

The importance of precision in contract drafting

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In *Namrood v Ebadeh-Ahvazi*,¹ the appellant purchaser appealed the primary judge's decision that the respondent vendor was entitled to retain the \$146,000 deposit paid by the purchaser under a contract for the sale of property. The key issue was the vendor's alleged failure to comply with orders made by the local council which were the subject of obligations under the contract, and the purchaser's subsequent refusal to complete the contract after the belated performance of such obligations, on the basis that sufficient evidence of compliance had not been produced.

The vendor commenced proceedings, seeking declaratory relief as to the validity of his termination of the contract and his entitlement to retain the forfeited deposit (given the purchaser's refusal to complete upon service of a notice to complete), and the primary judge found in favour of the vendor. The Court of Appeal's decision, handed down by Leeming and Payne JJA and Sackville AJA on 8 December 2017, upheld the primary judge's findings and dismissed the appeal with costs.

Timeline:

- *6 February 2015*: Fairfield City Council (the Council) issued a prevention notice ordering the vendor to remove soil placed on the property without approval. Over the coming months, the Council issued further orders (although these were not material to the dispute).
- *16 May 2015*: The auction was held. The purchaser attended the auction and was the successful bidder at \$1.46 million. The contract was executed, and the completion date on the front page was "35 days after the date of this contract (clause 15)", being 20 June 2015. The contract contained the following:

— a special condition providing that:²

Prior to completion, the vendor agrees to carry out the following at the vendor's expense:

- 1 Remove the load of soil currently lying on the property;

2 Carry out a Survey substantiating that the levels of the land have been restored.

3 Provide copies of receipts for the disposal of land fill/waste associated with the removal of the soil.

— standard form cl 11.1 providing that "*normally, the vendor must by completion comply with a work order made on or before the contract date*".

- *17 June 2015*: The purchaser's solicitor informed the vendor's solicitor of the Council notices (the vendor's solicitor having erroneously advised that there were no outstanding notifications, claims or requirements by a statutory or local authority) and requested confirmation of the works and supporting documentation of the Council's satisfaction.
- *19 June 2015*: The vendor's solicitor advised that the vendor will comply with the special condition.
- *20 June 2015*: Completion did not take place.
- *25 June 2015*: Following works on the property, the vendor's solicitor informed the purchaser's solicitor that the vendor has "complied with the conditions under the contract and requires the purchaser to settle on Monday 29 June 2015".³ The purchaser's solicitor disputed the vendor's readiness to complete because:
 - evidence of the Council's satisfaction had not been provided
 - the survey provided did not confirm the restoration of land levels
 - a letter from "2Men & A Bobcat" did not satisfy the requirement to provide copies of receipts

The purchaser's solicitor enclosed a notice to perform, asserting that the time for completion has expired and the vendor has failed to provide evidence of compliance with the orders and to carry out the required works.

- *29 June 2015*: The vendor's solicitor informed the purchaser's solicitor that the vendor has completed the works and was obtaining confirmation

of the Council's satisfaction, and proposed that settlement should occur on 1 July 2015, with \$13,000 being held back in trust until such confirmation from the Council.

- *17 July 2015*: Throughout July, the purchaser's and vendor's solicitors engaged in ongoing correspondence disputing fulfilment of the contract terms, and amidst this, the vendor's solicitor sent an email attaching a letter from a surveyor which confirms that the land's current levels are generally consistent with the original survey, despite some discrepancies.
- *29 July 2015*: The purchaser's solicitor sent a notice of termination citing both the failure to comply with the notice to perform dated 25 June 2015, and the vendor's issuance of a notice to complete despite having unperformed obligations. The vendor's solicitor responded that:
 - the notice of termination was a repudiation and an anticipatory breach of the contract
 - the vendor was able to complete the contract
 - the vendor was prepared to provide an opportunity to withdraw the notice of termination and proceed to completion on 10 August 2015.
- *22 September 2015*: The vendor's solicitor informed the purchaser's solicitor that the vendor has complied and attached both a letter from the Council confirming the same and a notice to complete on 9 October 2015.
- *9 October 2015*: Completion did not take place.
- *19 October 2015*: The vendor's solicitor served a notice of termination citing the purchaser's failure to complete in accordance with the notice to complete dated 22 September 2015. The vendor sold the property to a third party for \$1.5 million.
- *23 October 2015*: The vendor commenced proceedings.

Key issues in the court's decision

Issue 1: interpretation of "completion"

This issue turned on whether the use of the term "completion" in the special condition and cl 11.1 required the obligations contained therein to be fulfilled by the completion date specified on the front page of the contract or prior to transfer of title to the purchaser. The primary judge distinguished between the use of "completion date" and "completion", the former referring to the date for completion provided by the contract and the latter referring to the date that title is conveyed.

The purchaser contended that cl 11.1 and the special condition were pre-completion obligations required for settlement and therefore had to be fulfilled before the completion date of 20 June 2015. This was rejected by Leeming JA, because there was no risk to a purchaser in connection with the Council's notices and orders prior to settlement and as such:

... it did not matter from the purchaser's point of view, whether the various works and provision of documents required by Council took place on 20 June 2015 or some time later, so long as it took place before settlement.⁴

The Court of Appeal dismissed concerns that a vendor could use this construction to unilaterally delay completion for their benefit since such a vendor would be exposed to civil and criminal liability while noncompliance persists and specific performance would be available to such a purchaser any time after the date provided for completion by the contract (so long as that purchaser is ready, willing and able to complete).

Further, the purchaser contended that cl 11.1 and the special condition were conditions precedent to settlement and that he was entitled to terminate the contract upon those conditions not being fulfilled within a reasonable time. The Court of Appeal also rejected this argument because the contract expressly specified that the obligations were to be fulfilled prior to completion (the transfer of title) and not within a reasonable time of the date that the contract provided for completion. As such, despite the required works being completed after 20 June 2015, the vendor had nonetheless satisfied his obligations under the contract.

Issue 2: repudiation by the vendor

The Court of Appeal upheld the primary judge's finding that the vendor had not repudiated the contract. The vendor's solicitor's statements — that \$13,000 be held back pending the Council's confirmation of compliance, and that such confirmation was not required by the contract for completion to occur — insisted on the performance of the contract (that is, the opposite of repudiation). In accordance with cited authority, this would have been the case even if the contract's requirements had been incorrectly construed and the vendor had not satisfied his obligations.

Issue 3: termination by the vendor

The purchaser argued that the vendor's notice of termination was invalid because the notice to complete dated 22 September that preceded it was served at the same time as evidence from the Council that the order had been complied with and the purchaser did not have time to consider it. This argument was rejected on the basis that (as was held by the primary judge) the

vendor's obligations under cl 11.1 and the special condition were not due when the notice to complete was served, but rather upon completion and the vendor merely had to be willing to and capable of fulfilling these obligations when the notice to complete was served. With the notice to complete being validly served, the subsequent notice of termination was also valid.

Issue 4: Australian Consumer Law

The Court of Appeal agreed with the primary judge's finding that the advertisement of the auction by "mortgagee sale" was misleading and deceptive and this likely attracted the purchaser to the auction; however, it did not induce the purchaser to bid or enter into the contract, because he was told prior to the auction that the vendor was the manager of a project housing builder, and therefore he did not hold any belief that the auction was by mortgagee sale at the relevant time.

Issue 5: discretion to return a deposit

The purchaser argued that it would be unjust and inequitable for the vendor to retain the deposit for a number of reasons, including:

- the vendor's making of misleading or incorrect statements (the advertisement of a "mortgagee sale" and an incorrect answer to a requisition regarding the existence of the Council orders)
- that the purchaser had acted reasonably to protect his interests
- that it was arguable that the Council orders were never fulfilled
- the short time within which the vendor was able to resell for an additional \$40,000

The primary judge had found that misinformation carried "little weight" in these circumstances because it did not cause the purchaser to bid or enter into the contract and discrepancies had been quickly discovered following execution. Arguments relating to the protection of the purchaser's interest and potential noncompliance were contrary to the court's finding that Council compliance was not a prerequisite to completion, and that there was evidence of compliance, and so were not relevant. Finally, the additional profit of \$40,000 was not considered undue. As such, the Court of Appeal held that the primary judge was correct not to exercise discretionary power provided for under s 55(2A) of the Conveyancing Act 1919 (NSW), and refuse to return the purchaser's deposit.

Key takeaways

This case offers some important lessons regarding the importance of clear drafting and the considered exercise of termination rights.

The phrases "the completion date" and "by completion" are not interchangeable and their inconsistent use creates uncertainty. Practitioners should be aware of the distinction and apply the terms consistently and logically when drafting special conditions to supplement a standard form contract for sale. It is crucial that a contract is clear about any due date by which obligations must be fulfilled. When determining what due date is appropriate, it is worth reflecting on the Court of Appeal's comments about the time at which a purchaser will be exposed to risk in connection with an obligation and remedies that will be available to them if they progress to completion without that obligation being fulfilled. In determining disputes, courts will closely review the exact terms used in the relevant contract.

Purchasers should be wary of unreasonably refusing settlement of a contract with reference to unperformed contractual obligations unless such obligations have in fact become due for performance as preconditions to settlement. In this case, the purchaser's incorrect interpretation as to the due date to undertake the required works was a costly error. By purporting repudiation too soon, the purchaser's actions were without cause and cost him the deposit of \$146,000. Further, the decision is a reminder that while the court has a broad power to return a deposit, such power is also discretionary and the court will only be compelled to do so in light of unjust or inequitable circumstances. While the circumstances need not be "special",⁵ a degree of severity appears to be necessary, and such standard which was not satisfied in the facts of this case.



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Footnotes

1. *Namrood v Ebadeh-Ahvazi* [2017] NSWCA 310; BC201710693.
2. Above, at [9]–[10].
3. Above n 1, at [17].
4. Above n 1, at [36].
5. Above n 1, at [64].