

THE HIGH COURT

[2013 No. 1182 P]

BETWEEN

DOMHNALL MAC A BHAIRD

PLAINTIFF

AND

THE COMMISSIONERS OF PUBLIC WORKS IN IRELAND

DEFENDANTS

JUDGMENT of Ms. Justice Baker delivered on the 5th day of April, 2016.

1. The plaintiff seeks specific performance of an agreement made on the 4th November, 2011, for the sale to the defendant of lands at Glanmire, County Cork. This judgement primarily concerns the counter claim of the purchaser for a declaration that the contract has been rescinded, and its claim for a return of the contract deposit.

The contract

2. By agreement for sale made in writing on or about the 4th November, 2011, and which incorporated the Law Society General Conditions of Sale, between the plaintiff as vendor on the one part, and the defendant as purchaser on the other part, the defendant agreed to purchase and the plaintiff agreed to sell all of the premises known as Unit 4A, Glanmire Industrial Estate, Glanmire, in the County of Cork for the total purchase price of €862,000. The contract was made subject to a number of general and special conditions, and closing was to be within seven weeks of the grant of planning permission for change of use of the premises. Planning permission issued on the 25th January, 2012, and the sale fell to be completed on the 14th March, 2012, in accordance with this special condition.

3. The vendor served a notice in accordance with General Condition 40 of the Law Society General Conditions of Sale on the 23rd November, 2012, and the purchaser, by letter of the 9th January, 2013, purported to rescind the contract, by reason of what is said to be the inability of the vendor to close the sale on the expiration of the period of 28 days fixed for closing by the completion notice.

4. The 28-day period provided in the completion notice expired during the Christmas holiday, and the parties have agreed that, taking into account an agreed period during which time did not run, the closing date in accordance with the notice was the 2nd January, 2013.

5. Much of the evidence revolved around events that occurred since the service of the completion notice on the 23rd November, 2012, and on whether the vendor, and/or the purchaser, was in a position to comply with certain title requirements, and certain general and special conditions relating to the mode and place of closing.

6. Both parties agree that the contract for sale is valid, and the central issue is whether the vendor has validly rescinded the contract.

Invalid notice?

7. Either party to a contract for sale made under the Law Society General Conditions may serve a completion notice, under General Condition 40, and condition 40(a) provides that a completion notice is 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".

8. Three matters were required to be dealt with by the vendor to be ready, able and willing to perform his obligations as vendor under the contract as follows:

- The lands, the subject matter of the contract for sale, were subject to a charge registered in favour of Bank of Ireland. The charge created a security over other lands not relevant to the sale, but the vendor required a deed of partial discharge from the Bank in respect of the subject lands in order to give an unencumbered title.
- The lands in sale were also subject to a charge in favour of Danske Bank, and it is common case that this charge came to light only on the 21st December, 2012, and when the purchaser made its closing searches. That charge also affected other lands not the subject matter of the sale, and again, a partial discharge was required to clear the title to the subject lands.
- The contract was subject to the vendor producing at closing a valid tax clearance certificate. At the time the completion notice was served, the vendor's tax clearance certificate had expired, and, although the evidence is that he was tax compliant, he did not have a valid tax clearance certificate until one issued from Revenue on the 4th January, 2013.

While the matter arose initially in argument, counsel have now agreed that the completion notice was valid at the date of service, and that the matters still to be done by the vendor were administrative matters wholly within his control, or did not contractually require to be in place at the date of the service of the notice.

9. I do not therefore propose to deal with the question raised but not answered by Clarke J. in *Windham v. Maguire & Anor* [2009] IEHC 359, and mentioned by Finlay Geoghegan J. in *Mackin v. Deane* [2010] IEHC 192, as to the consequence of a party becoming unable to close in the currency of a notice which was valid at the date of service.

The correspondence

10. After the service of the completion notice on the 23rd November, 2012, nothing was heard from the solicitor for the purchaser

until a phone call on the 18th December, 2012, followed up by an e-mail on 19th December, 2012, in which she sought details of the redemption figures on the Bank of Ireland mortgage up to Friday 21st December, 2012. This was because of Special Condition 9 of the contract, which required a separate cheque to be made payable to Bank of Ireland in respect of the balance of the purchase price after taking off the costs of sale and VAT on the transaction.

11. By an e-mail sent at 14.58 on the 19th December, 2012, the solicitor for the purchaser, after repeating her request for details of the redemption figures, suggested that in lieu of the furnishing of separate bank drafts, as was required by the Special Condition, that the balance of the purchase price could be transferred into the account of the vendor's solicitor. It was said that confirmation of this proposal was required as a matter of urgency as "in order for the monies to be in your account by Monday next, I need details of your firm's account today." The Monday referred to was Christmas Eve, the 24th December, 2012.

12. In an e-mail some 20 minutes later, at 15.19, the purchaser proposed a closing in the office of the vendor's solicitor on either Friday the 21st December or Monday the 24th December, 2012. The email mentioned again the fact that in order for the option of an electronic transfer to be available, details of the relevant bank account were required on that day, 19th December, 2012.

13. On the following day, the 20th December, 2012, by fax, and letter hand-delivered by courier, the solicitor for the vendor furnished details of the relevant bank account, but gave no reply as to a proposed date and time for closing. The exact time that this faxed letter was sent is unclear, but from the attendance note on the file of the purchaser's solicitor of a phone call from the office of the solicitor for the vendor at 14.35 requesting confirmation that a fax had been received, I conclude that the letter was faxed at or near that time.

14. At 15.46, the solicitor for the purchaser sent a letter marked "urgent" in which it was pointed out that the option of the electronic transfer was no longer available as there had been a limited, and now expired, window within which such transfer could happen.

15. Some time was given over in the course of evidence to the reasons for this, and to an arguable lack of clarity in the letters from the purchaser's solicitor, in that they had not expressly identified the fact that the option could not be availed of after the 19th December, 2012. I consider that correspondence is sufficiently clear. The offer of an electronic transfer was by variation on Special Condition 9, which provided for a three-way physical closing and the furnishing of three bank drafts in the relevant amounts. The variation was not accepted in accordance with the terms of the letter, and accordingly that option never became a variation on the conditions relating to closing.

16. The solicitor for the vendor on Friday the 21st December, 2012, by fax sent at 11.51, indicated that the sale could complete either that afternoon, or on Monday the 24th and asked for confirmation that the purchase monies had been transferred to her client account. That letter also contained details of the redemption figures. I consider that, as the option of an electronic transfer of funds was no longer available, the solicitor for the vendor misunderstood the correspondence. The solicitor for the purchaser pointed this out in an email at 12.58, by proposing closing on Monday the 24th December, 2012, and then sent her closing searches in anticipation of that closing. These showed a charge registered by Danske Bank on 29th January, 2010, ranking second in priority to the Bank of Ireland charge. I have heard evidence, and accept, that this charge affected a small portion on the south east of the subject lands only, but as a matter of law the charge was an encumbrance and had to be cleared off the title in accordance with the contractual obligation to provide an unencumbered title. From the correspondence and the oral evidence, I consider that the solicitor for the vendor was unaware of this charge, as it was registered after the long negotiations for the sale had resulted in a concluded agreement in November 2011.

17. The solicitor for the vendor suggested by a fax sent at 16.06 that she would hold the bank drafts on trust until the completion documents and searches had been explained and certified. I consider that this was not at all consistent with the agreed mode of closing, namely by three way closing involving the physical presence of the solicitors for the purchaser, the vendor and Bank of Ireland. No agreement was reached on the 21st December, 2012, that the sale would close on the 24th December but the solicitor for the purchaser had indicated that she could close on that day.

18. On the 24th December, 2012, by email and fax sent at 10.19, the solicitor for the purchaser asked that a time for completion be nominated as a matter of urgency. She received no reply to this letter nor to an email sent at 11.14. She later attempted to contact the solicitor for the vendor by phone, but the evidence is that the office of the solicitor for the vendor was by then closed for the Christmas vacation.

19. The parties were contractually required to close by way of a physical three-way closing, and the purchaser was required to have three bank drafts. On the 21st December, 2012, AIB Bank was requested to furnish the three relevant bank drafts, but was not in a position to do this by the 24th December, 2012, and the purchaser was therefore not able to close on that day. It is not at all clear to me in those circumstances why the solicitor for the purchaser remained in her office until 16.00 on Christmas Eve in anticipation of closing.

20. Three bank drafts were made available on the 28th December, 2012, and for that reason I conclude that the purchaser was not in a position to close until that date.

21. In contractual terms the proposal by the purchaser for completion on the 21st December or the 24th December, 2012 was permissible, but I find that the purchaser was not in a position to complete on either of those days, and was not so in a position until the 28th December.

22. I turn now to consider when the vendor was in a position to close. The effect of the completion notice was that he was required as a matter essential to the contract to be in a position to close on the 2nd January, 2013, at the latest.

Was the vendor able to complete on the 2nd January, 2013?

23. I consider that the vendor was not in a position to complete this sale on the 2nd January, 2013, the date that the completion notice expired. This is for a number of reasons: the solicitor for the vendor was quite clear that she was not aware of the Danske Bank charge registered on title until, as she put it, she "got a fright" when she received the closing searches from the purchaser's solicitor on that day, albeit they had been sent on the 21st December, 2012, when her office was closed. She did reach an agreement with Danske Bank that it would furnish a deed of partial release but not until some days later, possibly the 7th January, 2013. Equally, the vendor could not have closed on the 2nd January, 2013, because he did not have a current tax clearance certificate until the 4th January, 2013. Furthermore the solicitor for the vendor did not have an agreement with the solicitor for Bank of Ireland that it would furnish on or before the 2nd January, 2013, the deed of partial discharge for the purpose of clearing the first charge on title.

24. Thus, while each of the three matters in respect of which complaint is made were matters within the control of the vendor these were not in place or capable of being put in place by the 2nd January, 2013.

25. It is a matter of some concern that the solicitor for the vendor did not inform the solicitors for the purchaser that this was so, and indeed there was complete silence from her until her letter of the 9th January, 2013, wherein she inexplicably failed to explain or deal in any way with the gap, at a time when matters were clearly at a critical point. It is regrettable that the solicitor for the vendor considers that the approach being taking by the solicitor for the purchaser was a form of what she described as "posturing" and that she did not genuinely believe that the purchaser would rescind, or that she was at any risk that this could occur.

26. I also consider that the solicitor for the vendor was not in a position to offer to close on the 24th December as she had no agreement with the solicitors for Bank of Ireland to close on that day and, in her evidence, she explained her reference to her offer to "close" on that day as meaning that she was in a position to receive the monies, hold them on trust, agree an arrangement for the holding of the title deeds on trust, and deal with the balance of the conveyancing issues when the office of Judge and Co., the solicitors nominated to act for the Bank opened in January. Thus, the offer to close on the 24th December, 2012, was not well made, and was not one, had it been accepted, that could have been performed by the vendor.

27. It was unfortunate that the solicitor for the vendor made certain assumptions that a degree of informality would be acceptable to the purchaser, and that she did not explain to them when she offered to close on the 24th December, 2012, that she did not mean that the full transaction would be completed and all conveyance requirements met on that day. She could not achieve this, and she ought not to have offered to do so, albeit I accept that she believed she would have "substantially closed", as she put it, on that day.

28. The key date was the 2nd January, 2013. The solicitor for the purchaser did wait until 17.14 to ascertain the position and send an email. The vendor's solicitor did nothing at all to communicate with the purchaser on that day. It was the vendor's solicitor who had served the completion notice, she by then was aware, or ought to have been aware, that the Danske Bank charge remained on title and needed to be dealt with as a matter of urgency. It was she who had to make the arrangement for the solicitor for the Bank to attend at the place and time agreed, and it was she who had to meet the other title and conveyancing requirements including the production of a tax clearance certificate for her client. I consider that she was not in a position to deal with the matter on the 2nd January, 2013, she could not have brought together various elements to close on that day and accordingly she was not in a position to close the sale within the 28 day period in respect of which time was of the essence following service of the completion notice.

29. I find on the facts that the vendor was in a position to provide a discharge in respect of the Danske Bank charge on the 7th January, 2013, and not before. The draft deed was sent to the solicitor for that bank on the 3rd January, 2013, and a soft copy was provided to him on the following day. I accept the evidence of Mr. Keogh that he was not asked as a matter of urgency to make himself available to facilitate closing on the 4th January or at any time before that.

30. As regards the tax clearance certificate, the plaintiff himself said that he obtained this certificate on the 4th January, 2013, in Cork and that he posted it to his solicitor. His solicitor says that she had always anticipated that her client would travel to Dublin to physically hand over the tax clearance certificate and any other documents that were required for closing. I am satisfied however, that the plaintiff was not asked to attend at any closing on the 4th January, 2013, and, as his evidence was that it would have taken him less than three hours to travel from Cork to Dublin, I consider that he was in a position to produce the certificate on the 4th January, 2013. The difficulty arose from the fact that his solicitor had not asked him to travel to Dublin on that day.

Conclusion on ability to close?

31. The option of closing on Friday the 21st December, 2012, had no reality from either point of view, and at best it seems to me there was a degree of optimism, and at worst a lack of appreciation of the degree of urgency involved, on both sides. However, I accept that at that time at least the purchaser was willing to close. Indeed some suggestion was made in the course of cross examination that the purchaser had "gone cold" on the transaction and was happy to avoid the contract by December, 2012, and I accept the bona fides of both parties, both of them wished to complete this sale, and both solicitors were under instructions to so do.

32. The purchaser was in possession of three drafts each dated 28th December 2012, on the 2nd January, 2013, when they were collected from the bank in anticipation closing on that day. Thus the purchaser was in funds and was able to close within the period of the completion notice.

33. Furthermore, I accept the evidence of Ms. Crombie solicitor for the purchaser that she had ordered a taxi and had available to her the drafts and all other necessary documents in order to close on the 4th January, 2013, in accordance with what she believed was an agreement reached with Ms. O'Driscoll, solicitor for the vendor.

34. I reject the suggestion of counsel for the vendor that the solicitor for the purchaser was setting a trap by waiting until late on the 2nd January, 2013, to send an email. The ball was quite clearly in the court of the vendor's solicitor at that time and it is remarkable that she did not pick up the phone and attempt to reach an agreement other than through fax and hand delivered documents which were insufficient to meet the requirements of exigency then apparent. I also reject the suggestion that the letter from the vendor's solicitor where she used the expression "we propose to close" is anything other than an invitation to close on the 4th January, and I take that view because there was nothing unclear or incomplete about the time, place and date in respect of which the closing was to happen.

35. Thus, for the reasons outlined, I find that the purchaser was in a position to close within the period provided by the completion notice, but the vendor was not.

Events on 2nd January, 2013

36. Nothing happened between the 24th December, 2012, and late on the 2nd January, 2013, the date the completion notice expired, when the purchaser's solicitor sent an email at 17.14, marked "urgent", confirming that she was in a position to close.

37. She suggested that closing would take place on the following day the 3rd January, 2013, i.e. outside the 28-day period, and enclosed a long schedule of closing requirements, which included a number of matters not already raised in pre-contract or post-contract requisitions, and which were either unnecessary or not contractually mandated, such as a request for an indemnity under seal in respect of the footpaths, roads and sewers from the original developer, and a letter from Cork County Council confirming that the roads and services were in charge.

38. I consider that the solicitor for the purchaser in her email sent at 17.14 on the day the completion notice expired, accepted that

the sale would not close on that day and expressly proposed a closing outside the 28-day period fixed by the notice. Further, she raised matters not contractually required of the vendor, and in the course of cross-examination she accepted this, and that she had been prepared to close even without each of them being satisfied. However her correspondence did not make this clear, and the matters raised would have required a detailed consideration by the solicitor for the vendor. I consider that the vendor's solicitor was entitled to treat the new requisitions as matters in respect to which she needed to reach agreement with the solicitor for the purchaser that she would not insist on the matters raised by way of new requisitions. A parallel series of letters were exchanged between the solicitors dealing with this question, and I find that the solicitor for the purchaser did not withdraw the additional requisitions until her evidence at trial.

39. On the 4th January at 9.55 the solicitors for the vendor separately replied to the letter raising the additional requisitions, and, correctly in my view, said that no further or new closing requirements would be entertained by her.

40. On the 3rd January, 2013, by fax at 14.56 the solicitors for the vendor proposed closing at a time and place on the following day, Friday the 4th January, 2013. That letter was headed "strictly without prejudice to the contract for sale," and was not an acceptance of the offer of the 2nd January, 2013, to close on the 3rd January, 2013, but a counter offer to close the following day. Thus, I find that no agreement had been reached that the sale would close on the 3rd January, 2013.

41. By email sent on the 4th January, 2013, at 10.23, the solicitor for the purchaser replied to the letter of 3rd January, apologised for the delay in replying, and required a "written explanation" in respect of the use of the phrase "strictly without prejudice to the contract for sale". She proposed closing at 15.00 that day, but "subject to receiving a satisfactory written response" to this query by noon that day. The solicitor for the vendor sensibly responded to requests for "an explanation" at 12.18 by fax. She headed her letter "strictly without prejudice" but her response was fulsome. Whether it was "satisfactory" as required by the solicitor for the purchaser is not clear, save that by a response, sent at 13.24, the solicitors for the purchaser did accept the offer to close at the time, place and date proposed.

42. I consider this is an acceptance of the offer or a waiver of the objection with regard to the use of the rubric "without prejudice". Therefore, I find that at 13.24 on the 4th January, 2013, an agreement was reached for the closing of the sale later that day, and the solicitor for the purchaser at 14.08 sent further closing searches for explanation, the same searches which had been sent on the 21st December, 2012.

43. The solicitor for the vendor clearly did not think that an agreement to close was in place, and as late as 14.16 she faxed a letter, inexplicably headed "strictly without prejudice", indicating that she was awaiting confirmation from the solicitor for Bank of Ireland that he was available to attend a three-way closing that afternoon. The solicitor for the purchaser by email at 15.27 called for closing before close of business, but the sale did not close and no further communication was sent by the solicitor for the vendor until 14.28 on the 9th January, five days later, by which it was proposed that the sale would close on the 10th January. The solicitor for the purchaser responded at 17.29 and rescinded the contract, in stated reliance on the completion notice as the new proposed date was outside the term provided by that notice, or the "one final opportunity" to complete, namely the 4th January, 2013. While this is not spelt out, it is implicit in the letter that the solicitor for the purchaser regarded the period provided in the completion notice as having being extended to the 4th January, 2013.

44. The purchaser is correct in my view that no satisfactory explanation was provided by the solicitor for the vendor as to the reasons for the delay between early afternoon on the 4th January, 2013, and the 9th January, 2013, when, without explanation or apology, the vendor's solicitors sought closing on the following day.

45. I turn now to consider the argument that the vendor was entitled to rescind in reliance on General Condition 40.

The effect of service of a completion notice

46. Time is in general not regarded as of the essence in a contract for the sale of land. This proposition arises primarily from the fact that an action for specific performance of a contract for the sale of land sounds in equity, and the courts of equity will not imply into such contract a term that time is of the essence, and will relieve against a failure of one or other party to comply with strict time conditions if to do so is in the interests of justice.

47. A party to a contract for sale may however seek to fix a time for closing if it is considered that a reasonable time has passed, and that the other party is in default of the obligation to close. General Condition 40 of the Law Society General Conditions of Sale provides a convenient way in a contract made under its terms to fix a time for completion. This provides in the relevant parts as follows:

"COMPLETION NOTICES

Save where time is of the essence in respect of the Closing Date, the

following provisions shall apply:

- (a) if the sale be not completed on or before the Closing Date either party may either on or after that date (unless the Sale shall first have been rescinded or become void) give to the other party notice 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 able, ready or willing by reason of the default or misconduct of the other party
- (b) upon service of such notice the party upon whom it shall have

been served shall complete the Sale within a period of twenty eight days after the date of such service (as defined in Condition 49 and excluding the date 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 (c) the recipient of any such notice shall give to the party serving the same reasonable advice of his readiness to complete."

48. Certain propositions of law are not contested, and are well established in the authorities. The service of a completion notice under General Condition 40 makes time of the essence in the contract in respect of the period of 28 days therein provided. The notice binds both parties, such that both the giver of the notice and the recipient are bound to comply with all contractual obligations within the 28 day period fixed.

49. While it is sometimes said that the service of a completion notice pursuant to General Condition 40 makes time of the essence of a contract, that description may not be useful if it is taken to mean that the contract is to be characterised as one in which time was of the essence ab initio, or for all purposes. The service of a completion notice does not change the essential character of the contract, and if time was not of the essence at its inception, the service of the completion notice does not make time of the essence save in respect of the time fixed by reference to the condition. This is clear from the express terms of General Condition 40 from which it is clear that the effect of a valid notice is that time is of the essence only of the period of 28 days thereby fixed.

50. Time was not of the essence in respect of the agreed closing date in the agreement for sale in the present case, thus the service of the completion notice under General Condition 40 had the effect that the purchaser was obliged as a matter essential to the contract to complete the sale within a period of 28 days after the date of service. After making allowance for the Christmas period the relevant closing date so designated was the 2nd January, 2013.

51. It is accepted by both parties that the service of the completion notice creates mutual obligations, and that the notice binds both giver and recipient. Thus, if a vendor serves a completion notice the purchaser is bound to close within the time stipulated, but equally the vendor is obliged to perform the obligations on his part within the time limited by the notice.

52. The authority for the proposition that mutual obligations arise is the judgment of the Court of Appeal for England and Wales in *Quadrangle Development and Construction Company Ltd. v. Jenner* [1974] 1 All E.R. 729 where Russell L.J. stated the proposition in general terms as follows:

"It seems to be that if by the notice the giver of the notice brings into existence a term in respect of which time should be of the essence that the recipient of the notice should complete, it is implicit in that the term equally binds the giver of the notice because completion....is in my judgment an activity in which two parties necessarily co-operate. Completion by one cannot be effected without co-operation of the other"

53. Similarly, in the same judgment, Buckley L.J. explained the matter thus:

"I am of the opinion that when notice is given to complete in this form it has the effect of making time of the essence of the contract as a whole and in respect of both parties to the contract..."

54. Both of these quotes have been referred to with approval by the Supreme Court in *Tyndarius Ltd. v. O'Mahony & Ors.* (Unreported, Supreme Court, 3rd March, 2003) and by the Supreme Court in *United Yeast Co. v. Cameo Investments* [1977] 111 I.L.T.R. 13, and are accepted as stating the general proposition that time becomes of the essence in respect of the performance by both parties to the contract of the obligation to complete. For this reason the service of a completion notice has often been described as a "two-edged sword".

55. As was memorably put by Farrand at p. 184 of the 4th edition of his seminal text, 'Contract and Conveyance':

"...the party serving a notice to complete must himself be ready both at the time of service and at the time of expiry, or else it may be a case of the biter bites."

56. The failure of one party to meet the obligations made essential by virtue of the service of a valid notice means that the innocent party may rescind the contract for breach by the other of that essential term.

The effect of the extension of time

57. A completion notice may be waived, or extended by agreement. Express provision is made for an extension of time by agreement under General Condition 40 (f) as follows:

"the party serving the notice under this Condition may, at the request of or with the consent of the other party, by written communication to the other party extend the term of such notice for one or more specified periods of time, and, in that case, the term of the notice shall be deemed to expire on the last day of such extended period or periods, and the notice shall operate as though such extended period or periods had been specified in this Condition in lieu of the said period of twenty-eight days, and time shall be of the essence in relation to such extended period."

58. Wiley & Woods, at para. 13.25 of their authoritative text 'Irish Conveyancing Law' express the view that when time is extended for a fixed and defined period, time becomes of the essence in respect of the extended or new period. The authority for this position is stated to be the case of *Lock v. Bell* [1931] 1 Ch 35. I do not consider that general proposition to be correct for reasons I now elaborate.

59. *Lock v. Bell* arose in the context of the proposition, accepted as being correct by the court that, as the contract was for the sale as a going concern of a public house and its stock, time was prima facie of the essence, and that the authorities bore this out. Thus it is not authority for the broad statement of principle stated by Wylie and Woods.

60. The judgment of Maughan J. in *Lock v. Bell* was also relied on by Farrand at p.178 of his text, although in a different context. Referring to contracts where time was originally of the essence, he said that where delay to a particular date is allowed, "that later date automatically becomes of the essence instead." The distinction he drew was between contracts where time was originally of the essence, and the contrasting case where time was made of the essence by service of a notice to complete. I consider that Farrand has correctly identified the proposition found in *Lock v Bell*.

61. This is clear too from the judgment of Jessel M.R. in *Barclay v. Messenger* (1874) 43 LJ Ch 449. That case involved an action for specific performance where it was held that time was of the essence of the contract, and the question for the court was whether the purchaser had waived this essential term of the contract by extending the time. The Master of the Rolls considered the differences in the authorities and expressed his authoritative judgment at p. 455 of the judgment as follows:

"It appears to me plain that a mere extension of time, and nothing more, is only a waiver to the extent of substituting the extended time for the original time, and not an utter destruction of the essential character of the time."

62. The court came to that conclusion inter alia on the grounds that it could not be the case that if time was of the essence the extension of time could put a party in a better position than had originally been agreed.

63. Farrell expresses the proposition that if time is extended to a substitute date, time remains of the essence with regard to that substitute date. He quotes *Barclay v. Messenger* as authority for this proposition, but as I have noted that case is not authority for a broad proposition that the new time becomes of the essence, as that case involved a contract where time was originally of the essence.

64. Farrand also refers to *Buckland v. Farmar & Moody* [1979] 1 WLR 221, in which the Court of Appeal for England and Wales held that time was of the essence, when delay had been allowed after a notice to complete had expired and two fixed date extensions were allowed. That judgment is also not authority for the proposition that time remains of the essence if an extension is allowed after the time fixed by a completion notice has expired, as it was predicated on a concession by both sides that to quote Buckley L.J. "if a vendor has once made time of the essence of the contract and then allows a further extension to a fixed date, the time remains essential". The Court of Appeal for England and Wales found on the facts that there was no waiver of the essential time condition. That case is more usefully considered as authority with regard to waiver of the essential nature of the term with regard to time.

65. This approach is consistent with the comment by Farrand that Denning L.J. in *Rickards (Charles) Ltd. v. Oppenheim* [1951] K.B. 616 at 620 considered the matter to be an application of the High Trees principle. The same proposition is stated with characteristic succinct style by the late John Farrell in his 'Irish Law of Specific Performance', under the heading "waiver of a time limit" at para. 8.39 where he says the following:

"When time is of the essence the relevant time limit may be waived. This may be done by conduct. The vendor when faced with the time limit for sending an abstract title of a title document agreed to be sent is likely to lose the right to insist on the purchaser raising his objections or requisitions within the time limited for that purpose. If the delay is serious it may even amount to waiver of a clause in the contract making time of the essence for completion of a sale."

66. No argument of waiver was made in the present case, and accordingly, I must look to the general law with regard to the effect of an agreement to extend the time for closing.

67. The general proposition seems to be, rather, that an extension of time will, without more, destroy the essential element of a time provision. Farrand quotes the dicta of Malins V-C in *Webb v. Hughes* [1870] L.R 10 Eq 281 at 286 where he said: -

"If the time is once allowed to pass and the parties go on negotiating for the completion of the purchase, then time is no longer of the essence of the contract."

68. Farrand in his discussion makes the following wry observation:

"This means that the consequence of courtesy would be as if time had never been of the essence, involve either waiting for an unreasonable delay or else taking steps to make a later time of the essence."

69. I consider that the approach canvassed by Farrand points me to a difference between the extension of a time limit where time is originally of the essence, and in a contract where time is not of the essence, but is made of the essence of the period fixed by a completion notice.

70. I find useful the decision of Goulding J. in *Luck v. White* (1973) 26 P. & C.R. 89. That case involved a contract for the sale of land where time was not originally of the essence, and a notice to complete was served by the vendor who then allowed the time to pass and continued to press the purchaser's solicitor to close. The dicta at pp. 95 and 96 of the judgment were quoted with approval by Buckley L.J. in *Buckland v. Farmar & Moody* as follows:

"...if the party who was in the right allowed the defaulting party to try to remedy his default after an essential date had passed, he could not then call the bargain off without first warning the defaulting party by fixing a fresh limit, reasonable in the circumstances."

71. Buckley J. in *Buckland v. Farmar & Moody* while accepting that general statement of law, found on the facts that it was clear on the evidence that the vendor "had no intention of releasing the plaintiffs from their liability resulting from their default in complying with the completion notice" (at p. 230 F).

72. In summary, I consider that the correct proposition of law is that if time is originally of the essence of a contract, an agreed or permitted extension of time will not destroy that essential element, but that if time is not of the essence the continuation of negotiations toward agreeing a new date following expiration of the time fixed by a completion notice will not at common law have the effect that time is of the essence of the extended period, unless that is made clear by the innocent party.

The effect of General Condition 40(f)

73. The express terms of General condition 40(f) modify somewhat that common law rule. It is clear that its provision with regard to the extension of time may be availed of by either party, i.e. either the purchaser or the vendor may seek an extension of time, and if agreement is reached time remains of the essence of the extended and specified time or times.

74. What is not clear however is whether the agreement to extend must be made in the currency of the notice, as is argued by the plaintiff. Counsel points to the term of General condition 40 itself, which refers to the extension of "such notice". He argues that if the period of the notice has expired, the notice can no longer be said to subsist and accordingly, may not form a framework within which the extended period operates. Condition 40 (f) refers throughout to "the notice" "the term of the notice" or "such notice".

75. The Condition is silent as to when an agreement to extend must be made, and the question is devoid of authority. I consider that there must at the time of the agreement to extend the notice be an extant notice, the period of which can be extended. If, whether with or without a failure on the part of either or both parties, the service of a completion notice does not result in either the closing of a sale or the rescission of the contract, time has ceased to be of the essence. The General Condition does not envisage circumstances where a party can serve a completion notice and then seek, after the expiration of that notice, to make a further period of time of the essence in reliance on that notice, and without serving a fresh notice. This is because service of the notice does not make time of the essence of the contract as a whole, it does not change the essential nature of the contract, but time is thereby made of the essence only of the 28 days so specified. Outside the period of the notice, if a new closing date is agreed, the parties are setting a new time and not extending an essential time condition, which has ceased to operate on the expiration of the time fixed. The new time is agreed in the context of the general contractual principle that time is not of the essence of a contract for the sale of land. Making time of the essence is the exception to the general contractual position. If the parties agree a closing date, time is not thereby agreed to be of the essence. If the time fixed by the completion notice has expired, they are not operating under its rubric, and therefore an agreement with regard to a date for closing is not an essential term, unless agreed or nominated to be such.

76. Thus, it seems to me that counsel for the plaintiff is correct that if an agreement was reached between the parties for the extension of the period provided for in the completion notice, that agreement is an effective addition to the 28 day period in respect to which time is of the essence, only if the agreement was reached while that notice was still extant. The alternative proposition cannot be correct as it envisages the extension of a period provided by an already expired notice.

77. I conclude then, that on a true construction of General Condition 40(f) that an agreement to extend a completion notice must be made in the currency of the notice. That proposition is consistent with the general law that time is not of the essence of a contract for the sale of land, and with the authorities analysed above with regard to the effect of service of a completion notice and of continuation of negotiations outside the notice period.

78. I conclude accordingly, that as the agreement to extend the closing date was made after the expiration of the completion notice on 2nd January, 2013, that time was not of the essence of the extended period.

79. However, the authorities show that the innocent party may reserve his or her rights under a notice, and I turn now to consider that proposition on which the defendant relies.

The reservation of rights

80. The defendant argues that it reserved its entitlement to rescind while at the same time agreeing to the two-day extension of 28-day period.

81. The correspondence from the solicitor for the purchaser after the 20th December, 2012, was expressly sent either without prejudice, without prejudice to the contract or by way of reserving rights under the contract. The first time this formula was used was in a letter of the 20th December, 2012, by which she "reserved our client's right" in the context of her assertion that the vendor was not ready to complete the sale after reasonable notice had been given of the readiness of the purchaser.

82. That rights may be effectively reserved in these circumstances is clear from the *dicta* of Goulding J. in *Luck v. White*, where he noted that the vendors had continued to negotiate without reserving in express terms their right to rescind, and made the following observation with regard to what might have been the situation had that occurred:

"Indeed, the mere extension of the period to a new fixed date would on the authorities have preserved the position that time was of the essence, without fresh stipulation to that effect. The vendors, however, did nothing of the kind. They encouraged the purchaser to try to complete notwithstanding the expiry of the notice, and there was nothing to tell him at what moment the axe would fall."

83. I turn now to consider the rights the purchaser asserts it had reserved.

84. It is argued that as a result of the proposal from the purchaser that it would close on the 21st December, 2012, or the 24th December, 2012, that the purchaser could have rescinded as the vendor was not in a position to close on that nominated date. I consider that as a matter of law the purchaser could not have rescinded the contract until the expiration of the full 28-day period in respect to which time was of the essence. This is apparent from the decision of the Chancery Division of the English High Court in *Oakdown Ltd. v. Bernstein & Co. & anor.* [1984] 49 P. & C.R. 282. That case concerned a vendor's notice to complete in response to which the purchaser proposed to complete on the first day of the Passover. The vendor, who was of the Jewish faith, refused to complete on that date, and also refused to deliver the title deeds on the day before. The plaintiff successfully sued for specific performance. Scott J. held that while both the party serving and the party receiving a completion notice had an obligation to complete within the 28-day period, the giving of a notice of a willingness or readiness to complete within that 28 day period would not mean that the other party was in breach. The obligation is more simply stated: It is an obligation on both parties to complete within the 28 day period, and no failure on either party to complete before that on an intermediate date could render the contract capable of being rescinded by the other party.

85. Scott J. said as follows:

"First, the obligation which binds the recipient of the notice and in respect of which time is of the essence is to complete within 28 days. I do not see why the corresponding obligation which binds the giver of the notice and in respect of which time is of the essence should be an obligation to complete on such day within the 28-day period as may be nominated by the recipient of the notice. Secondly, if the recipient of the notice selects a day for completion, say, five days after service and fails then to complete it is clear, in my judgment, that the failure does not place the recipient of the notice in breach of his obligations under the notice. He can still remedy that failure by completion within the remaining 23 days. I do not follow why the failure of the giver of the notice to complete on the selected day should have a repudiatory effect whereas the like failure of the recipient of the notice does not have that effect."

I accept, of course, that the failure by the giver of the notice to complete on an intermediate date within the 28-day

period would be a breach of contractual obligation and might, in an appropriate case, affect the running of interest on the purchase money. But it would not, in my judgment, per se entitle the recipient of the notice to treat the contract as at an end"

86. Scott J. regarded the conclusion in *Quadrangle Development and Construction Company Ltd. v. Jenner* [1974] 1 ALL ER 729, often regarded as the leading decision on completion notices, that a party who serves a completion notice must be ready to complete at all times within the period specified, not to be authority for a wider proposition that that the recipient could call for an earlier closing. I agree. If either party is not ready, willing and able to complete within that fixed period, the other can rescind once the notice has expired, but not before. The period of 28 days is absolute in the sense that the party not at fault may not rescind until the notice has expired, and the full period of 28 days has to be given to both recipient and sender.

87. I consider that the use of formulae by the solicitor for the purchaser in her correspondence suggestive of the reservation of rights had no meaning as the purchaser had no right to rescind before the end of the period provided by the completion notice on the 2nd January, 2013. Thus, the reservation of rights to rescind had no legal effect.

88. Further, the rights expressly reserved by the solicitor for the purchaser were those under the contract, such as the right to purchase the premises at the agreed price, not to be charged interest, to the benefit of the various special conditions etc. There was no express reservation of rights that might have arisen by virtue of the failure of the vendor to be ready and able to close at the expiration of the completion notice. The reservation of rights in accordance with the authorities mentioned above must be clear and unequivocal and I am not satisfied that the solicitor for the purchaser clearly and unequivocally reserved her client's right to rescind by virtue of the failure of the vendor to be in a position to close. The purchaser did in my view have a right to rescind on the 2nd January, 2013, but continued to engage as if the contract subsisted and indicated a willingness to close thereafter, and not having expressly reserved the right to rescind by these negotiations, it has hereby lost that right. To borrow the words of Goulding J. in *Luck v. White*, the solicitor for the purchaser encouraged the vendor to close on a later date. She cannot now resile from that position, and seek to rely on the essential nature of time in the contract, without making time of the essence afresh.

Conclusion

89. I consider then, that the defendant did not have a right to rescind the contract for sale in reliance on the completion notice of the vendor. The date agreed for completion was outside the time fixed under that notice, and accordingly time was not of the essence of the agreed extension. As the purchaser did not make time of the essence of the new date it cannot rescind for failure of the purchaser to close on that agreed date.

90. The counterclaim fails. The vendor seeks specific performance, and as the vendor is ready, willing and able to close, and no argument is made that a reasonable time has not been allowed to the purchaser to perform the obligations arising, the vendor is entitled to specific performance of the contract. I will hear further argument with regard to the claim for interest on the purchase price.