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Conveyancing Law: The Notice To Complete

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Notice to Complete

Put very simply a notice to complete is a document that is sent by one party to a contract to another, asking that actions already agreed between the two parties be made within a specific time frame. In conveyancing terms this generally means that one party to the sale and purchase of property asks the other party within the sale and purchase to complete the sale whether it be through paying monies owed on the property, or by fronting up with a title, lease document or similar item that had been agreed to previously by both parties, thereby creating a contract. Usually the notice to complete is used by one party to “hurry along” the other party in a contract situation where no specific time line for completion has been made.

An example of a case where a notice to complete was considered within the context of terminating a contract is *Laurinda Pty v Capalaba Park Centre*¹. In this case Laurinda wanted to lease a building from the Capalaba Park Centre. The two parties came to an agreement over the lease and Laurinda took up residence of the building in December 1985. At the time Capalaba Park Centre was not in a position to offer a lease document for registration because they were in the process of changing their own internal financial structure and so the Laurinda Company occupied the building for 9 –

¹ *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623

10 months without a registered lease. However after this time Laurinda wanted to sell their business as a going concern within the leased building and so sent a notice to complete to the Capalaba Park Centre in August 1986 giving the company 14 days to come up with a registered lease document. When Capalaba Park Centre did not come up with the lease, Laurinda terminated the lease agreement.

When this case came up for appeal in the High Court of Australia a number of issues were discussed. Firstly it was held that there was an agreement between the two parties that Laurinda would take the lease of a shop within the Capalaba Park Centre. Clause 6.1 of the contract indicated that the Centre would grant and Laurinda would accept a lease of six years, but at the time no dates for commencement and termination were included in the deed, although the commencement date of the lease was deemed 1st December 1985, which was when Laurinda took up occupancy in the building. Clause 6.2 of the agreement indicated that the dates for commencement and termination, a plan of the building (required by the Registrar of Titles), the yearly and monthly rental amounts and any other formal matters required by the Registrar of Titles would be completed either at the date of the commencement of the lease, or as soon as is possible after that time.

One of the issues with the notice to complete raised in this case was the concept of mutuality. Judges Dean and Dawson held that if a notice to complete contained the threat of termination of the contract then the notice could not be considered mutual because only one party could terminate the contract under the specifications of the notice. There was also consideration about the deadline specified within the notice that

was given as 14 days. This was considered inadequate time to furnish Laurinda with a registered title, but taken in context of the nine months that had already elapsed before Laurinda sent the notice to complete to the centre; this time frame was considered fair².

Rossiter³ considered the issue of timeliness in relation to relief in equity in sales. He mentioned many cases where a time stipulation was part of a contractual agreement, and that in cases where a specific hour was specified that the “innocent” party was within their rights to withdraw from the contract even if the time span was delayed by as little as five or ten minutes⁴. In one Australian case, *Smilie Pty Ltd v Bruce*⁵, settlement was to be completed by 3 pm on a given day, with the notification made by a notice to complete. Settlement for the deal was arranged for 2pm at the law Society rooms. At 2.45 the mortgagee left to attend another appointment and at 2.55pm the purchaser representative arrived, not to complete the agreement but to deliver a letter of other complaints raised by the purchasers solicitor. The vendor’s solicitor said at 3.05pm that they refused to go through with the settlement, and although the purchaser did try to get the deal to go through later, Bryson J held that there was no need for the vendor to go through with the deal because the letter delivered at 2.55 pm could be taken as indication that the purchaser was not prepared to go through with the deal as it had been agreed previously.

There are some instances where time is an important element of a business transaction, but in land deals this consideration, down to the last minute, is not as

² Ibid, Gaudron J

³ Rossiter, C. J. The Essence of Punctuality: Termination of contracts for the sale of land for late performance and relief in equity, *University of NSW Law Journal*, [2001] UNSWLJ 10

⁴ See *Union Eagle Ltd v Golden Achievement Ltd* [1997] AC 514; [1997] 2 All ER 215

⁵ *Smilie Pty Ltd v Bruce* (1998) 8 BPR 15893 (Bryson J); aff’d (1998) 9 BPR 16273 (Court of Appeal)

pressing, and therefore there is some leeway in the law regarding a notice to complete. Already noted above in *Laurinda* although the notice to complete did not give the Centre adequate time to arrange a registered title (within 14 days) because of the nine-month time span prior to the notice to complete, *Laurinda* was able to terminate the contract without being responsible for damages or compensation. This highlights the need for the notice to complete to be fair on both parties.

In *Louinder v Leis*⁶ the notice to complete was judged unenforceable because the terms of the original contract did not specify a time span for the contract to be completed and therefore it was impossible to determine if an “unreasonable delay” had occurred. Gibbs CJ and Mason J noted that “ a mere failure to comply with a non-essential stipulation as to time justified the giving of a notice having the effect of making time of the essence of performance of that stipulation even though failure to comply did not involve an unreasonable delay”⁷. Gibbs CJ and Mason J also noted that although a breach of a non-essential term of a contract not relating to the completion of a contract could justify the giving of a notice of completion, that generally if time is a non-essential element then a notice of completion could not be given to try and force the contract⁸.

*Ng v Chong*⁹ raised other issues concerning a notice to complete. In this case a contract was formed between the vendor and two purchasers. A third purchaser was added to the contract later through a deed of novation. The vendor claimed that he

⁶ *Louinder V Leis* (1982) 149 CLR 509

⁷ *Ibid*, (iii)

⁸ *Ibid* (iv); see also *Neeta (Epping) Pty Ltd v Phillips* (1974) 131 CLR 286 at 299; *Raineri v Miles* [1980] 2 WLR 847; *McNally v Waitzer* [1981] 1 NSWLR, 294, approved.

⁹ *Ng v Chong* [2005] NSWSC 270

terminated the contract in a legitimate manner, after a notice to complete was given by him to the purchasers and was not complied with. The case came to court because the vendor only served the notice to complete on the first two purchasers, not the third and then decided to terminate the contract despite the purchasers (either the two or three of them) being keen to reach a settlement and who had the money in place to make settlement. Although much of the case concerned the deed of novation, the notice to complete was also considered. The concept of the deed of novation, under law, meant that a new contract had to be completed for the settlement to take place, and if the deed was valid (which it appeared to be) then the notice to complete could not have been given because the time for settlement under the new contract had not been determined at the time, nor could it be considered “delayed”. This decision would be different however if the deed of novation was in fact a deed of variation.

The objections to the notice to complete were identified as being the vendor not entitled to give notice when he did; that the notice only gave 13 as opposed to 14 days to complete; that the notice was only addressed to two of the three purchasers and that the notice to complete did not specify a place for completion¹⁰. Case law considered at the time included the fact that the delay in time was not unreasonable¹¹; that there was no breach of contract necessitating a notice to complete to be given; that there was only 13 days given in the notice to complete instead of the 14¹² and the fact that notices to

¹⁰ Ibid, 28 (1-4)

¹¹ *Michael Realty Pty Ltd v Carr* [1977] 1 NSWLR 553 per Glass JA at 566

¹² See *Sindel v Georgiou* (1984) 154 CLR 661

complete as legal documents do not necessarily have to be complied with or given with the same formality that other documents may require¹³.

There are established legal and case precedents that support the use of a notice to complete to facilitate a more speedy contractual transaction in cases where time is an important element of the contract. A brief discussion of the usage of a notice to complete has been outlined above, but there are a number of other cases that could have been included in this discussion. In summarizing the concept of a notice to complete it may be wise to state at this time that there can be valid reasons why such a notice can be used as means of terminating a contract, but that there are a number of case specific instances that can negate the impact of the notice to complete, and in terms of conveyance at least, such a notice should not be issued with the assumption that a legal termination of contract will automatically follow if the notice is not complied with.

¹³ See *Hankey v Clavering* [1942] 2 KB 326; *contra Mannai Investment co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 at 767-768, 775-776, 780 and 782.

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UNSWLJ 10

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