

## Rescission of contracts for the Sale of Land and the Practical Importance of Default Clauses

***You only get to know your contract when something goes wrong and you need to rely on it.***

This session looks at what common problems occur and the contractual clauses you need to deal with them. It includes:

- Delay in completion of the contract:
  - The importance of a 'time is of the essence' clause
  - What behavior waives the right to rely on such a clause?
  - How to reactivate this obligation
- The right to claim repudiation:
  - When can a party claim repudiation?
  - What are the risks of repudiation?
- Advantages of rescission over repudiation
- What are a party's rights if the other party defaults?
  - Retention of the deposit
  - Less than full deposit paid – can the rest be recovered?
  - Options for recovering for loss of bargain

### Introduction:

1. A leading Australian superior court judge has stated that “unless conveyancing is made much simpler it is no game for the amateur”<sup>1</sup>. If the object of simplification is ambitious, the new standard form of contract, and electronic conveyancing<sup>2</sup> may be steps in the right direction. However it is respectfully agreed that “conveyancing is ... no game for the amateur”.
2. Where a contract for the sale of land “goes off” by reason of one party's default or breach, the remedies which may be available to the innocent party will depend upon the right infringed and will include rescission, termination, damages or specific performance, as well as analogous remedies under the *Sale of Land Act 1986 (Vic)*(SLA) and the *Australian Consumer Law (ACL)*<sup>3</sup>. The party may need to invoke the remedy of rectification or in some circumstances other ancillary equitable remedies, such as an injunction.

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<sup>1</sup> SR Stevens Holdings Pty Ltd v Von Begensey (Unrep., NSWSC, 28.02.92 BC9202051 per Young J. I acknowledge the assistance of Chelsea Campagna, final year law student at Deakin University who carried out valuable research for this seminar paper

<sup>2</sup> by the Electronic Conveyancing National Law which has been adopted in Victoria, see *Property Law Update - Recent Developments in Sale of Land and Property Law*, by John Arthur, Barrister, 12 February, 2015 available at: <http://www.gordonandjackson.com.au/online-library>

<sup>3</sup> The *Australian Consumer Law (ACL)* is Sched 2 to the *Competition and Consumer Act 2010 (Cth.)* which is the reincarnation of the *Trade Practices Act 1974 (Cth.)*.

3. Probably the most common, and arguably, the most important right or remedy in the context of disputes relating to contracts for the sale of land is that of rescission or termination<sup>4</sup>. The remedy may be available to either party depending upon the circumstances. Often, the analysis of which party has this right is a “watershed” issue, which will determine what other rights or remedies flow; which of the parties is innocent, or in default; where the deposit should go and which party must pay damages. Often the question will simply be: by whose default did the contract “go off”?

#### **Delay in completion of the contract:**

4. Under the general law where time is of the essence (or an essential term<sup>5</sup>) of the contract, each party is bound to perform his or her obligations strictly in accordance with their terms and failure to do so will constitute a breach entitling the other party to rescind the contract at once<sup>6</sup>, at least providing the breach is of an interdependent obligation<sup>7</sup>, or of an essential term or a sufficiently serious breach of a non-essential term. Indeed, if a vendor validly rescinds a contract upon the failure of a purchaser to complete in accordance with an essential time stipulation, then, in the absence of fraud, accident or mistake or other conduct of the vendor which has in some significant respect caused or contributed to the breach of the essential time stipulation, the

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<sup>4</sup> In the law, the word “rescission” is used in a number of different senses:

- (a) termination of a contract for breach of condition or breach of an essential term;
- (b) termination of a contract on the basis of a contractual condition which confers such right;
- (c) termination of a contract by reason of vitiating factors in its formation which gives such a right at law or in equity;
- (d) termination or avoidance of a contract pursuant to a statute which confers such right;
- (e) termination following acceptance of repudiation; and
- (f) termination by mutual agreement or abandonment.

(largely drawn from the meanings of the term identified by Meagher Gummow & Lehane, *Equity Doctrines & Remedies*, 3rd Ed, para 2401-2405). The use of the word “rescission” in contexts other than (c) above has been criticized on the basis of the distinction between rescission, or more correctly, discharge, or termination of *future obligations* on the one hand, and rescission *ab initio* on the other. Likewise it is suggested that despite a different usage in the past, the word “repudiation” should be confined in its usage to where one party evinces an intention no longer to be bound by the contract: eg. *Bell v Scott* (1922) 30 CLR 387 at 392, Knox CJ; *Pips (Leisure Productions) Ltd v Walton* [1980] 43 P&CR 415; *Valoutin Pty Ltd & Harpur v Furst, Tremback & Official Trustee in Bankruptcy* (1998) 154 ALR 119 at 150-51; *Shevill v Builders Licensing Board* (1982) 149 CLR 620; 625-6 per Gibbs CJ. See for example, *Photo Production Ltd v Securicor Transport Ltd* [1980] AC 827 at 844; Halsbury’s Laws of Australia, para [110-9005]; Remedies, Kercher & Noone, 2nd Ed., LBC, pp. 257-258. In Victoria, in the General Conditions in the former Table A of the Seventh Schedule of the Transfer of Land Act 1958 (Vic) (“Table A”) (see clauses 6 and 7)(which were in the past incorporated into most land contracts in Victoria) the word “rescission” and its derivatives is used in the senses referred to in (a) and (b) above, as they are in the Sale of Land Act 1962 (SLA) (eg. ss. 9AE(1), 27(8)(b), 32(5)). Under the standard contract of sale of real estate prescribed under the *Estate Agents (Contracts) Regulations* 2008 (see para 3.1.2 and note 17) the word “rescission” and its derivatives are no longer used being replaced by the word “ends” and its derivatives (see, “Cooling-off period” notice to purchasers; GC5, 9.5, 12.2, 14.2, 28.2, 28.328.4, 28.5. References hereinafter to the conditions of contract in the new standard contract of sale of real estate will be referred to as “GC”).

<sup>5</sup> Voumard *The Sale of Land Victoria*, Wikrama, 4<sup>th</sup> Ed., p. 324

<sup>6</sup> *Ibid* Voumard at p. 327

<sup>7</sup> *Green v Sommerville* (1979) 141 CLR 594 at 609.

contract will be at an end and the purchaser will have no basis for seeking specific performance<sup>8</sup>.

### **Tanwar's case**

5. The famous illustration of this is *Tanwar's case*<sup>9</sup>. In that case the vendors (respondents) duly rescinded a contract for the sale of land when the purchaser failed to settle on the agreed date but obtained the required funds the next day.
  
6. The Court held that in order for the purchaser to obtain relief he or she had to establish that the vendor had engaged in *unconscientious conduct* in exercising his or her contractual right to terminate. Mere reliance on a legal right was insufficient. The "special heads of fraud, accident, mistake or surprise" identify in a broad sense the circumstances when it will be unconscientious for the vendor to rely on a contractual time stipulation. These special heads "do not disclose exhaustively the circumstances which merit this equitable intervention. But, at least where accident and mistake are not involved, *it will be necessary to point to the conduct of the vendor as having in some significant respect caused or contributed to the breach of the essential time stipulation*" (emphasis added). Fraud evidently includes equitable fraud<sup>10</sup> and would include a representation by the vendor which could found an estoppel. Accident will be confined to events which were unforeseeable. Mistake is related to accident. None of this could be shown by the purchaser, and the High Court held that the purchaser had no remedy. The High Court also pointed out that the purchaser's interest in land prior to completion "is commensurate with the availability of specific performance". Once a contract was terminated the relief available to the purchaser (if any) was specific performance and not relief against forfeiture. The latter remedy was unavailable to a purchaser as under a validly terminated contract he or she had no interest in land.

### **Time of the essence clauses and termination for breach of essential time stipulations**

7. Generally in contracts of the sale of land as well as many other contexts, there will be a term of the contract that time is 'of the essence' (or an essential term). Time will be made essential by agreement between the parties.

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<sup>8</sup> *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; (2003) 217 CLR 315; 201 ALR 359

<sup>9</sup> *Tanwar Enterprises Pty Ltd v Cauchi* [2003] HCA 57; (2003) 217 CLR 315; 201 ALR 359

<sup>10</sup> eg. innocent misrepresentation, breach of fiduciary duty

8. If time has not been made of the essence, or has ceased to be of the essence<sup>11</sup>, and a party's performance or lack of it – his or her delay - becomes an issue (where, for example, a party has been guilty of unreasonable delay in performance where no time for performance is fixed), the innocent party may serve a notice to complete on the defaulting party requiring performance to take place within a reasonable stipulated time<sup>12</sup>. That time stipulation will be treated as of the essence (for both parties)<sup>13</sup>, and if not complied with, will entitle the innocent party to rescind<sup>14</sup>.
9. In Victoria, time stipulations have for many years been made essential by Clause 5 of the now repealed Table A of the Seventh Schedule of the *Transfer of Land Act 1958* (Vic.) (subject to the notice to remedy provision in Clauses 5 and 6)<sup>15</sup>. The position is similar since the introduction of the new standard contract of sale of real estate which is Forms 1 and 2 in the Schedule to the *Estate Agents (Contracts) Regulations 2008*<sup>16</sup>. While time is made of the essence of the contract (GC16.1), the right to rescind, or bring the contract to an end, is subject to giving a written default notice (GC 27.1) which specifies certain matters (GC 27.2 and 28.2)<sup>17</sup>. If time has ceased to be of the essence, the party will first need to serve a notice making time of the essence and then serve a rescission, or default notice, and if not complied with, will end the contract<sup>18</sup>.
10. A failure by the purchaser to pay the balance of the price on the agreed date for settlement, where time is of the essence of the contract, will constitute a breach going to the root of the contract. Payment on the date named in the contract is

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<sup>11</sup> Time may cease to be of the essence where a party waives the benefit of the provision that time is of the essence. See *ibid*, Voumard at pp. 335-6

<sup>12</sup> *Ibid* Voumard at p. 331

<sup>13</sup> see *Fekala Pty Ltd v Castle Constructions Pty Ltd* [2002] NSWCA 297

<sup>14</sup> *Ibid*, Voumard at p. 331 and see *Fekala Pty Ltd v Castle Constructions Pty Ltd* [2002] NSWCA 297

<sup>15</sup> The Seventh Schedule to the *Transfer of Land Act 1958* (Vic) was repealed by the Land Legislation Amendment Act 2009, No. 80/2009, s. 71.

<sup>16</sup> In the second reading speech to the Land Legislation Amendment Bill, Mr Batchelor, Minister for Community Development, 2 September 2009, Assembly, p. 2983 stated "the bill repeals .. table A of the seventh schedule, which prescribe general conditions of sale. In 2008 the Estate Agents (Contracts) Regulations 1997 were reviewed, creating a new standard contract of sale of real estate. In developing the new contract, the principle that contracting parties should have all the terms and conditions of the agreement before them when the contract is created was applied. The new contract replaces the table A conditions altogether. However, many of the conditions of sale contained in the standard contract have been derived from table A and modernised for contemporary usage. The new contract has been adopted as the industry standard, so the outdated conditions in table A are now redundant". In relation to the new form of contract, see *Fast and friendly: The 2008 contract of sale of land* by Russell Cocks, David Lloyd, Murray McCutcheon (2008) 82(10) LJ, p. 40; *Property: Contract of sale tweaked* by Russell Cocks, Jan/Feb 2012 86(1/2) LJ, p.84

<sup>17</sup> Similar to what clauses 5 and 6 of Table A formerly required

<sup>18</sup> Voumard at p. 331

regarded as an essential or fundamental term of the contract<sup>19</sup>. Such default or breach will confer on the vendor the right to rescind at once<sup>20</sup> subject to the terms of the contract, and specifically in Victoria, the provisions of GC 27 and 28<sup>21</sup> being complied with, or unless from the purchaser's conduct there can be inferred a repudiation.

### **In cases of repudiation no default notice is required**

11. It is clear that a vendor in Victoria, as well as other Australian jurisdictions faced with a default by the other party, an innocent party is not confined to the remedy under the standard contract of sale of real estate. The party may also exercise his or her rights under the general law. Where the party elects to bring the contract to an end because it has been repudiated by the purchaser, it is not necessary for him or her to give a default notice as required by the standard contract of sale of real estate<sup>22</sup>.
  
12. If the purchaser's failure to pay the balance of the price, together with any other relevant words and conduct by that party, sufficiently shows an intention *no longer to be bound by the contract*, the vendor may simply accept the repudiation, thus immediately putting an end to the contract (without the need for serving a rescission or default notice)<sup>23</sup>. However, if the purchaser has simply failed to pay the balance of the price without more, then it is suggested that a vendor will need to ground its rescission on breach of condition rather than repudiation, and in order to rescind in these circumstances, it will first be necessary to serve a notice to complete<sup>24</sup>. If it is more advantageous for the vendor to terminate by acceptance of repudiation, it will usually be sensible for the vendor to serve a notice to complete. This will assist him or her to demonstrate, by reference to the other party's non-compliance with the notice, that the other party has repudiated his obligations under the contract, thus entitling him or her to rescind<sup>25</sup>.

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<sup>19</sup> *Thornton v Basset* [1975] VR 407 at 419

<sup>20</sup> *ibid*, *Holland v Wiltshire* at p. 418 per Kitto J

<sup>21</sup> previously Clauses 5 and 6 of the former Table A

<sup>22</sup> *Walter v Cooper* [1967] VR 583; *Nund v McWaters* [1982] VR 575 at 589; *Galafassi v Kelly* [2014] VSCA 190 at [96]

–[110]

<sup>23</sup> under Clauses 5 and 6 of Table A or GC27 and 28

<sup>24</sup> as required by Clauses 5 and 6 (and GC27 and 28); *Sibbles v Highfern* (1987) 76 ALR 13 at 22

<sup>25</sup> *Taylor v Raglan Developments Pty Ltd* [1981] 2 NSWLR 117 at 131

13. It should be emphasised that if it is decided to rescind or terminate, the right must be validly exercised – clearly and without equivocation and in proper form.

### **The importance of a ‘time is of the essence’ clause**

14. If time is not of the essence the party can only terminate if the other party is guilty of protracted delay in delivering performance from which the court can draw an inference of repudiation<sup>26</sup>. However a tender of performance within a reasonable time after the date for completion will preclude the other side from terminating<sup>27</sup>.

### **What behaviour waives the right to rely on such a clause?**

17. Time may cease to be of the essence where a party by words or conduct waives the benefit of a provision to that effect. According to *Voumard*, any unequivocal act indicating an intention to forgo the right to rescind will constitute a waiver<sup>28</sup>. While Young, Croft and Smith in “*On Equity*”<sup>29</sup> state that: ““Waiver” has been defined as an intentional act, with knowledge, by which a party abandons or renounces a right or benefit”. Waiver requires a deliberate act, but like election does not require an intention to being about the act’s consequences, but merely that the conduct from which waiver may be inferred is deliberate<sup>30</sup>. Waiver may occur where a vendor has allowed the purchaser to occupy the property for an extended period after settlement date without paying the balance of the purchase price but subject to paying rent. If the vendor then serves a rescission notice, without serving a notice to complete which again makes time of the essence, then the notice will be ineffectual<sup>31</sup>. It may also occur where negotiations for completion of the contract occur after the time for completion, and purchase money is accepted after the settlement date<sup>32</sup>, giving an extension of time for paying the balance after default has been made,<sup>33</sup> making an arrangement to settle after a right of rescission has occurred<sup>34</sup>. However a mere extension of time will not in general constitute a waiver of the benefit of an

<sup>26</sup> *Principles of Land Contracts and Options in Australia*, C Rossiter, Butterworths, 2003 at pp. 218-219; *Voumard* at pp. 327-8

<sup>27</sup> *Ibid*, *Voumard* citing inter alia *Bull v Gaul* [1950] VLR 377 at 381

<sup>28</sup> *Ibid*, *Voumard* at p. 335-6; see also *Green v Sommerville* (1979) 141 CLR 594 per Barwick CJ at 600

<sup>29</sup> “*On Equity*”, Young, Croft and Smith, Lawbook Co, 2009 at p. 832

<sup>30</sup> *ibid*, “*On Equity*”

<sup>31</sup> *Green v Sommerville* (1979) 141 CLR 594

<sup>32</sup> *Voumard* at p. 336 citing *Mehmet v Benson* (1965) 113 CLR 295 and see also *Thornton v Bassett* [1975] VR 407

<sup>33</sup> *Voumard* at p. 336

<sup>34</sup> *ibid*

essentiality as to time clause<sup>35</sup>, but an extension of time if combined with other circumstances will effect a waiver<sup>36</sup>. Similar facts may form the basis for a claim of estoppel<sup>37</sup>.

### How to reactivate this obligation

18. Where time was never of the essence, or has ceased to be so, and default has been made by one party, the other party may by notice make time of the essence<sup>38</sup>. The party is entitled to give a reasonable notice making time of the essence of the matter<sup>39</sup>.

### The right to claim repudiation:

19. The common law of Australia is that a right to terminate a contract for the sale of land arises in respect of: (a) breach of an essential term; (b) breach of a non-essential term causing substantial loss of benefit; or (c) repudiation<sup>40</sup>. In *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited*<sup>41</sup> the High Court held that a party may terminate a contract where there has been either a breach of an essential term or a sufficiently serious breach of a non-essential term by the other party<sup>42</sup>.

### When can a vendor claim repudiation?

20. A right of rescission or termination will be available to the innocent party if the other party repudiates the contract. As has been noted repudiation occurs where one party by words or by conduct evinces an unwillingness or an inability to render substantial performance of the contract<sup>43</sup>. This is sometimes referred to as an intention no longer to be bound by the contract or to fulfil it only in a

<sup>35</sup> Ibid at 336-7, n. 31; *Thornton v Bassett* [1975] VR 407 at 422

<sup>36</sup> Ibid at 337

<sup>37</sup> Ibid at 337

<sup>38</sup> Ibid at 327 citing inter alia *Thornton v Bassett* [1975] VR 407 at 423 and *Louinder v Leis* (1982) 149 CLR 509

<sup>39</sup> *Thornton v Bassett* [1975] VR 407 at 422

<sup>40</sup> *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61; (2007) 233 CLR 115 (Kirby J), [114].

<sup>41</sup> Ibid

<sup>42</sup> An essential term is one which the parties have agreed will always justify termination if breached. The common intention of the parties, expressed in the language of the contract and understood in the context of the contractual relationship it creates and the commercial purpose it serves, determines whether a term is essential. Whether a sufficiently serious breach of a non-essential term justifying termination has occurred is to be determined primarily upon a construction of the contract, after which a judgment about the seriousness of the breach and the adequacy of damages is made. Breaches of this kind are described as "going to the root of the contract" and involve the application of the doctrine concerning intermediate terms).

<sup>43</sup> *Koompahtoo Local Aboriginal Land Council v Sanpine Pty Limited* [2007] HCA 61; (2007) 233 CLR 115, (Gleeson CJ, Gummow, Heydon and Crennan JJ) at [44]

manner substantially inconsistent with the party's obligations<sup>44</sup>. If this occurs the other (innocent) party will have the right (or election)<sup>45</sup> to accept the repudiation and rescind (or terminate) the contract<sup>46</sup>. If the contract is thus "rescinded", or discharged, it is ended only insofar as future performance is concerned and remains "live" for the purpose of awarding of damages for prior breaches, including the breach which constituted the repudiation. Where the party has repudiated the contract, the other party may terminate without serving a notice to complete.

### **Galafassi v Kelly**

21. A recent illustration of these principles is *Galafassi v Kelly* [2014] NSWCA 190. In that case the appellants (Mr & Mrs Galafassi) entered into a contract to purchase a residential property in Paddington from the respondent/vendor (Mrs Kelly) for \$6.35m with a 5% deposit (\$317, 500). The settlement date under the contract was 30 December 2011. On that morning, the purchasers' solicitors advised that their clients did not have the necessary funds to enable them to complete and that they would not be able to proceed with the purchase. The vendor responded that the purchasers' apparent repudiation was not accepted and the vendor was going to initiate proceedings for specific performance. Then on 4 January 2012 the purchasers' solicitors advised that the purchasers were not financially capable of completing the contract and that they would be unable to comply with an order for specific performance. On 20 January 2012 the vendor commenced proceedings seeking orders for specific performance and, in the alternative, damages. A few days later on Mrs Galafassi sent an email to the vendor and her husband apologizing for their failure to complete and explaining that the purchasers had been unable to sell their own home and had instead agreed to a property swap arrangement with the vendor of a different property, and in the process they had lost all their savings, meaning that they were unable to go through with the purchase. On or about 24 February 2012 Mrs Galafassi

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<sup>44</sup> *Laurinda Pty Ltd v Capalaba Park Shopping Centre Pty Ltd* (1989) 166 CLR 623 at 634 ; 85 ALR 183 at 190 per Mason CJ.

<sup>45</sup> The acceptance of a repudiation is manifested by "so acting as to make plain that in view of the wrongful action of the party who has repudiated, [the innocent party] claims to treat the contract as at an end": *Heyman v Darwins Ltd* [1942] AC 356; [1942] 1 All ER 337, Viscount Simon LC at 361 (AC); *Ryder v Frohlich* [2004] NSWCA 472, McColl JA at [117] (Hodgson and Ipp JJA agreeing); *Cooper v Kinsella* [2011] NSWCA 45, Hodgson JA at [52]–[54] (Allsop JA agreeing, Sackville AJA disagreeing on the application of the principle to the facts) cited in *Thomson Laws of Australia* at TLA [7.6.595]; *Holland v Wiltshire* at p. 416 per Dixon J: vendor's "election to treat the contract as discharged by the purchasers' breach was sufficiently manifested by his proceeding to advertise the property for sale, and by his selling it"; *Poort v Development Underwriting (Vic) Pty Ltd [No. 2]* [1977] VR 454 (FC) and see, *ibid*, TLA [7.6.595]

<sup>46</sup> eg. *Holland v Wiltshire* (1954) 90 CLR 409 at p. 420 per Kitto J; *Nund v McWaters* [1982] VR 575 (FC); *Carr v JA Berriman Pty Ltd* (1953) 89 CLR 327 per Fullagar at 351-352; *McRae v Bolaro* [2000] VSCA 72

sent a further email again stating that there was no way they could comply with an order for specific performance if such an order was granted because they did not have the means to raise the funds to complete. The email suggested that the vendor should attempt to resell the property and might achieve a better result if she did so.

22. On 17 April 2012 the vendor filed a statement of claim seeking an order for specific performance and, in the alternative, damages. On 24 April 2012 the vendor served a notice of termination of the contract on the purchasers, purporting to accept their repudiation. The basis for termination identified in that notice was the content of correspondence from the purchasers of 30 December 2011 and 4 January 2012. On the same day the vendor entered into a contract for sale of the property to a third party for \$5.5m which was completed on 30 May 2012. On 6 June 2012 the vendor filed an amended statement of claim seeking damages for breach of contract including the deficiency on resale, special condition interest, and the payment of the vendor's liability for land tax for 2012. The purchasers by their amended defence denied that they had repudiated the contract and had been unwilling and unable to perform the contract, and argued that some of the correspondence on which the vendor relied was sent "without prejudice" and was inadmissible. The purchasers contended that the vendor had elected to affirm the contract and therefore the vendor's purported termination was wrongful and amounted to repudiation by the vendor. In the alternative the purchasers argued that the vendor had failed to mitigate her loss in exercising the power of resale. The purchasers also contended that they were not liable for special condition interest or land tax.
23. On the repudiation point both the trial judge and the appeal court found that the purchaser's communications constituted clear statements of the purchasers' inability and unwillingness to perform the contract. Further the service of a notice to complete was not a prerequisite of a right to terminate where there has been repudiation by a party of its obligations under the contract, and not merely delay in performance<sup>47</sup>. Even if the vendor had elected to affirm the contract, the commencement of proceedings for specific performance and filing of pleadings did not preclude a subsequent claim for damages for breach of contract in circumstances where there was continuing repudiation by the purchasers.

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<sup>47</sup> at [90]-[108]

24. The primary judge had held correctly that s131(1) Evidence Act was not applicable to the emails of 24 January and 24 February, as these communications were not in connection with "an attempt to negotiate a settlement" of a dispute. Alternatively, the exception in s131(2)(g) was applicable because the Court would likely be misled as to whether there was continuing repudiatory conduct by the purchasers after the institution of the proceedings if the communications were not admitted. The exception in s131(2)(i) would also have applied as the disputed communications related to the vendor's contractual right to terminate for repudiatory conduct after the institution of proceedings: at [109]-[146].

### **What are the risks of repudiation?**

25. The risk of terminating a contract for repudiation is that it is often not easy to determine whether the party's conduct in question is sufficiently serious to amount to repudiation. A quick and accurate determination of the contractual rights and obligations of the parties is necessary. The consequences of getting it wrong may be drastic, and result in the tables being completely turned. If an innocent party faced with apparently repudiatory conduct decides to accept a repudiation and terminate, but the court finds that the conduct was not repudiatory, and did not justify termination, the innocent party may have committed repudiatory conduct itself, which the original defaulting party could accept, and itself terminate.

### **What are the advantages of rescission over repudiation?**

26. Termination under a rescission clause, for example, General Conditions 27 and 28 of the standard form of contract, or Clause 5 and 6 of Table A, sets out a procedure for termination which gives the parties greater certainty. Provided time is of the essence, the innocent party knows that if the default properly identified in a default notice containing all the requisite details, is not remedied by the date specified in the notice, which must be within 14 days of service of the notice, the contract will be immediately terminated. From the defaulting party's view-point, he or she knows that the other party cannot simply terminate but must give them a notice to remedy the breach which will allow them the stipulated period within which to do so. This gives that party a final chance to perform under the contract and avoid the contract going off and the consequences which will flow from that.

27. Termination by acceptance of repudiation is governed by common law principles and not by the terms of the contract. It will be a question of judgment and degree for the innocent party whether the other party's delay or failure to comply with their contractual obligations, is sufficiently serious to justify immediate termination of the contract. Minds will differ on this. A party who claims to be the 'innocent' one, that is, the one not in default, and who purports to terminate a contract because of the other party's repudiatory conduct, if they have acted prematurely or without proper cause, may end up being guilty of a wrongful termination which may give the other party the right to terminate.

### **Availability, and loss, of right to terminate**

28. In general terms, rescission is only open to a party who:
- (a) is willing to perform the contract on its proper construction (otherwise he is not what is described as "an innocent party")<sup>48</sup>
  - (b) did not bring about or materially contribute to the occurrence of the event which gave rise to the right of rescission<sup>49</sup>; and
  - (c) is ready, willing and able to perform his obligations at the time when he purports to terminate the contract<sup>50</sup>.
29. The right to rescind will be lost if the party with such right affirms the contract<sup>51</sup>, or if there is waiver or estoppel<sup>52</sup>. Delay in exercising the right may raise an estoppel, or be regarded as an election to affirm the contract or conduct precluding rescission<sup>53</sup>.

### **What are the rights and obligations of, and the consequences for, the parties in the event of default?**

30. It is apposite at this point to recall the seminal statement of principle by Sir Owen Dixon in *McDonald v Dennys Lascelles Ltd* (1933) 48 CLR 457 at 476 – 477:

When a party to a simple contract, upon a breach by the other contracting party of a condition of the contract, elects to treat

<sup>48</sup> *ibid*, DTR Nominees at 138 CLR 433

<sup>49</sup> *eg. Nina's Bar Bistro v MBE Corporation* [1984] 3 NSWLR 613

<sup>50</sup> *Foran v Wright* (1989) 168 CLR 385

<sup>51</sup> *Sargent v ASL Developments Ltd* (1974) 131 CLR 634

<sup>52</sup> *Cth v Verwayen* (1990) 170 CLR 394

<sup>53</sup> *Principles of Equity*, 2nd ed at pp 933-4

the contract as no longer binding upon him, the contract is not rescinded as from the beginning. Both parties are discharged from the further performance of the contract, but rights are not divested or discharged which have already been unconditionally acquired. Rights and obligations which arise from the partial execution of the contract and causes of action which have accrued from its breach alike continue unaffected. When a contract is rescinded because of matters which affect its formation, as in the case of fraud, the parties are to be rehabilitated and restored, so far as may be, to the position they occupied before the contract was made. But when a contract, which is not void or voidable at law, or liable to be set aside in equity, is dissolved at the election of one party because the other has not observed an essential condition or has committed a breach going to its root, the contract is determined so far as it is executory only and the party in default is liable for damages for its breach. (See *Boston Deep Sea Fishing and Ice Co. v. Ansell*, per Bowen L.J., at p. 365; *Hirji Mulji v. Cheong Yue Steamship Co.*, per Lord Sumner, at p. 503; *Cornwall v. Henson*; *Salmond and Winfield, Law of Contracts*, (1927), pp. 284-289; *Morison, Principles of Rescission of Contracts* (1916), pp. 179, 180).

31. The general rule of the common law is that where a party sustains loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same position as if the contract had been performed.<sup>54</sup> “(T)he words “*loss by reason of a breach*” encapsulate the ideas of causation, remoteness and mitigation.”<sup>55</sup> In contract “damages are awarded with the object of placing the plaintiff in the position in which he would have been had the contract been performed - he is entitled to damages for loss of bargain (expectation loss) and damage suffered, including expenditure incurred, in reliance on the contract (reliance loss)”.<sup>56</sup>
  
32. To be recoverable the loss and damage must be seen as arising naturally from the breach, or must be within the reasonable contemplation of the parties as the probable result of a breach at the time when the contract was made<sup>57</sup>. Loss under the so-called first limb of *Hadley v Baxendale* is that which arises naturally in the usual course of things as the probable result of the breach. To establish the second limb the plaintiff must prove that the defendant knew or ought to have known that such loss would be a probable result of the breach.

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<sup>54</sup> Pape J in *Cowan v Stanhill Estates Pty Ltd No 2* [1967] VR 641 at 648; Parke B in *Robinson v Harman* (1848) 1 Exch 850 at 855; 154 ER 363 at 365

<sup>55</sup> *Holmark Construction Company Pty Ltd v Tsoukaris C/A* Unrep. 16.5.88; (1988) NSW Conv R 55-397; BC8801975 per Priestley JA

<sup>56</sup> *Gates v City Mutual Life Association Society Ltd* (1986) 160 CLR 1 at 11-12

<sup>57</sup> *Hadley v Baxendale* (1854) 9 Exch 341 at 354; 156ER 145 at 151

33. Damages for breach of contract for the sale of land are often measured by, but not limited to, the difference between the purchase price and the market value of the land at breach and may include incidental expenses which have necessarily flowed from the breach<sup>58</sup>.
34. Unless actual loss can be established, only nominal damages will be recoverable.
35. Termination of the contract is not required in order for the plaintiff to obtain damages *except* (and notably so) in cases of anticipatory breach and claims for expectation or loss of bargain damages<sup>59</sup>.
36. In order to be entitled to remedies for breach of contract the plaintiff must be able to show that he or she is ready, willing and able to perform his or her side of the contract<sup>60</sup>.

**Vendor's rights upon default by the purchaser:**

37. The vendor's rights to damages and otherwise will ordinarily arise under the contract or the common law consequent upon rescission or termination by reason of the purchaser's default.

**Termination under default clause:**

38. It should be recalled that:

A rescission clause is of a very special nature and for a very special purpose, and must always be construed accordingly<sup>61</sup>.

39. If the vendor validly rescinds the standard contract of sale of real estate by reason of the purchaser's default (in duly completing the contract and paying the price), by exercising his or her rights pursuant to GC27 and 28, his or her remedies are set out in GC28.4:
  - (a) the deposit of up to 10% of the price is forfeited to the vendor as the vendor's absolute property, whether the deposit has been paid or not; and

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<sup>58</sup> *ibid*, Cowan at p. 648

<sup>59</sup> *Sunbird Plaza Ltd v Maloney* (1988) 166 CLR 245 at 260-1

<sup>60</sup> *Foran v Wright* (1989) 168 CLR at 408; 452; see also *Reading Entertainment Australia Pty Ltd v Whitehorse Property Group Pty Ltd* [2007] VSCA 309; BC200711130

<sup>61</sup> *Gardiner v Orchard*, Unrep., H.C., 16.05.10 per Isaacs J

- (b) the vendor is entitled to possession of the property; and
- (c) in addition to any other remedy, the vendor may within one year of the contract ending either:
  - (i) retain the property and sue for damages for breach of contract ;
  - or
  - (ii) resell the property in any manner and recover any deficiency in the price on the resale and any resulting expenses by way of liquidated damages.

40. To elaborate on these provisions, under GC28.4(c)(ii)<sup>62</sup>, the vendor is entitled to the deficiency in the price upon resale and any resulting expenses as “liquidated damages”. The advantages of a liquidated damages clause are that the vendor can sue for a liquidated amount and obtain judgment for such amount without the necessity of proving each item of loss. The defence will be confined to alleging that the sum claimed is unenforceable as a penalty<sup>63</sup>. The liquidated sum must still be a reasonable pre-estimate of damage and (judged at the time of the contract and not the breach) not extravagant and unconscionable in comparison with the loss likely to flow from the breach<sup>64</sup>. There are cases which support the view that the vendor’s duty on re-sale is analogous to that of a mortgagee exercising a power of sale<sup>65</sup> and others which state that after termination the purchaser no longer has any beneficial interest in the land akin to an equity of redemption but the vendor is still required to take steps to mitigate his or her loss and is thus required to act reasonably<sup>66</sup>.
41. Although under GC 28.4(d) the vendor may retain any part of the price paid to him pending the determination of damages, once those damages are worked out, any part of the price paid by the purchaser over and above the deposit may be recovered by the purchaser<sup>67</sup>. The deposit is paid in consideration of the vendor’s entry into the contract but the price is paid in consideration of the vendor’s transfer of title<sup>68</sup>. Even if the parties had agreed that the vendor had an absolute right at law to retain the instalments, in the event of the contract going off, in equity such a contract is considered to involve a forfeiture from which the purchaser is entitled to be relieved. It appears that without GC28.4 (d) the

<sup>62</sup> formerly clause 6(3)(b)(ii) of Table A

<sup>63</sup> *ibid*, Rossiter at p. 305

<sup>64</sup> *ibid*, Rossiter at pp. 306-308) citing *Dunlop Pneumatic Tyre Co Ltd v New Garage Motor Co Ltd* [1915] AC 79 at 86-7 and see *Amev-UDC Finance Ltd v Austin* (1986) 162 CLR 170 at 190; *Esanda Finance Corp v Plessnig* (1989) 161 CLR 131 at 139, 141, 153 and in a sale of land context, *Re Hoobin* [1957] VR 341 cited in *Remedies, Commentary & Materials*, Tilbury, Noone & Kercher, LBC, 3<sup>rd</sup> Ed., 2000 at p. 33.

<sup>65</sup> *eg. Loughbridge v Lavery* [1969] VR 912

<sup>66</sup> *eg. Jampco Pty Ltd v Cameron (No 2)* (1985) 3NSWL 391

<sup>67</sup> Dixon J in *McDonald v Dennys Lacshelles* at 478 citing *Mayson v. Clouet* [1924] AC 240)(moneys paid by purchaser in excess of the deposit recoverable in an action for moneys had and received upon a total failure of consideration: *ibid*, Cowan at p. 650-1; *Bot v Ristevski* [1981] VR 120; *Lexane Pty Ltd v Highfern Pty Ltd* [1985] 1 Qd R 446; 455

<sup>68</sup> *ibid*, *Bot v Ristevski*; cf *ibid* Rossiter at p. 139

vendor would be unable to retain from the amount of the instalments the amount of his loss occasioned by the purchaser's abandonment of the contract (pending the determination of damages). A vendor may, of course, counterclaim for damages in the action in which the purchaser seeks to recover the instalments<sup>69</sup> as may a defaulting purchaser counterclaim for the return of instalments of the price in excess of the deposit in a proceeding by the vendor for damages for breach.

42. The “resulting expenses” may include estate agent’s commission and legal costs incurred on the re-sale, rates, taxes and other outgoings incurred after the completion of the sale ought to have taken place, as well as legal costs and interest on the price<sup>70</sup>.
43. When the vendor validly rescinds or terminates the new standard contract of sale of real estate pursuant to GC 27 and 28, or other similar term, the contract is discharged as a source of further obligation. In these circumstances, the vendor has the right to sue the purchaser for damages for breach of the contract which right is independent of and additional to the rights to sue conferred by the standard form of contract<sup>71</sup>.
44. As noted above the vendor’s damages are usually calculated on the basis of the difference between the contract price and the market value at the date of completion<sup>72</sup> and are assessed at the date of breach.
45. Damages may include “foreseeable future loss” including damages for loss of income or profits (ibid). In addition the vendor will be entitled to recover any reasonably foreseeable consequential loss. For example, if the vendor has purchased another property on the strength of the sale, which he or she is unable to complete by reason of the sale going off, he or she will be entitled to recover the forfeited deposit paid by him or her to their vendor<sup>73</sup>, as well as any damages paid to that party. If the vendor chooses to avoid defaulting on his or her purchase by obtaining bridging finance, he or she will claim this as part of

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<sup>69</sup> ibid, Dixon J in *McDonald v Dennys Lacselles* at 478-79

<sup>70</sup> ibid Rossiter at pp. 308-309

<sup>71</sup> Cl 6(3)(b)(i) and Cl 6(3)(b)(ii) of Table A (and GC28); *Victorian Economic Development Corp v Clervale Pty Ltd* [1992] 1 VR 596

<sup>72</sup> ibid, Rossiter at p. 301; *Carpenter v McGrath* (1996) 40 NSWLR 39

<sup>73</sup> ibid, Rossiter at 302 citing *Carpenter v McGrath*

their damages<sup>74</sup>. In each case the particular items of loss and damage must be within the reasonable contemplation of the parties.

46. Some further general observations may be made about the vendor's right to the deposit and damages:
- (a) the vendor is entitled to "up to"10% of the price whether or not a deposit of this amount, or even if no deposit, has been paid<sup>75</sup>;
  - (b) in calculating the vendor's damages, the deposit paid by the purchaser must be brought into account<sup>76</sup>;
  - (c) equity has jurisdiction to relieve the purchaser against forfeiture of the deposit<sup>77</sup>. There is also a limited statutory jurisdiction to relieve against forfeiture of the deposit<sup>78</sup>.
47. Where the vendor was not entitled, or elected not, to terminate the contract, the measure of the vendor's loss will be measured by reference to the delay in payment of the price. Usually this will amount to interest on the balance of the purchase price from the date of completion to the date of the balance of the price is paid. The vendor is entitled to an equitable lien where he or she has completed the contract without receiving all or part of the purchase price. The vendor's lien will support a caveat<sup>79</sup>.

### **Purchaser's rights upon default by the vendor:**

#### **Damages:**

48. If the vendor repudiates the contract by refusing, or being unable, to perform his or her obligations, and the purchaser terminates the contract (specific performance being impossible), the purchaser should be entitled to recover the deposit and the costs of investigation of title as well as damages for loss of bargain (if any)<sup>80</sup>.

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<sup>74</sup> *ibid*, Rossiter at 302-303

<sup>75</sup> *Bot v Ristevski* [1981] VR 120 per Brooking J; GC28.4(a)

<sup>76</sup> *Mallet v Jones* [1959] VR 122; *ibid*, Cowan at pp. 648-9; *Portbury Developments Co Pty Ltd v Mackali* [2011] VSC 69 and see GC28.4(e)

<sup>77</sup> *ibid*, Rossiter at pp. 142-147

<sup>78</sup> s. 49(2) *Property Law Act* 1958

<sup>79</sup> *ibid*, Rossiter at pp. 332-3; *Barry v Heider* (1914) 19 CLR 197

<sup>80</sup> eg. *Holmark Construction Company Pty Ltd v Tsoukaris C/A Unrep.* 16.5.88; (1988) NSW Conv R 55-397; BC8801975: vendors unable to procure a discharge of mortgage and hence unable to transfer the land in accordance with the contract. Subsequently land sold by the vendor's mortgagee exercising its power of sale). In *Grant v Harlgate Pty Ltd* [2012] VSC 464 the purchaser successfully recovered the deposit from the vendor's agent following the vendor company going into liquidation, and the liquidator disclaiming the contract as onerous, in circumstances where the vendor's agent had paid the deposit out to a co-agent on account of commission and fees and to the first mortgagee without the purchaser's authority.

49. Traditionally, where the vendor breached the contract by failing to give a good title, the rule in *Bain v Fothergill*<sup>81</sup> confined the purchaser to recovery of the deposit and costs of investigation of title and precluded recovery of loss of bargain damages. It is unclear whether this rule survives in this state. It has been disapproved by the New South Wales Court of Appeal<sup>82</sup> as well as legislated against in some states. The rule would not preclude reliance damages (for wasted costs and expenses) which can be recovered if a purchaser has not suffered or cannot prove damages for loss of bargain<sup>83</sup>. It appears that this latter principle is of general application<sup>84</sup>.
50. Where the vendor fails to give “vacant possession” of the property, the purchaser will be entitled, in appropriate circumstances, to obtain damages for the costs of obtaining vacant possession, including, legal costs, if proceedings are taken against a tenant, costs of removal of rubbish, damages for delayed possession, including interest from the date of completion to the date vacant possession is given, the costs of alternative accommodation, and removal and storage costs, if the loss or damage claimed is within the contemplation of the parties<sup>85</sup>.
51. The normal measure of damages for loss of bargain in cases of breach of contract for sale of land is the difference between the contract price and the market value of the land at the time of the breach<sup>86</sup>. In *Wenham* the purchaser’s damages included the profits that would have been made from the land if it had been transferred when it should have been. The market value will be the subject of expert evidence unless there has been a re-sale in which case the re-sale price will be evidence of market value<sup>87</sup>. Consequential losses are also recoverable providing they are not too remote.
52. If a purchaser duly rescinds the new standard contract of sale of real estate (as was previously the case under Table A), he or she is entitled to “be repaid any money paid under the contract, .. any interest and reasonable costs payable

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<sup>81</sup> (1874) LR 7HL 158

<sup>82</sup> *ibid*, Holmark at p. 3

<sup>83</sup> *ibid*, Rossiter at p. 296

<sup>84</sup> *ibid*, Amann at 174 CLR 81-6, 99-108, 134-7, 154-7, 61-4

<sup>85</sup> *ibid*, Rossiter at pp. 299-301; *King v Poggioli* (1923) 32CLR 222 at 250-1 (stock losses due to delay in settlement); *Phillips v Lamdin* [1949] 2KB33 (plaintiff recovered damages for loss of business income, additional removal and storage costs); *Raineri v Miles* [1981] AC 1050 (alternative accommodation costs)

<sup>86</sup> *Wenham v Ella* (1972) 127 CLR 454; *Cowan v Stanhill Estates Pty Ltd (No 2)* [1967] VR 641; *Nangus Pty Ltd v Charles O’Donovan Pty Ltd* [1989] VR 184

<sup>87</sup> *ibid*, Rossiter at p. 293

under the contract; and .. all those amounts are a charge on the land until payment; and .. the purchaser may also recover any loss otherwise recoverable<sup>88</sup>.

53. Even apart from the terms of the contract<sup>89</sup>, it is noted that a purchaser who pays the deposit to the vendor or his agent (but not to a stakeholder other than the vendor) obtains an equitable lien over the land the subject of the sale to secure repayment of the deposit (if necessary). He or she may be able to lodge a caveat on the land on the basis of such interest. The purchaser becomes a secured creditor of the vendor and if the vendor fails to repay the deposit, the purchaser will become entitled to enforce the security by obtaining an order for sale of the property by a Court.<sup>90</sup>
54. Where the purchaser has a right to terminate the contract for breach but chooses to keep the contract on foot, the purchaser will be entitled to damages or compensation. For an error or misdescription of the property or the title, the purchaser will usually seek the latter rather than damages<sup>91</sup>.
55. If the purchaser validly rescinds a contract for misrepresentation or misleading and deceptive conduct prior to settlement, the Court would ordinarily order a refund of the deposit and interest. If after completion and the purchaser has retained the property, the damages would generally be based upon the difference between the price paid for the property and its true value together with any recoverable consequential losses.

### **Specific performance.**<sup>92</sup>

56. Where a purchaser is faced with a recalcitrant vendor who refuses to complete the contract and transfer the property, the purchaser, rather than terminating the contract and suing for damages, may wish to compel the vendor to perform the

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<sup>88</sup> GC28.3; Clause 6(3)(a)

<sup>89</sup> GC28.3; Clause 6(3)(a)

<sup>90</sup> Rossiter at pp. 110-111

<sup>91</sup> eg. Ibid, Rossiter at p. 298

<sup>92</sup> "Specific performance" is used in two different senses. In its proper sense it is concerned with executory contracts (eg. a contract of sale of land which requires the execution of a conveyance or transfer) rather than executed contracts (contracts which do not require the execution of an instrument or the doing of an act for the purpose of putting the parties in the position contemplated – the contract does it itself). "Specific performance, in the proper sense, is a remedy to compel the execution in specie of a contract which requires some definite thing to be done before the transaction is complete and the parties' rights are settled and defined in the manner intended": Dixon J in *JC Williamson Ltd v Lukey and Mulholland* (1931) 45CLR 282 at 297. If a Court orders a party to an executed contract to perform his obligations or some of them thereunder, the relief is not specific performance in the proper sense but merely relief analogous to it: Meagher, Gummow & Lehane, *Equity Doctrines and Remedies*, 3rd Ed., 1992 at pp. 495-6. Such an order may be framed as an injunction.

contract. The remedy he or she would choose in these circumstances is specific performance.

57. In many other instances, where a purchaser is suing for rescission and return of the deposit, a vendor will defend the proceeding and counterclaim for specific performance, and damages in the alternative.
58. Specific performance is an equitable remedy which compels a party to a contract to perform his or her obligations under the contract in accordance with its terms. It is commonly granted in relation to contracts for the disposition of interests in land.
59. It may be necessary to seek rectification as a precursor to seeking specific performance.
60. In order to obtain an order for specific performance it will be necessary for the applicant to establish:
  - (a) a binding contract which the defendant is not entitled to rescind;
  - (b) a breach by the defendant;
  - (c) that damages are not an adequate remedy; and
  - (d) the plaintiff has performed, or is ready and willing to perform his contractual obligations<sup>93</sup>.
61. Even if each of these elements are present, the remedy may still be refused because in common with all equitable remedies, its grant is discretionary<sup>94</sup> and subject to equitable defences<sup>95</sup>.
62. A vendor who is entitled to rescind a contract for the sale of land because of a purchaser's failure to complete, but who elects to sue for specific performance is not thereby precluded from later rescinding the contract and claiming damages for the continued refusal by the purchaser to complete<sup>96</sup>.
63. A procedure worth noting in this context is the power of the Court to secure the enforcement of an order for the execution of a document or the endorsement of

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<sup>93</sup> at least in cases of specific performance in the proper sense, see n. 87.

<sup>94</sup> derived from Meagher Gummow & Lehane wherein they are denoted as "Defences"

<sup>95</sup> *ibid*, Covell & Lupton at p. 151; *ibid*, Meagher Gummow & Lehane at pp. 497-98

<sup>96</sup> *Ogle v Comboyuro Investments Pty Ltd* (1976) 136 CLR 444. It is open for a vendor/plaintiff to claim the incompatible remedies of damages for breach of contract, and specific performance so long as the plaintiff is put to an election between these remedies before final judgment, see *Heckenberg & Anor v Delaforce* (No 2) [2000] NSWCA 254 at [9] citing *United Australia Ltd v Barclays Bank Ltd* [1941] AC 1, and *Ogle*.

a negotiable instrument by the procedure under s 22 *Supreme Court Act* 1986. This power is independent of the Court's power to obtain compliance by committal and sequestration under r 66.05<sup>97</sup>.

### Injunction:

64. Another remedy in the context of contracts for the sale of land in relation to which disputes arise, is the injunction, and especially the interlocutory injunction. Such injunctions may be granted in a variety of contexts in sale of land disputes<sup>98</sup>.
65. The jurisdiction to grant an injunction may be exercised "if it is just and convenient to do so"<sup>99</sup>. In order to obtain an interlocutory injunction, the plaintiff will need to establish that:
- (a) the plaintiff has made out a prima facie case, in the sense that if the evidence remains as it is there is a probability that at the trial of the action the plaintiff will be held entitled to relief;
  - (b) he or she will suffer irreparable injury for which damages will not be adequate compensation unless an injunction is granted; and
  - (c) the balance of convenience or justice favours the granting of an injunction<sup>100</sup>.

<sup>97</sup> *Leach v Leach* [1965] VR 599 at 604–5. See, *Williams, Civil Procedure* at para. [I 66.05.0]; [I76.01.65]

<sup>98</sup> For example, (a) to restrain mortgagee exercising its power of sale over the plaintiff's home, injunction granted: *Rawcliffe v Custom Credit Corp* (1994) ATPR 41-292; (b) by the vendor/plaintiff against the Registrar of Titles to restrain registration of a transfer and a mortgage where the plaintiff claimed her signature on the transfer was a forgery, injunction granted: *Clarey v Thomson and Ors* [2000] VSC 400; (c) restraining the Registrar of Titles from giving effect to a vesting order in favour of the defendant: *Johnson v Morrison* [2009] VSC 72; (d) purchasers under a contract of sale which was exchanged but not completed and where writ for levy of property registered by judgment creditors of vendors, obtained an injunction to restrain sale of land by judgment creditors as holders of equitable interests in land entitled them to priority over any rights to land held by respondent judgment creditors: *Garnock v Black* (2006) 66 NSWLR 347; (2006) NSW ConvR 56-158; [2006] NSWCA 140. A similar case to this in Victoria was *Skosples v Perpetual Trustees Victoria Ltd* [2004] VSC 422; (e) purchaser obtains injunction to compel vendor to permit termite inspection of property where contract conditional on pest report being obtained: *Bairstow v Berry* [2003] WASC 155. A not dissimilar Victorian case was *Del Mars Properties Pty Ltd v 159 Racecourse Road Pty Ltd* [1999] VSC 527 and also note Bradto, see **note 141**; (f) purchaser obtained injunction to restrain vendor from repossessing land where purchasers had commenced action arising out of a contract whereby the parties had agreed to sell and purchase the land for damages or rescission for negligent misrepresentation, invalidity of demand notice, and claim for relief against forfeiture: *Dominion Nominees Pty Ltd v Coolmo Pty Ltd* [2000] ANZ ConvR 198; [1999] WASC 199; (g) purchaser/plaintiff and vendor/defendant in dispute. Contract was subject to special condition that plaintiff was entitled to obtain approval of a plan of subdivision. Plaintiff unable to obtain planning and subdivision approval and appealed. Defendants terminated the contract and plaintiff sought specific performance. Injunction granted restraining defendant from dealing with the land: *Castlecity Pty Ltd v Newvintage Nominees Pty Ltd* [2000] WASC 111.

<sup>99</sup> S. 37(1) *Supreme Court Act* 1986 (Vic)

<sup>100</sup> Mason CJ's summary of principle in *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 148 at 153-4 approved of by Gleeson CJ in *ABC v Lenah Game Meats* (2001) 208 CLR 199; [2001] HCA 63 at para 13; *Australian Broadcasting Corp v O'Neill* (2006) 227 CLR 57; 229 ALR 457; 80 ALJR 1672; [2006] HCA 46. In *O'Neill* the test for the grant of an interlocutory injunction was clarified. The High Court reiterated and explained the 'prima facie case' test laid down in *Beecham Group Ltd v Bristol Laboratories Pty Ltd* (1968) 118 CLR 618, stating that the doctrine established in that case should be followed, preferring it to the "serious question to be tried" test enunciated by Lord Diplock in *American Cyanamid* 1975] AC 396 at 407. In *O'Neill Gummow and Hayne JJ* (with whom Gleeson CJ

**Conclusion:**

67. When a party defaults under a contract for the sale of land - by breach of an essential term, or a non-essential term causing substantial loss of benefit, or by repudiation - the innocent party must carefully consider his or her options.
68. As outlined in this paper the first step will be to properly analyse the parties' respective rights and obligations and who in fact and law is in default. Ordinarily the party's lawyer will write to the other side to properly set the stage for a valid and effective termination by, inter alia, serving a notice to complete, and a properly drawn default notice. If the default is sufficiently serious to amount to repudiatory conduct, the innocent party may choose to exercise their general law right to accept the repudiation, and immediately terminate. The defaulting party must also consider their position taking whatever steps are available to salvage or mitigate the situation.
69. Careful consideration must be given to the facts and applicable legal principles for indeed conveyancing is no game for the amateur.

Dated: 23 March, 2015

John K Arthur  
 LLB., BA.  
 Barrister and Member of the Victorian Bar  
 Nationally Accredited Mediator  
 FCI Arb

Tel: 9225 8291

Mob: 0412 892199

E-mail: jkarthur@vicbar.com.au

W: www.gordanandjackson.com.au

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and Crennan J agreed) explained (at para 65) that in assessing whether the applicant had made out a prima facie case, "it is sufficient that the plaintiff show a sufficient likelihood of success to justify in the circumstances the preservation of the status quo pending the trial" rather than it needing to be demonstrated that it was more probable than not that the plaintiff would succeed at trial. See also *Tymbook Pty Ltd v State of Victoria; Bradto Pty Ltd v State of Victoria* (2006) 15 VR 65 at [84]. See "Interlocutory Injunctions, Mareva Orders & Other Applications", Seminar paper, 21 October, 2008, by the writer, view at: <http://www.gordanandjackson.com.au/online-library>