation is essential or not, remedies which call for consideration include:
   -- make a claim for *damages* (usually where an election is made not to terminate);
   -- seek *specific performance*;
   --terminate and claim damages (if the purchaser); terminate, declare the deposit forfeit and seek damages (if the vendor).

3. The most usual situation where a vendor serves a *notice to complete*, is when the time for completion has arrived, and the purchaser does not attend for completion, via PEXA or otherwise. Usually, completing by the date for completion is not regarded as being of the essence, such that if one of the parties wishes to make it of the essence, they have to first serve a notice to complete.

4. The main case in Australia on notices to complete is *Neeta (Epping) Pty Ltd v Phillips* [1974] HCA 18; (1974) 131 CLR 286, where Barwick CJ and Jacobs J said at 229:

   "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 that time of the essence of the contract*.

5. Thus the first two (of three) requirements for a party to issue a notice to complete are:

   --breach/ unreasonable delay by the promissor in performing a time stipulation;

   and

   --no breach by the promissee.

6. In order to determine whether or not there has been any 'unreasonable delay', it should be delay *relevant to or connected with the securing of completion* (*Neeta*). A party's breach disentitles that party from giving a notice to complete *only where it goes to time or to completion*.

   per Young J (as HH then was) in *Collingridge v Sontor Pty Ltd* (1997) 141 FLR 440 (at 446)

7. In *McNally v Waitzer* [1981] 1 NSWLR 294, 299-301, the vendor's breach was to not supply full details of registered leases, thus disentitling it from giving a notice to complete. The underlying principle is that until a vendor has delivered *a perfect abstract*, time does not run for completion and until then, the vendor cannot get *specific performance.*

8. The third requirement for a valid notice to complete is that the vendor be ready, willing and able to complete.: *Re Barr Contract* [1956] Ch 551 at 556;

   As was stated in *Proctor v Chahl* [2008] NSWSC 1252 para [113], t*his is a matter of fact*. That case addressed whether a vendor who had to show he could convey title clear of any charge for land tax, had made necessary arrangements with the Office of State Revenue *prior* to issuing a notice to complete, such that it could be said it was ready willing and able.

9. The UCPR 14.11 presumes a party who needs to show it is “ready, willing and able”, is indeed so.

   As such, it’s up to the person wishing to negate that the other side was ready willing and able, to put that in issue by e.g. not admitting it on the pleadings (or perhaps denying it; or positively asserting the other party was not so ready etc): *Dalswinton Pastoral Company Pty Ltd v Cole* [2006] NSWSC 570, at [11] and the more detailed commentary of the rule and its exceptions in para [176] of *Al Achrafi v Topic* [2016] NSWSC 1807.

10. Although a plaintiff in a suit for specific performance must show that he or she is ready, willing and able to perform the contract, a plaintiff who has committed a breach of a trivial or non-essential nature can still obtain specific performance. An example is afforded by *Dyster v Randall & Sons* [1926] Ch 932, where the purchaser was obliged to submit plans for the buildings to the vendor's architect for approval. Despite breaching this condition,, the purchaser was awarded specific performance.

11. In *Louinder v Leis* [1982] HCA 28; (1982) 149 CLR 509 Mason J (with whom Stephen J agreed and Gibbs CJ and Wilson J generally agreed) referred (at 523) to the above extract from *Neeta* and continued (at 524):

    “In my view Barwick CJ and Jacobs J were right in saying that a mere failure to comply with a non-essential stipulation as to time justifies the giving of a notice having the effect of making time the essence of performance of that stipulation, even though the failure to comply does not involve an unreasonable delay. *The non-essential stipulation as to time is a term of the contract enforceable by an action for damages and it is the breach of this term that justifies the giving of the notice*.”

12. So bear in mind what the court was addressing was:

--a non essential obligation,
--as to time.

WHAT IS ESSENTIAL?

13. But there are many non essential obligations in contracts for the sale of land. Some obligations not in their nature essential, can be deemed as being essential; some obligations are not expressly said to be essential but in context might be seen as such; or might not. This is where the rules of construction / interpretation of contracts, come into play, centre stage.

Two circumstances where there has been a breach of contract by one party may entitle the other to terminate:

first --where the obligation breached has been agreed by the parties to be essential, sometimes described as a *condition*, going to its very root, the breach of which would immediately entitle the innocent party at its option to rescind the contract and sue for damages for the loss of the contract;

second - where there has been a sufficiently serious breach of a non-essential term (a *mere warranty)***.**

Characterisation of a term as essential or non-essential depends upon the true construction of the contract: *Tramways Advertising Pty Ltd v Luna Park (NSW) Ltd* (1938) 38 SR (NSW) 632, where it was held:

In *Tramways* Jordan CJ expressed the test in the following terms (641 - 642):

“The test of essentiality is whether it appears from the general nature of the

contract considered as a whole, or from some particular term or terms, that the promise is of such importance to the promisee that he would not have entered into the contract unless he had been assured of a strict or a substantial performance of the promise, as the case may be, and that this ought to have been apparent to the promisor."

In *Koompahtoo Local Aboriginal Land Council & Anor v Sanpine Pty Ltd & Anor* [2007] HCA 61; (2007) 233 CLR 115; (2007) 82 ALJR 345; (2007) 241 ALR 88; [2008] Aust Contract Reports 90-279; (2008) 24 BCL 272, the plurality added a rider to the statements made by Jordan CJ [48]:

"What Jordan CJ said as to substantial performance, and substantial breach, is now to be read in the light of later developments in the law. What is of immediate significance is his reference to the question he was addressing as one of construction of the contract. It is the common intention of the parties, expressed in the language of their contract, understood in the context of the relationship established by that contract and (in a case such as the present) the commercial purpose it served, that determines whether a term is 'essential', so that any breach will justify termination."

14. So for example, a covenant to pay rental in advance is not in itself essential, but the parties can agree to make it essential, and effect is then to be given to such agreement: *Shevill v The Builders Licensing Board* [1982] HCA 47; (1982) 149 CLR 620 at 627 per Gibbs CJ.

See also *Progressive Mailing House Pty Ltd v Tabali Pty Ltd* (1985) 157 CLR 7 at 29-30, 54 and *Karacominakis v Big Country Developments Pty Ltd* [2000] NSWCA 313 at [123] - [128].

A with respect, handy summary is found in *Googe v Spoljaric* [2017] WADC 99.

15. *Burger King Corporation v Hungry Jack's Pty Ltd* [2001] NSWCA 187 at [125]-[126] is useful in this context as it considers essentiality in the context of *time*

stipulations in a contract.

16. The fact that, in the event of breach, a clause would not be readily enforceable by way of an action for damages (because damages would be difficult to prove) is a factor militating in favour of a conclusion that the clause is essential: *Ankar Pty Ltd v National Westminster Finance (Australia) Ltd* [1987] HCA 15; (1987) 162 CLR 549 at 557.

FORM OF THE NOTICE

17. The person who seeks to justify the notice bears the onus of showing that the time and form of the notice are proper: *Fileman v Liddle* (1974) 2 BPR 9192, 9205.

18. A notice to complete must not demand more than the contract entitles, so that in *Neeta*, the High Court held that an unwarranted claim for interest on the purchase price undermined the notice.

19. In *Sontor's case* (below), in obiter, it was held that the vendor's notice was invalid because it demanded the sum of $175,000 when it was clear the amount that had to be paid was $150,000.

    The vendor tried to get around this by submitting it was a mere typographical error, but the Court noted that the error had been pointed out by the purchaser's Solicitor and not corrected by the vendor's; and also that the wrong amount had figured twice in the impugn notice.

NOTICES TO PERFORM

20. The idea of a *notice to perform* was considered by Mahoney JA in *Gustin v Taajamba Pty Ltd* (1988) 4 BPR 97,274. After referring to *Neeta (Epping) Pty Ltd v Phillips* (supra) and *Louinder v Leis* (supra), Mahoney JA stated:

"It appears now settled that a distinction is to be drawn between, as I have described them, a notice to perform and a notice to complete. Where a party does not in due time perform an obligation *prior to the obligation to complete*, the other party may, by a notice, fix the time for the performance of that obligation. The effect of such a notice to perform, properly given, is twofold: it fixes a further time for the performance of the obligation; and it makes the obligation an essential obligation of the contract, in the sense that failure to perform it by the new time is a ground for termination of the contract for breach."

21. However, as Mason, J said in *Louinder* at 527,

"There are of course exceptions to this rule. Sometimes a contract will contain a condition which requires to be performed on or before the date of completion. Unreasonable delay or default in complying with the condition may then amount to delay or default in completion justifying the giving of a notice to complete. At other times the delay or default in complying with a particular provision may be so inordinate as to justify the innocent party in fixing a reasonable time for completion, as, for example, when non-compliance with the particular provision has the practical effect of making it impossible to complete within the time stipulated or contemplated by the contract."

22. The purchaser in *Taajamba* did not, as obliged under the contract, tender to the vendor the notice of assurance. No provision was made in the contract as to the date on which it ought be completed. The purchaser, when reminded, tendered the notice of assurance; and the purchaser then did not take steps to arrange for settlement; then the vendor served a notice to complete, purporting to make time of the essence by giving 16 days to complete; and then subsequently served a notice of termination when settlement did not occur.

The question which arose was whether the notice of termination was validly served.

The court held relevantly as follows:

--notice to complete could only be given if there was ground for it;

--notice to perform or to complete has two main functions: restricting the remedy of specific performance where a contract has been validly terminated at law; and ensuring an untimeous party, performs timeously (at 9375, towards the bottom of the page);

--where a party does not in due time perform an obligation prior to the obligation to complete, the other party may, by notice fix the time for performance. The effect of such a notice to perform, properly given, is twofold: it fixes a further time for the performance of the obligation; and it makes the obligation an essential obligation of the contract in the sense that failure to perform it by the new time is a ground for termination of the contract for breach **; (bottom p 9376 to top p 9377).

The case then contained discussion of the legal sleight of hand that morphs as non essential term into an essential term, including that after breach of the term, reasonable notice ought be given, to perform; and

“The result of non compliance with the notice is that the party in default is guilty of unreasonable delay in complying with a non - essential time stipulation. The unreasonable delay amounts to a repudiation and this justifies rescission.”

(At 9377, citing from *Louinder v Lees*).

Mahoney JA, for the plurality, concluded as follows at 9377, last para:

“…the notice given in such a case is not a notice to complete but a notice to

perform. Therefore, if a vendor has failed to answer requisitions within the time specified in the contract, the purchaser may give a notice requiring performance of that obligation y the vendor. If the vendor does not comply with it, the purchaser may, absent some provision in the contract, terminate the contract or he may continue with it. If he does not continue the contract, then (damages apart), presumably the parties proceed with the contract and the performance of the obligations which remain to be performed under it. And, subject to what I shall say, that operation of the notice to perform does not have any bearing, as such, upon the obligation to complete the contract. It is not, in effect, a notice to complete." (p 9377, last para).

The analysis then turned to whether non compliance with a non essential term, could ever justify a notice to complete the entire contract (as opposed to a notice to perform the relevant term); and the case was decided in favour of the vendor on the basis that *in certain circumstances,* a party could do so.

As such, everything said about notices to perform may be seen as obiter; but nevertheless from the Court of Appeal; and the paragraph I have asterisked above was cited with approval in para [62] of *Ebadeh-Ahvazi v Namrood* [2017] NSWSC 399.

In *Namrood's* case, the issue was whether the vendor had not performed an *obligation to remediate the land* prior to the date of completion.

23. So to pause and review, notices to perform can be served in circumstances including:

-- where the purchaser did not, as obliged under the contract, tender to the vendor the notice of assurance, in circumstances where no provision was made in the contract as to the date on which it ought be completed (*Gustin's case*);

--the vendor is late in an obligation to remeditate the land prior to settlement (*Namrood's case*).

--perhaps where important drainage pipes have not been installed, and had the contract made this a pre condition to completion: see the discussion in *Proctor v Chahl* [2008] NSWSC 1252 particularly at para [111] (however, on the terms of the contract, it was held that the vendor providing these pipes was not a pre condition to completion, and the analysis was not specifically about notices to perform, rather it was about whether the vendor was in breach of obligation such as to disentitle it to serve a notice to complete).

24. An important case involving a notice to perform, was *Collingridge v Sontor Pty Ltd* [1997] NSWSC 522. The plaintiff purchaser found land belonging to the defendant company that it considered would well suits its business, namely a wedding reception centre. The defendant had a building on the land, known as Kameraigal.

    The parties (which included the directors of Sontor) then entered into a deed whereby the plaintiff purchaser would pay certain significant amounts to the defendants. The 2nd tranche of $175,000 was to be paid upon the sale of the home of the plaintiff.
    The Plaintiff would be entitled occupy half the company's land where it could run its business; and that if development consent was not granted by council within 4 months of the deed, the parties could rescind.

    The defendant's directors would then build a residence for themselves on the other half.

25. The plaintiff purchasers paid their first tranche, $250,000.

26. Council apparently granted consent on the basis that Kameraigal be demolished.

27. In these circumstances, and on 21 February 1997, the defendants served a notice demanding the payment of the 2nd tranche of $175,000 (even though it had be agreement been reduced from its original $175,000 to $150,000) (and

part of this money was intended to be used by the vendors to go towards building their new residence, which couldn't be done at that time, in light of council's demolition requirement).

28. The plaintiff purchaser's strongly protested this notice, and declared they were doing everything possible to sell their home to obtain the necessary funding to pay the $150,000.

29. "Despite a reminder, there was no reply to this letter until, on 13 March 1997, the solicitors for the first defendant wrote simply saying, *"Our client hereby gives formal notice that due to your client's failure to pay to our client the balance of purchase monies as provided in clause 23.3 the agreement dated 17 July 1996 is terminated*."

30. "However, the notice of 21 February only required payment of the second tranche and threatened that if that money was not paid, the vendor would terminate. *The notice in that sense was a notice to perform indicating the attitude of the vendor that it would treat a breach of warranty as a breach of condition if the money was not paid by the extended period*. ……."

31. Referring to *Taajamba* and *Loinda v Leis*, HH held that the non-payment of the second tranche of $150,000 *did not have an effect on completion of the contract and thus could not justify the issue of a notice to complete in the true sense*; however, *it did constitute a notice to perform* and moreover, the plaintiff purchasers were guilty of *gross and unreasonable delay* in paying the second tranche.

    The focus then shifted to consider whether the defendant's were free from breach, so as to entitle them to issue a notice to perform.

    "……the first defendant was in no position to force completion on the date when it gave its notice to complete because, for the reasons set out in the

answer to question 1, it had not amended its articles so as to permit completion of the agreement to take place without there being an unauthorized reduction of capital. This is a breach which goes to the completion of the contract and is similar to the breach involved in ***McNally v Waitzer.*** Accordingly, the first defendant was not in a position to issue a notice to complete on 21 February 1997."

A REASONABLE TIME MUST BE GIVEN

32. "In *Michael Realty Pty Ltd v Carr* [1977] 1 NSWLR 553, 566, Glass, JA set out six propositions affecting the quantum of time that should be allowed in the notice. It is clear from that analysis that one must consider not merely what remains to be done by the delayor, but also all the circumstances of the case including what had happened previously. So in *Fiske v Sterling Investment Co Pty Ltd* (1977) 1 BPR 9219, 9222, when dealing with the time required to convert Crown leasehold to unrestricted freehold, Powell, J said that he "*must have regard not merely to what remains to be done at the date of the notice, but all the circumstances of the case, including the previous delay on the part of [the delayor] and the [delayee's] attitude to it*."

A person who gives a notice to complete for less than 14 days is usually inviting a challenge that the notice to complete is inadequate as to time. In the instant case, even paying due attention to the fact that four months had passed since the three month deadline for paying the second tranche of moneys, there had been no agitation by the first defendant for the money, nor was there any immediate use for the money because the second defendants' house could not be erected before the building application had been approved by the council. It accordingly may well have been the case that the plaintiff did not pursue obtaining the cash to pay the second tranche with full vigour and that even in the light of previous conduct, 12 days was sufficiently long to get the money.

I consider that the matter is a borderline situation, but that the defendants have

not satisfied me that the 12 days allowed in the notice to complete were sufficient."

Collingridge v Sontor Pty Ltd [1997] NSWSC 522

COMPUTATION OF TIME

33. A notice to complete (or perform) can only be given once the contractually delimited time has come and gone. Computing time is not as easy as it may seem, as different contracts use different formulae e.g. something must be done by a given time on a given day; or by a given date; or within X weeks of Event Q (eg registration of a strata plan must be within 2 weeks of the vendor receiving a certificate of practical completion of the works).

34. A good deal of these types of matters involve one or both of the parties miscalculating when it is they can serve notices making time of the essence.

    Sometimes the error comes from the need to harmonise standard terms and additional clauses, as in the case where I was lead counsel for the plaintiff, *Spark Properties v Christafaro*.

DOCTRINE OF ELECTION

35. When giving a notice, and when choosing its wording, always keep in mind the doctrine of election.

36. A notice to complete given following one party's repudiation does not necessarily constitute an election by the giver of the notice never to accept repudiation. Thus

for example, if (as was the situation in *Proctor v Chahl* [2008] NSWSC 1252), the notice to complete is invalid but the notice giver would otherwise be entitled to terminate for the recipient's repudiation, the mere giving of the notice does not preclude termination for repudiation: *Taylor v Raglan Developments* [1981] 2 NSWLR 117 at 134.

SHEPHERD V FELTEX

37. Where a party purports to terminate a contract for sale of land, citing an invalid ground, that termination may yet be valid if there is another (valid) ground: *Shepherd v Felt &* Textiles (1931) 45 CLR 759).

CASE EXAMPLE

38. Which brings me to *Budiyanto v KPI 6 Pty Ltd* [2018] NSWSC 1313, which involved a contract exchanged April 2014 for the sale of a lot in an unregistered strata plan.

The contract permitted the purchaser to give a *bond* as the deposit, which occurred.

Additional Clauses 13 & 14 covered the deposit bond, including provision of a replacement bond, and was engaged because a bond was in fact accepted by the defendant vendor.

It provided:

13. BOND

13.1 When this clause applies

This clause applies if the Vendor has accepted a Bond as the deposit or as any part of the deposit.

13.2 Payment of deposit

(a) *On and as a condition of completion*, the Purchaser must pay to the Vendor the deposit in cash or by unendorsed bank cheque.

(b) If the Purchaser fails to comply with clause 13.2(a), then:

(i) the Purchaser is immediately and without notice in breach of an essential term of this contract; and

(ii) the Vendor may demand payment from the issuing party of the lesser of the amount stipulated in the Bond and the amount owing by the Purchaser to the Vendor under clause 13.2(a).

(c) If the Vendor serves a notice claiming to forfeit the deposit, then that service will operate as a demand on the Purchaser for payment of the deposit immediately (or so much of the deposit as has not been paid). If the Purchaser fails to pay the deposit within 2 business days of service of the notice then:

(i) the Purchaser is immediately and without notice in breach of an essential term of this contract; and

(ii) the Vendor may demand payment from the issuing party of the lesser of the amount stipulated in the Bond and the amount owing by the Purchaser to the Vendor under clause 13.2(c).

14. REPLACEMENT OF BOND

14.1 General

The Purchaser must arrange for the replacement of the Bond in the circumstances required by this clause. ……..……..

14.3 Replacement of Bond

(a) If the Registration Date is extended then the Purchaser must replace the Bond and provide the Vendor with the replacement Bond within 10 business days of being advised of the extended date. The replacement Bond must have an expiry date not earlier than 3 months after the Registration Date (as extended in accordance with this contract).

(b) If the Bond expires prior to the Registration Date or prior to 3 months after the Registration Date then the Purchaser must replace the Bond and provide the Vendor with a replacement Bond no later than 1 month prior to expiration of the Bond.

14.4 Vendor's obligations

……..

14.5 Re-issue of Bond to another party

……..

14.6 Expiry date of Bond

It is an ***essential term*** of this contract that the Bond (or any replacement bond) has no expiry date *or an expiry date not earlier than 3 months after the Registration date (as extended in accordance with this contract).*

39. Additional Cl 3.5 allowed the vendor to extend the Registration date where construction was delayed by certain events, and upon a certificate from the vendor's architect / project manager, but not for longer than 12 months, i.e. *not beyond* 31 March 2018.

40. The vendor accepted a deposit guarantee for a maximum amount of $38,500. The Bond was issued on 20 March 2014, and had an expiry date of 31 March 2017 (i.e. not 3 months after 31 March 2017).

    For that reason, the Bond did not comply with Additional Clause 14.6.

41. However, the defendant vendor then extended the Registration date to 15th January 2018.

42. On 6th September 2017, the vendor gave a further notice *purporting* to extend the Registration date to *7th May 2018*, supported by a notice from its project manager, referring to delays because of rain and in obtaining a consent for an electrical sub station from an authority.

    The notice was non conforming to the contract, as 7th May 2018 was the wrong side of 31st March 2018 ie more than 12 month from the Registration date. It was thus held ineffective to extend the Registration date to 7th May 2018: para [31].

43. On 21 September 2017 the vendor's solicitors sent an email to the purchasers' solicitors:

    "Please note that your client's Deposit Bond expired on 31 March 2017; however, we have yet to receive a replacement or a deposit cheque for same.

    We confirm that your client is now is [sic] breach of an essential term of the Contract, time being of essence.

    Accordingly, we are instructed to demand that your client provides us with the 10% deposit, being the sum of $38,500 **by no later than Wednesday, 28**

September 2017.

We further confirm that our client reserves their full rights under the Contract.

We look forward to hearing from you as a matter of urgency."

44. Correspondence passed between the parties around this topic, with the purchaser seeking to explore various options including providing a cash deposit; and the vendor agreed to extend time for giving a cash deposit to the 20th October 2017 *(but significantly did not say that the time to do so, was essential)*: para [40].

    The cash deposit not having been paid by 25th October 2017, the vendor served a notice purporting to terminate.

    The purchaser paid the $38,500 into the trust account of the vendor's solicitor on 27th October 2017.

45. Various arguments were put back and forth by the parties. Argument put by the defendant vendor included that:

    -- as the expiry date of the Bond provided in March 2014 (being 31 March 2017) was at all times contrary to the essential term set forth in Additional Clause 14.6, the vendor was entitled to terminate the contract.

    --that its notice of 6th September 2017 validly extended the Registration Date to 31 March 2018 (the latest day allowed by the contract), and the purchasers were thus obliged under Additional Clause 14.3(a) to replace the Bond within 10 business days

    --- the purchasers failed to do so within that time, and failed to do so at any time up to the time of service of the Notice of Termination.

--the importance of the obligation under Additional Clause 14.3, particularly when read in conjunction with Additional Clause 14.6, was such that it was an essential term or condition of the contract, the breach of which gave rise to a right to terminate.

--the provision of a deposit was an essential term of the contract.

-- as the expiry date of the Bond provided in March 2014 (being 31 March 2017) was at all times contrary to the essential term set forth in Additional Clause 14.6, the vendor was entitled to terminate the contract.

46. HH then disposed of the defendant vendor's argument that the notice of 6th September 2017 effected the extension of the Registration date till 31st March 2018, as follows.

"[32] In my opinion it was not so effective. Additional Clause 3.5 enables the vendor, on one or more occasions, to extend the Registration Date by a day for each day construction of the building is delayed by an Event of Delay (as defined). The relevant notice to be served on the purchaser pursuant to Additional Clause 3.5(a) must specify the "number of days". Additional Clause 3.5(b) then operates to automatically extend the Registration Date by "that number of days". It is evidently intended that the "number of days" specified in the notice will be the number of days by which the Registration Date is to be extended. The number of days the building has been delayed by an Event of Delay is to be determined by the architect or project manager in accordance with Additional Clause 3.5(c). That sets a limit upon the number of days by which the vendor can extend the Registration Date. That limit is itself subject to the limit imposed by Additional Clause 3.5(e), which operates notwithstanding anything in the preceding parts of the Additional Clause 3.5. *Constrained by those limits, the vendor can serve a notice under Additional Clause 3.5(a) that has the effect of automatically extending the Registration Date by the number of days specified in the notice. I do not think that the language of Additional Clause 3.5, in particular*

Additional Clause 3.5(b), allows a notice that specifies a number of days to be read as if it specified a different number of days so as to avoid an impermissible extension. The Registration Date thus remained 15 January 2018."

47. The consequence was that Additional Clause 14.3(a) did not operate, upon service of the notice on 6 September 2017, to oblige the purchasers to provide the vendor with a replacement Bond within 10 business days.

48. As noted above, the plaintiff purchasers were in breach of the obligation in Additional Clause 14.6 of the contract by originally providing a deposit bond that expired on the original Registration date (rather than 3 months after it); and that breach was a breach of an essential term, giving rise to a right in the vendor to terminate the contract.

    However, HH held that that breach had been waived when the vendor notified its first extension to the Registration date: paras [35] and [36].

49. HH then at paras [37] to [38] referred to the authorities on notices to perform, including *Gustin v Taajamba* and *Neeta (Epping) Pty Ltd v Phillips* and *Louinder v Leis.*

    HH noted at [39] that the vendor did not take that course, rather it appeared as though the vendor assumed, "contrary to my conclusion concerning Additional Clause 14.3, that the failure of the purchasers since 31 March 2017 to replace the Bond amounted to breach of an essential term of the contract in respect of which time was of the essence…….".

    As such, HH concluded that that the failure of the purchasers to replace the Bond by 20 October 2017 (or indeed at any time since that date) was not a breach of the contract in an essential respect; and thus the vendor did not have the right to terminate the contract ie the notice of termination was ineffective.

50. As to Cl 13 (2) (a), HH held that what it meant was that it required the deposit to be paid *on completion*, failing which the purchaser is then in breach of an essential term of the contract. As such, completion not having been reached, there was no breach of this term by the purchaser.

WHAT IS THE GOLDEN THREAD UNDERLYING THESE CASES?

51. It may be that the unstated golden thread is that Notices to Perform are only valid in morphing intermediate terms into essential terms (and here I use "essential "in the sense of the *Tramway's decision*), if the obligation is one that needs to be done in order to get to completion e.g.:

--proffering a form of conveyance / assurance/ transfer: these were the facts in *Louinder's* case;

--answering requisitions;

--building the home for the purchaser to occupy before completion: *Collingridge v Sontor.*

On this approach, the term under consideration must *not* be one that is minor; it must be one of some substance; ie one where the promisee would not have entered into the contract unless assured of, at the least, "*substantial performance."*

Instinctively, it seems wrong that any term, no matter how unrelated to reaching to completion/ settlement by the "date for completion", can be morphed into an "essential" term in the *Tramways* sense.

Maybe the approach of a court would be to focus on the amount of time given in the notice, and ask whether the time given is reasonable, having regard to a conspectus of factors e.g. past non-performance; and the nature of executory

obligations; and whether the intermediate term not being strictly honoured has the potentiality to be a road block to completion.

There is a line in Carter, Peden & Tollhurst, *Contract Law in Australia,* 5th ed., p 717 which says, by reference to *Louinder HC* (1982) that any type of breach, *in theory at least*, gives rise to a right to serve a notice to perform.

Those learned authors say at p 718 [30-64], that the notice does not serve to convert what is a non-essential term, into an essential term (citing *Neeta v Epping*). Rather, it merely provides evidence of fundamental breach, being repudiation.

Consider how this impacts on the Standard Form**, and which clause/s.**

~ THANK YOU ~

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