

## A vendor's right to serve a notice to complete

*Carrapetta v Rado*<sup>1</sup> a decision of the Supreme Court of New South Wales Court of Appeal, is a reminder of the law in Australia on a vendor's right to serve a notice to complete.<sup>2</sup>

It continues to be usual conveyancing practice in Tasmania that time for completion is not an essential term of a contract for the sale of real estate.<sup>3</sup> Failure of a purchaser to complete by the agreed date under the contract, whilst a breach of contract, does not of itself entitle a Vendor to terminate the contract.

Under the terms of the Standard Form Contract for Sale of Real Estate, after the completion date, either party may serve on the other a 14 day notice to complete making time for completion essential. If such a notice is valid, at the expiry of the time stipulated in such a notice without completion, the party not in default may be justified in terminating the contract for a fundamental breach.<sup>4</sup> So when may a vendor rely on a notice to complete to terminate a contract?

According to the Court of Appeal, case law makes it plain that a "party seeking to make time of the essence must be an "innocent" party who is not "in default" or "in breach" and is "ready, willing and able" to proceed to completion in accordance with the contract."<sup>5</sup> Before a legal practitioner or conveyancer acting for a vendor serves a notice to complete under the Standard Form Contract in Tasmania, as in New South Wales, they must first be satisfied that the vendor is not in default of his or her contractual obligations and is ready, willing and able to proceed to completion.<sup>6</sup> That is, the vendor is not in default in respect of things which up until then should have been done. But a vendor may "give notice to complete prior to performing all those other things that [the vendor] has to perform in order to complete the contract".<sup>7</sup> Vacating the property where vacant possession is a term of the contract is perhaps one of "those other things" at the time of service of a notice to complete.

### Important

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<sup>1</sup> *Carrapetta v Rado* [2012] NSWCA 202

<sup>2</sup> *Ibid* [22] – [27].

<sup>3</sup> The Standard Form Contract for Sale of Real Estate in Tasmania (2012).

<sup>4</sup> Clause 17.1.

<sup>5</sup> *Carrapetta v Rado* *Supra* per Barrett JA at [27] with whom Beazley JA and Hoeben JA agreed.

<sup>6</sup> *Neeta (Epping) Pty Limited v Phillips* [1974] HCA 18; (1974-1975) 131 CLR 286; *McNally and Ors v Waitzer* (1981) 1 NSWLR 294; *Australia and New Zealand Banking Group Ltd v Robert John Burgess and Lois Joy Burgess* [1994] TASSC 137 (30 September 1994)

<sup>7</sup> *McNally and Ors v Waitzer* (1981) 1 NSWLR 294 per Hutley JA at 303.