

THE LAW REFORM COMMISSION
AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ
(LRC 40-1991)

REPORT
ON
LAND LAW AND CONVEYANCING LAW:
(4) SERVICE OF COMPLETION NOTICES

IRELAND
The Law Reform Commission
Ardilaun Centre, 111 St Stephen's Green, Dublin 2

© Copyright
First Published

The Law Reform Commission 1991
December 1991

THE LAW REFORM COMMISSION

The Law Reform Commission was established by section 3 of the *Law Reform Commission Act, 1975* on 20th October, 1975. It is an independent body consisting of a President and four other members appointed by the Government.

The Commissioners at present are:

The Hon Mr. Justice Ronan Keane, Judge of the High Court, President;
 John F. Buckley, Esq., B.A., LL.B., Solicitor;
 William R. Duncan, Esq., M.A., F.T.C.D., Barrister-at-Law, Associate Professor of Law, University of Dublin;
 Ms. Maureen Gaffney, B.A., M.A., (Univ. of Chicago), Senior Psychologist, Eastern Health Board; Research Associate, University of Dublin;
 Simon P. O'Leary, Esq., B.A., Barrister-at-Law.

The Commission's programme of law reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both House of the Oireachtas on 4th January, 1977. The Commission has formulated and submitted to the Taoiseach or the Attorney General thirty-eight Reports containing proposals for the reform of the law. It has also published eleven Working Papers, five Consultation Papers and Annual Reports. Details will be found on pp 28-31.

William Binchy, Esq., B.A., B.C.L., LL.M., Barrister-at-law, is Research Counsellor to the Commission.

Ms. Suzanne Egan, B.C.L., LL.M., Barrister-at-Law, Ms. Cliona Kimber, LL.B., LL.M., Ms. Julianne O'Leary, B.A., LL.B., Barrister-at-Law and Mr. Oisín Quinn, B.C.L., LL.M., are Research Assistants.

Further information from:

The Secretary,
 The Law Reform Commission,
 Ardilaun Centre,
 111 St. Stephen's Green,
 Dublin 2.
 Telephone: 715699.
 Fax No: 715316.

NOTE

This Report was submitted on 20th December 1991 to the Attorney General, Mr. Harold A. Whelehan, S.C., under section 4(2)(c) of the Law Reform Commission Act, 1975. It embodies the results of an examination of and research in relation to the law relating to The Service of Completion Notices which was carried out by the Commission at the request of the former Attorney General, Mr John Rogers, S.C., together with the proposals for reform which the Commission were requested to formulate.

While these proposals are being considered in the relevant Government Departments the Attorney General has requested the Commission to make them available to the public, in the form of this Report, at this stage so as to enable informed comments or suggestions to be made by persons or bodies with special knowledge of the subject.

CONTENTS	PAGES
CHAPTER 1: INTRODUCTION	1- 2
CHAPTER 2: PRESENT LAW	3-12
Vacant Possession	3
Remedies	5
Time	6
Completion Notices	8
Completion Notices: The Duty to Give Vacant Possession	10
<i>Viscount Securities Ltd v Kennedy</i>	10
CHAPTER 3: THE PROBLEM - THE CASE FOR REFORM	13-24
<i>I: Legal Authorities</i>	13
(i) Irish Authority	13
(ii) English Authority	16
(a) The Distinction Between Substantive and Administrative Matters	19
(b) Performance of the Vendor's Duties to Date	20
(c) Definition of Vacant Possession	21
(d) Matters which Entitle the Purchaser to Rescind	21
<i>II: Practical Application of Viscount Securities Ltd v Kennedy</i>	23
Discharge of Money Charges	23
CHAPTER 4: PROPOSALS FOR REFORM	25-27
Summary	27
Recommendation	27
LIST OF COMMISSION PUBLICATIONS	28-31

CHAPTER 1

Introduction

1. On the 6th March, 1987, the then Attorney General, in pursuance of section 4(2)(c) of the *Law Reform Commission Act, 1975*, requested the Commission to formulate proposals for the reform of the law in a number of areas. Among the topics was:

"Conveyancing law and practice in areas where this could lead to savings for house purchasers".

2. The Commission recognised that a comprehensive review of land law and conveyancing law was not feasible within the limited resources available to them at the time, and accordingly established a Working Group which was asked to identify a number of areas in which reform of land law or conveyancing law could be brought about more easily. The Working Group was asked to concentrate on areas where it could recommend changes in the law which would remove anomalies or redundant provisions.
3. The members of the Working Group appointed were Mr John F. Buckley, Commissioner (Convener), Miss Justice Mella Carroll, Professor J.C. Brady, Mr George Brady, SC, Ms Mary Laffoy, SC, Mr Ernest B. Farrell, Mr Rory McEntee, Solicitors. Miss Justice Carroll resigned from the Working Group in November 1988 following her appointment as a judge of the Court of the International Labour Organisation.
4. The Commission has already published two reports in the areas of the land law and conveyancing law. The first contained General Proposals - LRC 30-1989, and second dealt with Enduring Powers of Attorney - LRC 31-1989.
5. Ms Mary Laffoy, SC and Mr Rory McEntee resigned from the Working Group following the publication of the first two Reports and Ms Mary Geraldine Miller and Ms Deborah Wheeler, Barristers-at-Law, and Mr Patrick Fagan and Mr Tom O'Connor, Solicitors, joined the Working Group.

The Working Group has continued to concentrate on matters which occur in a significant number of conveyancing transactions which give rise to unreasonable delays in the completion of those transactions and

it has also identified a number of aspects of statute law which are in need of reform.

6. The Commission would like to record its deep appreciation of the contribution which the members of the Working Group have made to the Commission's examination of this difficult and technical area of the law. Their knowledge and experience were invaluable in enabling the Commission to formulate practical proposals for alterations in the law. As usual, however, the Commission emphasises that it alone is responsible for the contents of this Report.
7. The position of parties in the intermediate stage in the conveyancing process between contract and completion has given rise to considerable controversy in Ireland. This controversy not only manifests itself in the area of the passing of risk between contract and completion, on which topic the Commission is publishing a contemporaneous Report but also on the entitlement of a Vendor or Purchaser to serve a notice requiring the other party to complete the sale. This topic has recently been reviewed by the Supreme Court in the case of *Viscount Securities Ltd v Kennedy*.
8. In view of the considerable complexities in this area, together with the comparative materials which need to be referred to, the Commission decided to publish a separate Report on the area of the Passing of Risk from Vendor to Purchaser.
9. In view of the importance of the topic, and its complexities, the Commission decided to publish a separate Report on the Service of Completion Notices.

CHAPTER 2: THE PRESENT LAW

Vacant Possession

Parties to a contract for the sale of land frequently stipulate in their contract that the vendor shall give vacant possession of the property upon completion of the conveyance.¹ This is reflected in the Incorporated Law Society of Ireland's General Conditions of Sale, 1988 Edition, Condition 21 of which states:

"Subject to any condition to the contrary in the Particulars or in the Conditions or implied by the nature of the transaction, the Purchaser shall be entitled to vacant possession of the subject property on completion of the sale".

In the absence of any such express provision, there is an implied condition that vacant possession will be given on completion.² At that time, the purchaser will be entitled to be put into actual, as opposed to constructive, possession.³ This implied condition must, however, be consistent with the express terms of the contract and the conditions of sale,⁴ and it may be rebutted by implication.⁵ The matter is essentially a determination of the intention of the parties as revealed by the contract itself.

As a term of the contract for the sale of land, the requirement that a vendor give vacant possession stands independently of any other duty resting on the vendor:

"When a vendor contracts to sell land with vacant possession, he contracts not merely to give the purchaser the *right* to vacant possession, but also the *power in fact* to exercise that right. This obligation is not conterminous with the vendor's duties to make title free from encumbrances and to take reasonable care of the property between contract and conveyance, but it is a separate and distinct

1 Regarding vacant possession see generally: Wylie, *Irish Conveyancing Law*, para 10.078; JT Farrand, *Emmet on Title*, 19th ed, paras 6.011-18; JT Farrand, *Contract and Conveyance*, 4th ed, pp74-78; G Battersby, *Williams on Title*, 4th ed, p101.

2 *Bank of Ireland v Waldron* [1944] IR 303; *Cook v Taylor* [1942] Ch 349.

3 *Hughes v Jones* (1861) De GF & J 307, cited in Farrand, *Emmet on Title*, *op cit*, at para 6.011.

4 *Cook v Taylor* [1942] Ch 349.

5 *Lake v Dean* (1860) 28 Beav 607; *North v Loomes* [1919] 1 Ch 370.

undertaking".⁶

A condition that the vendor shall give vacant possession of the property is generally regarded as meaning, firstly, that the purchaser will acquire possession free from any form of occupation or from any claim to a right to possession by the vendor or by a third party. The vendor is accordingly obliged to terminate any subsisting leases or tenancies of the property.⁷ Furthermore, he must ensure that the premises are free from occupation by trespassers⁸ or squatters.⁹

Secondly, the term implies that the property will be given free from any physical impediment.¹⁰ In the English case of *Cumberland Consolidated Holdings Ltd v Ireland*¹¹ it was held that a vendor who had left a considerable quantity of rubbish in the cellars of the premises sold had failed to give vacant possession. Lord Greene stated:

"Subject to the rule *de minimis* a vendor who leaves property of his own on the premises on completion cannot, in our opinion, be said to give vacant possession, since by doing so he is claiming a right to use the premises for his own purposes, namely, as a place of deposit for his own goods inconsistent with the right which the purchaser has on completion to undisturbed enjoyment

Occupation by a person having no claim of right prevents the giving of 'vacant possession', and it is the duty of the vendor to eject such a person before completion The reason for this, it appears to us, is that the right to actual unimpeded physical enjoyment is comprised in the right to vacant possession. We cannot see why the existence of a physical impediment to such enjoyment to which a purchaser does not expressly or impliedly consent to submit should stand in a different position to an impediment caused by the presence of a trespasser".¹²

This decision was approved and followed in *Norwich Union Life Insurance Society v Preston*¹³ where it was held that failure to remove a substantial amount of furniture from the premises prevented the giving of vacant possession. Similarly, in Ireland, it was decided in the case of *Bank of Ireland v Waldron*¹⁴ that vacant possession was not given when lands which were the subject of a contract of sale were damaged due to trespass by a large number of cattle and sheep and some horses, in the time between the signing of the contract and the taking up of possession by the purchaser. In *Viscount Securities Ltd v Kennedy*,¹⁵ the existence of large amounts of spoil on the lands defeated the requirement of vacant possession.

The English courts have in recent years displayed a willingness to extend the

6 C Harpum, "Vacant Possession - Chamaeleon or Chimaera?" [1988] Conv 400-409 at p329.

7 *Hughes v Jones* (1861) 3 De GF & T 307; *Edwards v Wickwar* (1865) LR 1 Eq 68; *Royal Bristol Building Society v Bomash* [1887] 35 Ch D 390; *Irish Land Commission v Maquay* [1891] 28 LR Ir 342; *Re Postmaster-General and Colgan's Contract* [1906] 1 IR 287.

8 *United Yeast Co. Ltd v Cameo Investments Ltd* (1977) 111 ILTR 13.

9 *Dickie v White* (1901) 1 NIJR 128.

10 See Farrand, *Emmet on Title*, at para 6.012.

11 [1946] KB 264.

12 *Id* at p287.

13 [1957] 1 WLR 813.

14 [1944] IR 303.

15 Supreme Court, unreported 6th May, 1986?

meaning of "vacant possession" beyond mere occupation, third party right to occupy, and physical impediment. In *Topsell Ltd v Galley Properties Ltd*,¹⁶ Templeman J took the view that the meaning of the words "vacant possession" can vary from context to context.¹⁷ In that case a house was sold subject to a first floor tenancy, but with vacant possession of the ground floor. A notice under the *Housing Act 1961* prevented occupation of the house by more than one household. It was held that the purchaser could not be put into vacant possession since he could not occupy and enjoy the property, even though it was physically usable.

The requirement that a vendor give vacant possession of the property on completion is supported by his general duty to take reasonable care of the property, for the benefit of the purchaser, in the period between contract and completion.¹⁸ It does not matter that the impediment which prevents the giving of vacant possession is not caused by the vendor, or that the vendor may be unaware of the presence of that impediment.¹⁹ Regarding physical damage to property, Overend J stated in *Bank of Ireland v Waldron*:

"When it is proved to the satisfaction of the Court that the property sold has been damaged between the date of sale and the time when the purchaser gets possession, the onus is shifted to the vendor, whose duty it was to preserve the property, and it is for him to establish, if he can, what portion of the damage pre-existed the sale and what portion could not have been prevented by the exercise of due care and forethought on his part".²⁰

An express provision in a contract requiring vacant possession will be strictly construed. In England there is authority to suggest that there will be a breach of such a provision even if the impediment which prevents the giving of vacant possession is apparent or known before the contract.²¹ It has been suggested, however, that an implied condition as to vacant possession will not arise where the property is not in fact vacant when inspected by the purchaser.²²

Remedies

A number of options are available to the purchaser should the vendor fail to give vacant possession of the property on completion:

- (a) Having breached a term of the contract, the vendor cannot enforce that contract. The purchaser may resist efforts by the vendor to obtain specific performance of the contract, and may seek a return of his deposit.²³

16 [1979] 1 WLR 446. In this regard, the judgment of Wheeler, QC in *Sheik v O'Connor* [1987] 2 EGLR 269 by adopting a restrictive definition of vacant possession seems somewhat out of step with this trend in the English line of authority. See Harpum, *op cit*.

17 [1979] 1 WLR 446; [1979] 2 All ER 388 at p390.

18 *Clarke v Ramuz* [1891] 2 QB 456; *Re Dwyer* [1901] 1 IR 165.

19 *Viscount Securities v Kennedy Ltd*, Supreme Court, unreported 6th May, 1986.

20 [1944] IR 303, at p308.

21 *Hissett v Reading Roofing Co Ltd* [1969] 1 WLR 1757.

22 Farrand argues, in *Contract and Conveyance*, *op cit*, at p174, that this may be inferred from the decision of Simonds J in *Cook v Taylor* [1942] Ch 349.

23 *Id*.

- (b) The purchaser may complete the conveyance and subsequently sue the vendor to recover damages for breach of contract.²⁴
- (c) The purchaser may seek specific performance of the contract and an abatement of the purchase price.²⁵

Time

As we have seen, the law demands that under contracts for the sale of land, the purchaser is entitled to vacant possession of the property *on completion*. A question therefore arises as to exactly when completion takes place, or in circumstances where completion does not take place, at what point one party may justifiably conclude that completion should have occurred and accordingly seek remedies against the other party.

Where the contract is silent as to time, the law allows for a reasonable time within which completion of the sale may be secured. Roxburgh J stated in *Johnson v Humphrey*:

"It is, of course, well understood that, if a contract fixes no date for completion, the law implies that completion is to take place within a reasonable time. What is a reasonable time has to be measured by the legal business which has to be performed in connection with the investigation of the title and the preparation of the necessary conveyancing documents".²⁶

It is usual, however, for the parties to a contract for the sale of land to make provision in their contract for a specific date on or before which the sale is to be completed. Traditionally, law and equity had conflicting estimates of the merit of such time clauses. The common law took the view that time is an essential ingredient in an agreement for the sale of land. Accordingly, at common law, failure by one party to complete on or before the appointed day would amount to a fundamental breach, entitling the other party to treat it as a repudiation of the contract. Equity, on the other hand, did not regard time as being of the essence of the contract and was prepared to allow the parties a reasonable time, after the specified time period, within which to complete the sale.

The parties may, at the outset, expressly provide that time shall be of the essence of their contract.²⁷ Furthermore, even in the absence of an express provision to this effect, time may be deemed by implication to be crucial. For example, the nature of the subject property may be such that any delay in completion will affect business interests or the value of the property, so that a definite deadline for closing the sale is essential.²⁸ In such instances, where time is of the essence of the contract, the date specified for completion is final and failure to meet it will immediately expose the delaying party to liability for breach of contract. Furthermore, it is mutually binding: in *United Yeast Company Ltd v Cameo Investments Ltd*²⁹ Butler J, in the High Court, rejected the vendors' claim that a contractual stipulation that time was of the essence of the contract in respect of the closing date was

²⁴ *Beard v Porter* [1948] 1 KB 321.

²⁵ *Topfell Ltd v Galley Properties Ltd* [1979] 1 WLR 446.

²⁶ [1946] 1 All ER 460, at p463.

²⁷ *United Yeast Co Ltd v Cameo Investments Ltd* (1977) 111 ILTR 13; see Wylie, Irish Conveyancing Law, at pp536-37.

²⁸ *Guerin v Heffernan* [1925] IR 57; *Lock v Bell* [1931] 1 Ch 35.

²⁹ (1977) 111 ILTR 13.

not binding on them since it had been inserted in the contract at their insistence.

It is possible for the parties either expressly or impliedly to waive a condition as to time, so that time effectively ceases to be of the essence.³⁰ However, there is authority for the view that where such waiver amounts to an extension of the closing date, for a definite period agreed by the parties, then time may become of the essence in respect of the further period specified for completion.³¹

The equitable approach to time has prevailed³² so that as a general rule, time is not of the essence of contracts for the sale of land. The completion date is normally regarded as a target date. In the absence of specific reference to the importance of that date, completion within a reasonable time, or within a short time after the completion date is sufficient.

It follows that delay will not in itself be regarded as amounting to a breach of contract. It remains at all times open to the party facing delay to seek specific performance of the contract since that remedy relates to the equitable duty to perform the contract and does not depend upon breach of contract.³³ However, the aggrieved party is precluded from taking any other form of action until the delay in completing the sale is such that it may be regarded as unreasonable. Provided that the delaying party completes the sale within a reasonable time after the closing date, the other party may not invoke remedies such as rescission of the contract. The question of reasonableness depends upon the circumstances of the individual case.³⁴

A stricter approach to the question of time appears to be favoured by the English courts. Caselaw indicates that failure to complete on the date specified constitutes a breach of contract and entitles the other party to sue for damages, provided that the delay is not due to difficulties of title.³⁵ As Lord Edmund-Davies explained in *Raineri v Miles*³⁶:

"The fact that time had not been declared to be of the essence does not mean that the express date for completion could be supplanted by the court's treating it as a mere 'target' date and, in effect, enabling the defaulting party to insert into the contractual provision some such words as '... or within a reasonable time thereafter'".³⁷

Pearce and Tomkin have taken the view that this should be the preferred

30 *Lock v Bell* [1931] 1 Ch 35; *Rooney v Byrne* [1933] IR 609; *Healy Ballsbridge Ltd v Alliance Property Corporation Ltd* [1974] IR 441.

31 *Lock v Bell* [1931] 1 Ch 35; Wylie, *op cit*, para 12.24. Kenny J does not appear to favour this view in *Healy Ballsbridge Ltd v Alliance Property Corporation Ltd* [1974] IR 441.

32 *Judicature (Ireland) Act, 1877*, s 28(7). "Stipulations in contracts as to time or otherwise which would not before the passing of this Act have been deemed to be or to have become of the essence of such contracts in a Court of Equity shall receive in all courts the same construction and effect as they would have heretofore received in Equity." In *Maye v Merriman*, High Court, unreported, 13th February 1980, Hamilton J stated at p19: "Though the plaintiffs' claim herein is a claim at common law for damages for breach of contract and is not a claim for equitable relief, I must approach this case involving as it does a contract for the sale of land and the stipulation as to time in the contract on the same basis as if it were a claim for equitable relief."

33 Farrand, *Emmet on Title*, *op cit*, at para 7.044.

34 *MacBryde v Weekes* (1856) 22 Beav 533.

35 CT Emery, "The Date Fixed for Completion", [1978] *Conv* 144.

36 [1980] 2 All ER 145.

37 *Id* at p155.

approach in Ireland:

"Even in the everyday case, either purchaser or vendor may be substantially prejudiced by a failure to complete on the day fixed. This might be a reason for treating time as being of the essence (Lord Edmund-Davies thought that this could have been suggested in *Raineri v Miles* because of the consequences of delay in a chain transaction); but, in any case, it is wrong to permit a man who has undertaken to complete on a specific date to fail to do so with complete immunity from liability for foreseeable damage".³⁸

The authors point to the decision of the Supreme Court in *Hynes Ltd v Independent Newspapers Ltd*³⁹ as evidencing support for the *Raineri v Miles* approach.

The practice of conveyances in Ireland does however seem to be to treat the completion date as a target date, unless time is of the essence of the contract.

Completion Notices

Where time is not of the essence of the contract and the closing date has passed without completion of the formalities of sale, one of the options available to the party facing delay is service of a completion notice. This mechanism enables the aggrieved party to establish a clear cut-off date beyond which a delay in closing the sale may be regarded as amounting to a breach of contract. Hence it is often said that upon service of a notice to complete, time becomes of the essence of the contract.

"The notice operates as evidence that the promisee considers that a reasonable time for performance has elapsed by the date of the notice and as evidence of the date by which the promisee now considers it reasonable for the contractual obligation to be performed. The promisor is put on notice of these matters. It is only in this sense that time is made of the essence of a contract in which it was previously non-essential. The promisee is really saying, "Unless you perform by such-and-such a date, I shall treat your failure as a repudiation of the contract". The court may still find that the notice stipulating a date for performance was given prematurely, and/or that the date fixed for performance was unreasonably soon in all the circumstances."⁴⁰

In the absence of any contractual stipulations regarding completion notices, a number of general requirements must be fulfilled in order to serve a valid notice to complete. The law leans against allowing one party unilaterally to renegotiate a contract with the result that safeguards exist to prevent the aggrieved party from imposing unjust stipulations as to time.

- (a) The delaying party must be in default to such an extent that at the time of service of the notice the innocent party would be entitled to

38 "Damages for Delay in the Completion of a Contract for the Sale of Land" (1981) vol XVI *Irish Jurist* 28 at p33.

39 [1980] IR 204.

40 *United Scientific Holdings Ltd v Burnley BC* [1977] 2 All ER 62, per Lord Simon of Glaisdale, at p85.

rescind the contract.⁴¹ In other words, it is not sufficient merely for the closing date to have elapsed. The delay must be such that it may be regarded as unreasonable before an aggrieved party is justified in serving a notice to complete.⁴²

- (b) Secondly, the period of notice afforded to the delaying party must itself be reasonable, having regard to the circumstances of the case, including the progress of the sale to date.⁴³

The uncertainties inherent in determining what amounts to a reasonable time are such that it is now common practice for parties specifically to cater for completion notices in their contract of sale.⁴⁴ Under Condition 40 of the Incorporated Law Society's General Conditions of Sale, 1988 Edition, where time is not of the essence either party may serve a completion notice on the contractual date for completion or on any subsequent date. The notice gives the party on whom it is served twenty-eight days in which to complete the sale. In respect of this period time is of the essence but without prejudice to any intermediate right of either party to rescission. It follows that failure to complete within the twenty-eight days amounts to a material breach.

- (c) At common law, a third precondition to service of a completion notice is that the server of the notice must himself be "able, ready and willing to proceed to completion."⁴⁵ Default or delay by the other party must be the sole factor preventing completion of the sale. Failure on the part of the server in this regard will be a bar to a claim for specific performance. Furthermore, it will render the notice invalid and entitle the party on whom it is served to rescind upon its expiry.⁴⁶ The law is strict in its insistence that a completion notice binds the server to the same extent as it binds the person on whom it is served.⁴⁷

The exact degree of readiness which is required of the party giving notice does not appear to have been clearly defined. Nevertheless, it is generally recognised that the server should have performed his contractual obligations so that the formalities of closing are all that remain. For example, it is well established that where the vendor is serving notice to complete, he must have established a good title.⁴⁸

⁴¹ *Re Barr's Contract* [1956] Ch 551, per Danckwerts J, at p556.
⁴² *Hopkins v Geoghegan* [1931] IR 135; *Healy Ballsbridge Ltd v Alliance Property Corporation Ltd* [1974] IR 441. See A Sydenham, "Unreasonable Delay - Something of a Long-Stop on the Failure of a Notice to Complete?" [1980] Conv 19-26. *Behzad v Shaftesbury Hotels Ltd* [1991] 2 AER 477.
⁴³ *MacBryde v Weekes* (1856) 22 Beav 533; *Smith v Hamilton* [1951] Ch 174; *Re Barr's Contract* [1956] Ch 551; see Wylie, *op cit*, at para 12.16.
⁴⁴ It has been recognised in England that use of the Law Society's general condition regarding completion notices removes all question of reasonableness since time automatically becomes of the essence of the contract: *Cumberland Court (Brighton) Ltd v Taylor* [1964] Ch 29, per Ungood Thomas J.
⁴⁵ *Re Barr's Contract* [1956] Ch 551, per Danckwerts J, at p556.
⁴⁶ *United Yeast Co Ltd v Cameo Investments Ltd* (1977) 111 ILTR 13; *Finkelkraut v Monohan* [1949] 2 All ER 234; *Quadrangle Development & Construction Co Ltd v Jenner* [1974] 1 WLR 68.
⁴⁷ *Id*, *Oakdown Ltd v Bernstein & Co* (1984) 49 P & CR 282.
⁴⁸ *Healy Ballsbridge Ltd v Alliance Property Corporation Ltd* (1974) IR 441; *Re Stone & Saville's Contract* [1963] 1 WLR 103.

Completion Notices: The Duty to Give Vacant Possession

In the context of the vendor's duty to give vacant possession the position seems to be less clear. Does the requirement that a vendor be able, ready and willing to complete before giving notice imply that he must have given vacant possession? In other words, is it necessary that the premises be in actual vacant possession when notice to complete is served?

On a practical level, the answer would seem logically to be in the negative. Nevertheless, in light of the Supreme Court decision in *Viscount Securities Ltd v Kennedy*,⁴⁹ it seems that the giving of vacant possession is now a precondition to service.

Viscount Securities Ltd v Kennedy

The case centred on the sale of two premises, concerning which the validity of a completion notice served by the vendors on the purchaser was called into question. Clause 28 of the contract, which was in the Incorporated Law Society's General Conditions of Sale, 1978 Edition, provided in part:

"Save where the Special Conditions provide that time shall be of the essence of the Contract in respect of the closing date the following provisions shall apply:-

- (1) If the sale be not completed on or before the closing date, either party may on that date or at any time thereafter (unless the Contract shall first have been rescinded or become void) give to the other party notice in writing to complete the sale in accordance with this condition, but such notice shall be effective only if the party giving it shall then either be able, ready and willing to complete the sale or is not so ready by reason of the default or misconduct of the other party.
- (2) Upon service of such notice the party upon whom it has been served shall complete the sale within twenty eight days after the date of such service (excluding the day of service) and in respect of such period time shall be of the essence of the contract (but without prejudice to any intermediate right of rescission by either party).
- (3) If the Purchaser does not comply with such notice within the said period (or within any extension thereof which the Vendor may permit) he shall be deemed to have failed to comply with these Conditions in a material respect and the provisions of Clause 29 hereof shall apply accordingly".

Clause 29 of the contract stated that the purchaser's deposit should be absolutely forfeited should he fail in any material respect to comply with any of the conditions.

The purchaser failed to complete within the twenty-eight day period. He contended that the completion notice was not a valid notice, since at the time when the notice was served, the vendors were not then able, ready and willing to complete the sale. Firstly, they were not in a position to give vacant possession due to large amounts of spoil on the lands, and secondly, they were not able to make title to the lands.

⁴⁹ Unreported, 6th May, 1986, decision of Walsh J, Griffin and McCarthy JJ.

Clause 7 of the contract expressly provided that the purchaser should be entitled to vacant possession on completion. On the date on which the completion notice was served and for some weeks previous to that date, there was a large quantity of spoil on the lands. It had been placed there, unknown to the vendor's solicitors, by Dublin County Council in the course of construction of a dual carriageway. The spoil had been removed in full, ten days after the completion notice was served, and some twenty four hours after the vendors' solicitor learned of its existence.

The Supreme Court held that the completion notice was not valid. On a strict construction of the relevant clauses of the contract, the vendors had to be able, ready and willing to complete as of the date of service of the completion notice. On the facts of the case the vendors were unable to do so since the existence of the spoil on the lands prevented them from giving vacant possession of the property on the date of service of the notice and for ten days thereafter.

Walsh J stated:

"The effect of the service of the completion notice was to make time the essence of the contract. The question therefore is whether at the date of the service of the notice as distinct from the date of the expiration, the vendors were in a position to make title and to deliver vacant possession of the premises contracted to be sold."⁵⁰

.... On the date of the issue of the completion notice the vendors were not in a position to give vacant possession because of the presence of the spoil upon the land. The fact that the spoil was removed before the date fixed for completion does not in my view alter the matter, so far as the notice is concerned. Therefore the notice was not valid and was therefore not effective to make time the essence of the contract. If the notice had been issued after the removal of the spoil in so far as this point is concerned it would have been within the power of the vendors in invoking Clause 28 of the Conditions of Sale to make time the essence of the contract. Therefore I am of the opinion that the purchaser was not in default for not complying with the date for completion set out in that notice".⁵¹

Similarly Griffin J concluded:

"Under the contract for sale time was not of the essence of the contract unless made so by notice in writing in pursuance of Clause 28. By the express terms of that clause, the notice should be effective *only if the party giving it should then* be able, ready and willing to complete the sale. It is quite clear therefore, from the wording of that clause, that the vendors must be able to complete the sale at the date of the giving of the notice. That clause is in standard form"⁵²

I would agree that under such a clause as is in use in this case not only should the vendor be able, ready and willing to complete the sale on the date of the notice but that he should continue to be so able, ready and willing to perform his obligations at any time within the

⁵⁰ *Id* at p13.

⁵¹ *Id* at pp15-16.

⁵² *Id* at p6.

twenty eight days limited by the notice".⁵³

McCarthy J agreed that the vendors were unable to complete the sale since the existence of spoil on the lands at the date of service of the notice prevented the giving of vacant possession. He noted:

"It may well be said that there is little reality to this objection; the spoil was removed within twenty four hours of the vendors' solicitor learning of its presence; the land was bought for development; the presence of the spoil mattered not a whit. Be it so, but that is not, in my view, to the point. "Then" means "then"; it does not mean "when asked" or "when the notice expires". Such is the plain meaning of the words; the point is utterly technical and without any real merit, but that is irrelevant... It may well be that there is no reality in the proposition that the purchaser was entitled, on receipt of the notice, to demand immediate completion but such a possibility remained and is the strict construction of the relevant clauses".⁵⁴

In light of their conclusions on the question of vacant possession, Griffin J and McCarthy J did not consider it necessary to respond to the second argument advanced by the purchasers, namely that the vendors were not able, ready and willing to complete the sale because they were not able to make title to the lands. Walsh J was of the opinion that on the evidence the vendors were at all times in a position to make title.⁵⁵

53 *Id* at p8.
54 *Id* at pp3-5.
55 *Id* at p16.

CHAPTER 3: THE PROBLEM - THE CASE FOR REFORM

The decision of the Supreme Court in *Viscount Securities Ltd v Kennedy* gives rise to difficulty at two levels. Firstly, the legal authority on which the judgment rests raises a number of questions. Secondly, the decision has far-reaching practical implications.

I LEGAL AUTHORITIES

(i) *Irish Authority*

The Supreme Court decision in *Viscount Securities Ltd v Kennedy* naturally embodies the current position of Irish law on the question of completion notices. Nevertheless, it breaks new ground in relation to the rule that a vendor must be able, ready and willing to complete the sale before he can serve a completion notice.

The Supreme Court did not actually define the meaning of "able, ready and willing". Rather than discuss the nature of the requirement itself, the decision centred on the rigidity with which the requirement is to be applied. However, by including vacant possession within its ambit, the Supreme Court interpreted the "able, ready and willing" requirement in a uniquely broad fashion. The decision, therefore, indirectly extends the meaning of the phrase.

A further question arises, in the context of contractual completion notices, as to the precise point in time at which a vendor must be able, ready and willing to complete. The Incorporated Law Society's General Conditions, 1978 and 1988 Editions, state that a completion notice will be effective "only if the party giving it shall *then* either be able, ready and willing to complete the sale or is not so able, ready or willing by reason of the default or misconduct of the other party". There is a need to consider the meaning of the word "then" in this context. The Supreme Court adopted a narrow and literal interpretation and concluded that a vendor must be able, ready and willing to complete at the date of service of the completion notice. But could the word "then", on a broader interpretation, refer to some time after the date of service? For example, could it refer to the date at which the notice expires or alternatively could it refer to some time in the interim at which the parties agree to proceed to completion?

In this respect, the decision of Costello J in *Dublin Laundry Co v Clarke*⁵⁶ is instructive. The case concerned undertakings to discharge encumbrances on property which was the subject of a contract of sale, in the context of service by the vendor, a company in liquidation, of a notice to complete. The purchaser, in defending an action for specific performance, claimed that the notice was invalid since the vendor did not have good marketable title at the time of service. Costello J rejected this argument and accepted the evidence of the plaintiff that upon realisation of the company's assets, there would be sufficient funds to discharge the encumbrances. He took the view that the fact that releases of the encumbrances were not available on the date of its expiration, did not render the completion notice invalid. Referring to *Viscount Securities Ltd v Kennedy*,⁵⁷ Costello J stated:

"I do not think that the Supreme Court's decision is to be construed as meaning that if a vendor has not got releases of incumbrances available on the date of the service of the completion notice but could have had them on the date of its expiration that the completion notice is invalid.

In my view the plaintiff in this case was able, ready and willing to complete the sale on the date of the completion notice".⁵⁸

As we have seen, a vacant possession requirement will generally be implied, if it is not expressly stipulated in the contract of sale. In the course of their decision in *Viscount Securities Ltd v Kennedy*, the Supreme Court appear to have proceeded on the assumption that the giving of vacant possession is vital to a vendor being able, ready and willing to complete a sale of land. It is implicit in the judgment that a vendor may not be considered able, ready and willing to complete until the subject property is vacant. The question of whether vacant possession should in fact be a prerequisite to the service of notice was not actually raised or discussed.

The plaintiff's argument that the vendors were not able, ready and willing to complete was in fact based on two grounds: firstly, that they could not give vacant possession of the subject property and secondly, that they had failed to show good title to the lands. Although the question of title is far more substantive than that of vacant possession, only Walsh J touched upon the argument concerning title. He took the view that on the evidence the vendors were at all times in a position to make title to the lands. However, he emphasised that in his opinion the inability to give possession of the area covered by the spoil was sufficient to invalidate the completion notice.

The individual judgments of the Supreme Court focus generally on the rules regarding completion notices and in particular on the principle that such notices are mutually binding. In determining the invalidity of this particular service of notice to complete, all three judges relied on *Healy Ballsbridge Limited v Alliance Property Corporation Limited*.⁵⁹ The contract for the sale of land in that case stipulated that time was of the essence of the contract. However, the parties were not ready to complete on the date set and the vendors agreed to postpone the completion date. They subsequently served a completion notice on the purchasers. When the sale was not completed

⁵⁶ (1988) ILRM 29.

⁵⁷ Supreme Court, unreported, 6th May 1986.

⁵⁸ (1988) ILRM 29 at p35. An appeal to the Supreme Court was filed but the case was settled before hearing.

⁵⁹ [1974] IR 441.

in the twenty one day period referred to in the notice, the vendors purported to rescind the contract.

The case came before Kenny J in the High Court. He took the view that as soon as the vendors had agreed to postpone the completion date, time ceased to be of the essence of the contract.⁶⁰ Furthermore, the completion notice was invalid, firstly, because the vendors had not shown good title when the notice was received by the purchasers, and secondly, because the purchasers had not been guilty of unreasonable delay.⁶¹

Griffin J also referred to the English case of *Quadrangle Development and Construction Co Ltd v Jenner*⁶² in which the Court of Appeal discussed the service of a notice to complete under a clause of the English National Conditions of Sale corresponding to Clause 28 of the contract in *Viscount Securities v Kennedy*. The purchasers who had served the notice, were themselves unable to complete within the twenty eight day period. They argued, however, that the notice was not binding on them since it only required the party on whom it was served to complete within the twenty eight days. It was held that the notice to complete bound both parties. Russell LJ stated:

"Under the language of the clause, the party giving the notice must be ready and willing at the time of giving the notice to fulfil his own outstanding obligations under the contract. I should have thought it not really difficult to infer that the same party must continue to be ready and willing at any time during the period to fulfil his part of the contract".⁶³

Buckley LJ similarly said:

"The notice is not described as a notice requiring completion of the obligations of the party to whom the notice is addressed under the contract, but a notice requiring completion of the contract. The condition specifically requires that at the time when the notice is given the giver of the notice shall be ready and willing to fulfil his outstanding obligations, and in my judgment the condition clearly proceeds upon the footing that the giver of the notice will be ready and willing to perform his obligations at any time within the twenty eight day limit within which the other party is bound to complete the contract".⁶⁴

Healy Ballsbridge Ltd v Alliance Property Corporation Ltd establishes that failure to show good title on the part of the vendor is a bar to service of a completion notice. It is also authority for the view that the "able, ready and willing" requirement arises at the time of service of the notice to complete and subsists for the duration of the notice period. *Quadrangle Development and Construction Co. Ltd v Jenner* establishes that the completion notice itself binds both parties equally. In neither case, however, was the question of a failure to give vacant possession at issue; in *Quadrangle Development*, the completion notice was served by the purchasers, while in *Healy Ballsbridge* the vendors' failure to show good title prevented them from

60 *Id* at p447.

61 *Id* at p448.

62 [1974] 1 WLR 68.

63 *Id* at p70.

64 *Id* at p72.

being able, ready and willing to complete the sale. There does not appear to have been another case in this jurisdiction in which the question of vacant possession in the context of completion notices has been discussed. Indeed, there seems little authority generally addressing the question of what is required of a vendor that he may be able, ready and willing to complete a sale.

(ii) English Authority

There is, however, English authority on the issue of what constitutes "able, ready and willing". For the most part, these cases deal with the showing of good title, a factor which the courts have consistently recognised is essential to a vendor being able, ready and willing to complete.

In *Cole v Rose and Another*,⁶⁵ the property in question was subject to three charges, only two of which were detailed by the vendor. Confirmation that the two charges would be discharged before completion was requested and received by the purchaser. The purchaser's solicitor later discovered the existence of the third charge and wrote to the vendors' solicitor for details. The purchaser was unable to raise the purchase money and the closing date passed without completion taking place. The vendors served a completion notice in which they stated that they were "ready and willing to complete the sale". Meanwhile, correspondence continued concerning the third charge. The purchaser failed to complete within the notice period, so the vendors purported to rescind the contract and forfeit the deposit. The purchaser brought an action claiming a return of the deposit, arguing *inter alia* that the completion notice was invalid since the vendors were not in fact ready and willing to complete the sale.

In the High Court, Mervyn Davies QC held in favour of the purchaser. The completion notice was not valid because at the time of service the vendors, contrary to the notice, were not ready to complete the sale since they were not prepared to undertake that the third charge would be discharged on completion:

"The vendors were not ready if their solicitor was not ready... We know now that the vendors' solicitor was ready in the sense that it was later confirmed that the entries did indeed relate to charges that he supposed that they did relate to. Nevertheless, the vendors' solicitor was certainly not prepared to complete until he had had that confirmation. If he was not prepared to complete for that reason then he was not ready within condition 19(2). Counsel for the vendors contended persuasively for the contrary view. He said that a vendor had not literally to be ready when serving a notice because many steps had to be taken after the service of the notice to put a vendor into complete readiness. Thus a completion statement may have to be prepared and agreed, or arrangements made for the discharge of mortgages, or the time and place of completion agreed. I agree with that approach. Nevertheless, the unreadiness of the vendors' solicitor was, as I see it, of a different character. What he had to do on 29th January was to satisfy himself on a matter of substance that he could go forward to complete. He was not merely in a position of having to set up the necessary administrative arrangements respecting completion".⁶⁶

⁶⁵ [1978] 3 All ER 1121.

⁶⁶ *Id.* at p1128.

The fact that the vendors' solicitor was, at a later stage, able to confirm that the charge would be discharged on completion was immaterial.

In *Clearbrook Property Holdings Ltd v Verrier*,⁶⁷ it was recognised that failure on the part of the vendor to show good title is a ground on which to challenge the validity of a completion notice. On the facts of that particular case, however, Templeman J could see "nothing triable in the argument that the vendor was not ready, able and willing to complete".⁶⁸

In *Re Stone and Saville's Contract*,⁶⁹ involving a contract for the sale of registered land, the existence of a covenant on the charges register restricting use of the property to use as a private dwelling-house and garden, was not known to the purchaser until after the contract was signed. The vendor failed to reply to a requisition on this point raised by the purchaser, and when the latter party failed to complete, the vendor served a completion notice. The Court of Appeal held that the notice was invalid since the vendor had not fulfilled his part of the bargain to date. In the words of Lord Denning, the vendor was "guilty of a breach going to the root of the contract because he was not, on the face of his documents, able to make a good title to this land".⁷⁰

*Pagebar Properties Ltd v Derby Investment Holdings Ltd*⁷¹ concerned the sale of freehold property subject to and with the benefit of certain disclosed leases and tenancies. However, the vendor failed to make known the existence of one of the tenancies to which the property was subject. He subsequently sought to serve notice to complete the sale. It was held that the completion notice was invalid since the vendor was himself in breach of an obligation which ought to have been performed by that date, namely the obligation to disclose all existing tenancies. Furthermore, the Court considered it immaterial that the breach did not have the effect of annulling the sale or that it did not entitle the purchaser to compensation.

The decision in *Pagebar* was later discussed in *Bechal and Another v Kitsford Holdings Ltd*.⁷² There the purchaser argued that the vendor was not able, ready and willing to complete the sale and accordingly not entitled to serve a completion notice on account of a material misdescription of the area of the property in the conditions of sale. Sir Nicholas Browne-Wilkinson VC concluded that the notice was valid since the matter at issue was merely part of the description of the property and not, as was the case in *Pagebar*, a matter of title:

"On the facts of this case, on 30 November 1987 when they served the notice to complete, could the vendors fulfil the contract they had entered into? In my judgment they plainly could. The area sold is merely part of the description of the property and not a matter which would have featured in any way in the conveyance. To have performed that contract they would have had to tender a conveyance of all the property...and if they did tender that, that would be a performance of their contract. If, contrary to the facts, someone had raised the question that there was a misdescription of its area, they might have been required to accept an abatement in the purchase

67 [1973] 3 All ER 614.

68 *Id.* at p616.

69 [1963] 1 All ER 353.

70 *Id.* at p355.

71 [1973] 1 All ER 65.

72 [1988] 3 All ER 985.

price referable to the reduction in the area stated. But in any event they were able, ready and willing to fulfil that contract".⁷³

In *Prosper Homes Ltd v Hambros Bank Executor*,⁷⁴ the validity of a completion notice was challenged on the ground that the vendors were not ready, able and willing to complete the sale when the notice was served because they were in breach of their fiduciary obligation to look after the subject property. Without informing the purchasers, the vendors had permitted a change in the lessee and user of part of the property. Browne-Wilkinson J, in the High Court, rejected this argument, firstly, on the facts of the case, and secondly, as a principle of law:

...the fact that a vendor may have failed in some respect to carry out his duty between contract and completion in looking after the property does not mean that he is unable or unwilling or unready to complete... If any damage has occurred in the interim the vendor would have to make it good in damages. It does not prevent a completion of the contract.⁷⁵

In *Naz v Raja*,⁷⁶ the vendor who served a notice to complete in accordance with the standard contractual term had not fulfilled his statutory duty to furnish the purchaser with an authority to inspect the register.⁷⁷ The Court of Appeal considered that notwithstanding this fact, the vendor was ready and willing to fulfil this outstanding obligation under the contract for the sale of land. Therefore, his failure to furnish the authority to inspect before serving notice did not in itself render the notice invalid.

*Horton v Kurzke*⁷⁸ appears to be the only authority which touches upon the question of vacant possession in the context of a vendor being able, ready and willing to complete a sale so as to be in a position to serve a valid completion notice. The case involved a contract for the sale of land with vacant possession. Between contract and completion, the purchaser became aware that a third party was claiming an agricultural grazing right tenancy over the property and that this claim had been submitted to arbitration. The purchaser then raised a question as to whether vacant possession could in fact be given. She refused to complete the sale pending the outcome of the arbitration and the vendor served a notice to complete. When the purchaser failed to comply with the notice, the vendor sought to rescind the contract and forfeit the deposit. The purchaser brought an action for specific performance and claimed an abatement should the grazing tenancy be upheld. No such tenancy was found to exist, and the sale was eventually completed. The parties could not agree, however, on the question of costs and the matter came before Goff J in the High Court. He stated:

"The plaintiff opened her case on the footing that in the circumstances the defendant was not at any material time able to give vacant possession. I doubt whether that is an entirely correct way of

73 *Id.* at p988. The judge referred to another decision of the High Court, in *McGrath v Shah* (1987) *The Times*, 22 October, in which it was held that a misrepresentation by the vendors as to the area of the property did not prevent them from being able, ready and willing to complete.

74 (1987) 39 P & CR 395.

75 *Id.* at p400.

76 Court of Appeal (Dillon LJ and Stocker LJ) unreported, 7th April, 1987; *The Times*, 11 April, 1987.

77 See *Land Registration Act, 1925* (UK), at s110(1).

78 [1971] 2 All ER 577.

approaching it. I think the real question is whether the defendant was able to prove her title. As, however, there is not sufficient evidence that the alleged claimant was in actual occupation, and the inability to give vacant possession, therefore, if there were such inability, was based on her right to possession, I think whether one looks at it as a question of vacant possession or title, one gets back to the same position and must apply the same test".⁷⁹

Having classified the issue as being one of title rather than vacant possession, he proceeded to deal with purely in those terms:

"It is a fundamental part of the vendor's obligations to prove his title, and he is not, in my judgment, able to complete when he is not in a position to discharge that duty. Now, when the defendant served the notice, and when it expired, the position was that there was an adverse claim to the property which was either the question of fact or of mixed law and fact, the facts being... within the knowledge of the defendant and the claimant and not that of the plaintiff. It seems to me, therefore, that it was the duty of the defendant to clear her title, either by a vendor and purchaser summons, or probably more aptly by awaiting the determination of the arbitration, but she chose to claim to be able to perform her contract without taking either of those courses, and in my judgment that was something that she was not entitled to do"⁸⁰

A number of approaches may be gleaned from the English experience revealed in these cases:

(a) *The Distinction between Substantive and Administrative Matters*

An approach involving the distinction between matters of substance and administration has been most frequently applied by the English courts. For example, in *Cole v Rose*, Mervyn Davies QC took the view that being ready to complete for the purposes of serving an effective completion notice means that the vendor must have fulfilled all matters of substance although he need not also have made the necessary administrative arrangements for completion.⁸¹ Similarly, in *Re Stone and Saville's Contract*,⁸² it was the substantive nature of the vendor's default which led the court to believe that he was not able, ready and willing to complete.

The merit of this approach may be more theoretical than practical, since its success depends to a large extent on the nature of the particular duty of the vendor which is under scrutiny. The distinction had been applied by the courts in cases where the duty falls somewhat obviously into one or other of the respective categories of substance and administrative formality. For example, in cases where the validity of a completion notice is challenged on the ground that the vendor has failed to deduce a good title, the courts have had no difficulty in classifying it clearly as a matter of substance. Arrangements regarding, the exact time and place for completion⁸³ and, furnishing the purchaser with authority to inspect the register⁸⁴ have been considered to be purely administrative matters.

⁷⁹ *Id* at p579.

⁸⁰ *Id* at pp579-80.

⁸¹ [1978] 3 All ER 1121, at p1128; see Farrand, *Emmet on Title*, at para 7.047.

⁸² [1963] 1 All ER 353.

⁸³ *Cole v Rose* [1978] 3 All ER 1121, per Mervyn Davies QC, (obiter dicta) at p1128.

⁸⁴ *Naz v Raja*, Court of Appeal, unreported, 7th April, 1987; *The Times*, 11th April, 1987.

There are a number of other matters, however, which are less obviously matters of either substance or administration and regarding which application of the distinction is problematic. Although Mervyn Davies QC described "arrangements made for the discharge of mortgages" as merely administrative,⁸⁵ Farrand has argued that mortgages are more a question of substance than administration in the context of a vendor being deemed ready to complete:

"Certainly a vendor in fact unable to discharge a mortgage, e.g. because of lack of funds, should be liable to pay substantial damages for breach of contract even though he might have been entitled as of right to make arrangements for a discharge.

.... According to the ordinary usage of words, a vendor seems hardly "ready" (or able) to complete a sale free from incumbrances so long as any mortgages actually remain undischarged. However, a purchaser who has assented to particular arrangements for discharge on completion may rightly be unable to rely on the vendor's unreadiness".⁸⁶

Vacant possession is another such grey area. Application of the distinction between matters of substance and administrative formality is not particularly helpful on two counts. Firstly, the definition of vacant possession is sufficiently broad that it may encompass both matters which are substantive and matters which may be viewed as purely administrative. For example, a third party claim may in essence be seen as a substantive question of title. In contrast, the removal of the vendor's possessions from the subject property may be regarded by the parties as a purely administrative issue. Both matters, however, relate to the vendor's duty to give vacant possession.

Secondly, the simple distinction between substantive and administrative factors fails to take the time-frame of the conveyancing process into account. It emphasises the value or significance of matters arising out of the contract but falls short of evaluating them in the context in which they have to be performed. The contract embodies a series of obligations to be discharged in the course of the conveyance; some of these duties are performed immediately after the signing of the contract, some will subsist for the duration of the period between contract and completion and others will be performed towards the end of that period. Unless excluded, it will be an express or implied term of the contract that the vendor give vacant possession on completion. In the normal course of a conveyance, certainly with regard to the removal of the vendor's possessions from the premises, it is a duty that perhaps will not be performed until immediately prior to completion.

(b) Performance of the Vendor's Duties to Date

A second approach, featuring in the caselaw, seeks to avoid problems concerning time by emphasising that the vendor must have performed all of his duties *to date* before serving a completion notice. The vendor must accordingly be in a position to move directly to completion, rather than being on the point of completion itself. In the words of Danckwerts J in *Re Barr's Contract*, the vendor must be able, ready and willing "to proceed to

⁸⁵ *Cole v Rose* [1978] 3 All ER 1121, per Mervyn Davies QC, at p1128.

⁸⁶ "Notices to Complete: Never Effective?" [1979] Conv 161-163, at p162.

completion".⁸⁷ This reasoning is sensible in that it recognises that in practice vendors leave the performance of certain duties, such as physically vacating the premises, to the last minute.

Coupled with this approach is another theme, namely, that the vendor should have confirmed, at the time of the commencement of the period of notice, that he will perform any outstanding administrative matters. For example, should the purchaser become aware of a charge on the property, he may raise a requisition on this point and the vendor may agree to discharge it. Once he has made this commitment, the vendor will be entitled to serve notice to complete, even though the charge itself may not in fact have been removed at the time of service.⁸⁸ It is sufficient that the vendor is able, ready and willing to fulfil his outstanding obligations.⁸⁹ The vendor has an obligation, in the context of showing good title, to discharge any charges which affect the property. In the context of vacant possession, it is the contractual term itself which is testament to the fact that the vendor is prepared to fulfil this outstanding obligation.

(c) Definition of Vacant Possession

Much of the difficulty surrounding the issue of vacant possession and completion notices stems from the fact that the term "vacant possession" extends to a number of matters. It may refer to actual occupation, third party right to occupy, and physical impediment. Furthermore, the courts have been prepared to interpret each of these categories broadly.

In response to this, Goff J in *Horton v Kurzke*⁹⁰ distinguished matters of vacant possession which involve questions of title and those which do not. The case involved a third party grazing tenancy, which on the one hand affected the vendor's title and on the other was an impediment to the giving of vacant possession. Goff J regarded the issue of title as paramount and as a result, the discussion proceeded in terms of title rather than vacant possession. This is helpful since issues of title are clearly fundamental and must be settled before a vendor is either ready to complete or ready to proceed to completion.

(d) Matters which Entitle the Purchaser to Rescind

This approach is similar to the distinction between matters of substance and administration. However, it focuses on the impact of failure to perform the duty in question, rather than on the nature of the duty itself. A distinction is drawn between a fundamental breach of duty such as will entitle the purchaser to rescind and a breach which will not prevent completion of the contract.⁹¹ Failure to show good title will automatically entitle the purchaser to rescind the contract. The contract itself is contingent on the vendor showing title. While it may be said that the equitable interest in the property passes to the purchaser on contract, entitlement to specific performance only arises when title is deduced. In contrast, failure to give vacant possession merely entitles the purchaser to sue for damages. It does not empower him to rescind the contract, although he may resist efforts by the vendor to obtain specific performance.

⁸⁷ [1965] Ch 551, at p556.

⁸⁸ *Cole v Rose* [1978] 3 All ER 1121.

⁸⁹ *Naz v Raja*, Court of Appeal, unreported, 7th April, 1987; *The Times*, 11th April, 1987.

⁹⁰ [1971] 2 All ER 577.

⁹¹ *Prosper Homes Ltd v Hambros Bank Executor* (1987) 39 P & CR 395.

These four approaches are really variations on a theme. As such they are not mutually exclusive and are often applied side by side. The English caselaw reveals that the process of determining whether a particular duty is essential to a vendor being able, ready and willing is by no means precise. Nevertheless, it is suggested that overall the English authorities lend support to the view that vacant possession is not generally a prerequisite to service of a completion notice. An exception to this would be cases involving a third party claim regarding rights over the property, which although a matter of vacant possession, would also be a matter of title and more appropriately considered under that heading.

II PRACTICAL APPLICATION OF *VISCOUNT SECURITIES LTD V KENNEDY*

Regarding its practical application, it is apparent that the ruling of the Supreme Court in *Viscount Securities Ltd v Kennedy* may lead to unsatisfactory results. The practical significance of the vacant possession requirement varies depending upon the nature of the subject property and the use to which it is put. Separate to the question of third party occupation or physical impediment, the extent to which premises are occupied or in use will greatly determine the steps which must be taken to secure vacant possession. *Viscount Securities Ltd v Kennedy* concerned the sale of land for the purposes of development. Generally, in sales of this nature, fulfilment of the duty to give vacant possession of the property will not greatly trouble the vendor since the property is not subject to any residential or business use immediately prior to completion of the sale.

Where the vendor is in occupation of the premises which are the subject matter of the sale, the giving of vacant possession is a more cumbersome task. The establishment of a definite date for completion is all the more crucial. The process is further complicated in cases involving chain transactions, namely where the vendor is selling his property in order to purchase another property and the two conveyances are running concurrently.

The conveyance of a residential property serves as a good example of the complexities to which the doctrine in *Viscount Securities Ltd v Kennedy* gives rise. A vendor has contracted to sell the residential property in which he normally resides. He has entered into a second contract in order to buy a larger residence and he intends to fund the purchase, for the most part, with the proceeds from the original sale. As vendor, he has performed all of his substantive duties under the contract, including deducing a good title. Aside from administrative formalities, all that remains for him to do is to vacate physically the premises upon completion. The purchaser, however, is dragging his feet. The closing date has passed and the delay can no longer be considered reasonable. The vendor wishes to serve a notice to complete the sale on the purchaser.

According to *Viscount Securities Ltd v Kennedy*, the vendor must have vacant possession of the property at the time of service of such notice. It follows that the vendor must have vacated the property, together with all of his goods and chattels by this time. Furthermore, the premises must remain vacant during the time-period set out in the notice. The vendor cannot complete the purchase of his new premises without the proceeds of the original sale. However, he is not entitled to such proceeds, or to take further action to recover them, until the expiry of the period of notice. Accordingly, he must secure independent accommodation for himself and any dependents, as well as storage facilities for his possessions, for the duration of that period. Nor is he entitled to recover the cost of such expense. Further difficulty may arise with regard to insuring property which is left vacant for such a period of time.

While the decision in *Viscount Securities v Kennedy* was based on the wording of the particular contract, a court might take a similar line in relation to a sale on an open contract.

Discharge of Money Charges

A vendor is required to convey the property freed and discharged from all

money charges unless there are special conditions in the contract which provides otherwise. The normal practice for these charges to be paid off on completion of the sale and for undertakings to be given for the subsequent furnishing of formal releases.

Following the *Viscount Securities* decision concern was expressed particularly having regard to the judgment of Griffin J that a vendor might be required to have discharged any money charges prior to giving a valid completion notice. This would have imposed hardship on the vendor since in many cases it would have required the vendor to raise funds probably by way of bridging finance, to enable the vendor to discharge the money charge. In a number of cases completion notices are served because there are grounds to suspect that the purchaser is not going to be complete. The discharge by a vendor of his money charges could have a particularly adverse affect on the vendor if the purchaser did not respond to the completion notice and the sale did not go ahead. A vendor might have considerable difficulty and would have inevitable expense in remortgaging the property and it is possible that the mortgage terms would not be as favourable as those of his original mortgage. We would propose that any amendment of the law in this area should extend to the release of charges as well as to the giving of vacant possession.

CHAPTER 4: PROPOSALS FOR REFORM

Service of a completion notice should not alter the rule regarding the giving of vacant possession, namely that it is incumbent on the vendor to give vacant possession of the property upon completion.

- (a) The obligation which rests on the vendor is to give vacant possession of the subject property *on completion*. The corresponding right which the purchaser enjoys may not be relied upon until that time. The purchaser is entitled to expect that upon entering the property at the close of the sale he will find it vacant, but he cannot insist that it will be left vacant before that time. The service of a valid completion notice makes time of the essence, so that the closing date becomes crucial. Yet this in itself should not affect the question of vacant possession. Whether time is of the essence of the contract or not, the requirement that a vendor give vacant possession on completion remains the same. For example, if time is of the essence of the contract, either expressly or impliedly, from the very outset, the purchaser's entitlement to vacant possession of the subject property will still arise upon completion. In this context, making time of the essence merely serves to clearly establish a final date by which that duty must be performed.
- (b) If a completion notice is a means whereby a party facing delay can remedy that grievance in a fair and reasonable manner, it seems illogical to penalise that party for taking such action. It is difficult to justify imposing additional burdens on a vendor who is simply seeking to bring the contract to a speedy conclusion. Certainly, where the purchaser serves a completion notice, he is not faced with any corresponding burden.
- (c) While the law is concerned with preventing parties from having unlimited licence unilaterally to impose contractual deadlines, the requirement to be in a position to give vacant possession at the time of service of a notice to complete would appear to be too stringent to be justified on this ground. The rules regulating the service of completion notices are sufficiently strict to ensure that the server has performed his duties to date and has due reason to serve the notice, so that the interests of the delaying party are adequately safeguarded. In the event of a vendor serving a completion notice and failing to give vacant possession of the property on completion, the purchaser will still be able to seek redress in the normal fashion. Indeed it is

likely that his action will be favourably entertained since caselaw clearly indicates that the courts do not look kindly upon a party who serves notice to complete and subsequently fails to close the sale on the appointed day.

- (d) The "able, ready and willing" requirement should in practical terms relate to fundamental contractual matters. The vendor should have performed all of his contractual duties to date and be in a position to carry out the formalities of closing and the physical transfer of the property. The issue is to a certain extent subjective in that the vendor must be satisfied that he will be able to fulfil his outstanding obligations. Difficulty arises in respect of factors which are not directly under the vendor's control, such as a tenant vacating the premises. In practice, the removal by the vendor of his possessions from the premises, which is required in order to give vacant possession, is frequently carried out close, if not immediately prior, to closing. It seems reasonable, therefore, that upon serving a notice to complete the vendor should be at all times ready to vacate, but not that he should have actually vacated the premises.
- (e) A legitimate concern may be made that a purchaser should not be entitled to come along and give short notice to a vendor who has served a completion notice that the purchaser wants to complete. In the event that the purchaser is ready to complete prior to the expiry of the notice, it would be desirable that the vendor be informed and afforded a reasonable time within which to vacate. In this context, we suggest that the purchaser be obliged to give ten days notice of his readiness to complete.
- (f) This proposal would also serve to address a further concern, namely, that the vendor might be able to use the completion notice as a delaying tactic which would automatically entitle him to extend the closing date for a full twenty-eight days. In this respect it should be clear that the purchaser is not only obliged but also entitled to give ten days notice of his readiness to complete during the period of the completion notice.
- (g) The view that the "able, ready and willing" requirement should not apply to the giving of vacant possession is now embodied in the Incorporated Law Society's General Conditions of Sale.⁹² Condition 40(g) provides:

The Vendor shall not be deemed to be other than able, ready and willing to complete for the purposes of this Condition:

... (ii) by reason of being unable, not ready or unwilling at the date of service of such notice to deliver vacant possession of the subject property provided that (where it is a term of the sale that vacant possession thereof be given) the Vendor is, upon being given reasonable advice of the other party's intention to close the sale on a date within the said period of twenty-eight days or any extension thereof pursuant to Condition 40(f), able, ready and willing to deliver vacant possession of the subject property on that date.

92 1988 Edition.

This approach circumvents the impractical consequences to which the *Viscount Securities Ltd v Kennedy* doctrine gives rise. The problem should not, however, be left to resolution by contractual provision, but rather should be settled at law.

Summary

The Commission is concerned that any proposed solution to the issue must, on the one hand, prevent the vendor from being able automatically to extend the closing date for the full twenty-eight days and, on the other, prevent the purchaser from being able to surprise the vendor by demanding completion shortly after the vendor has served notice to complete.

We propose that the service of a completion notice should not alter the vendor's duty to give vacant possession on actual completion. The requirement that a vendor be able, ready and willing to complete before serving a completion notice should not be regarded as extending to vacant possession *per se*. Should the matter which is an impediment to the giving of vacant possession also prevent the vendor from showing a good title, then in this latter respect it will prevent him from being able, ready and willing to complete and render invalid any completion notice served.

We further propose that, after serving a completion notice, the vendor should be required to complete, giving vacant possession, within ten days of being requested to do so by the purchaser.

Recommendation

A statutory provision should be enacted to provide that:

- (i) The vendor shall not be deemed to be other than able, ready and willing to complete at the date of service of a completion notice:
 - (a) by reason of being unable to deliver vacant possession at that date; or
 - (b) by reason of not having discharged any mortgage which may effect the property.
- (ii) Once a completion notice has been served by the vendor, he may be required to complete, giving vacant possession, and discharging any encumbrance, within ten days of being requested to do so by the purchaser.

