DAMAGES FOR DELAY IN COMPLETION

RAINERI v. *MILES*[1]

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Introduction

It is common practice in conveyancing transactions for a vendor (V) to sell his house to a purchaser under a contract which provides for completion on a given date but which does not state time to be of the essence. The purchaser (P1) then resells his property to a third party (P2) under a similar contract. Both contracts are to be completed on the same date. Consider the following situations:

(1) V does not complete on the stipulated date, so that vacant possession cannot be given to P1 on that date. If P1 has already given up possession of his own home, he may have to find temporary accommodation elsewhere. If P1 has not given up possession of his home, he will not be able to give vacant possession to P2.

(2) P2 fails to complete the contract on the agreed date. P1 could be in a difficult position if he needs the money from that sale to finance his purchase from V.

In each of the above situations, the innocent party will sustain loss as a result of the delay in completion. Can the innocent party recover damages for such loss? Although these situations occur commonly in practice the matter had not been settled authoritatively until the decision in *Raineri* v. *Miles*.

There are two views of the law. One view was that as time was not expressed to be of the essence the stipulated date was a mere target date. Consequently, a failure to complete on that date was not a breach of contract and no damages were recoverable. The opposing view was that although time was not stated to be of the essence nevertheless, the delay was a breach of contract and therefore, damages were recoverable. In *Raineri* v. *Miles* the House of Lords has, by majority, adopted the latter view as correctly stating the law on the issue.

The Facts

Two contracts were entered into on 14 June, 1977. The vendor (Wiejski) contracted to sell their house to the purchasers (Miles). The latter in turn agreed to sell their house to the plaintiff (Raineri).

[1] [1980] 2 W.L.R. 847.

Both contracts were to be completed on 12th July, but time was not expressed to be of the essence. Wiejski could not give vacant possession of his home on the agreed date beacuse of financial difficulties in the purchase of his new home. Consequently, Miles was unable to complete and Raineri had to find temporary accommodation elsewhere. On 13th July Miles served a notice to complete on Wiejski under the English Law Society's conditions of sale. Condition 19 provides that in every contract (except where time is expressed to be of the essence of the contract), if the sale is not completed on the date fixed for completion, either party may, by notice to the other, make time of the essence twenty eight days after the notice is served. Wiejski complied with the notice within the time stipulated. Raineri claimed expenses incurred due to delay in completion. Miles in turn sought an indemnity from Wiejski by joining him as a third party. In short, the position was the same as that in the first situation described in the introduction, with P2 suing P1 for damages and P1 seeking indemnity from V.

The Issues

The House of Lords considered three issues on the appeal.

(1) Whether the plaintiff Raineri could succeed in an action for damages for delay in completion where time was not expressed to be of the essence. (This was the main issue.)
(2) The effect of serving the notice to complete.
(3) The importance of the reason for delay in completion.

The Law before *Raineri* v. *Miles*

The question whether an innocent party can recover damages for the other party's failure to complete on a specified date where time is not expressed to be of the essence is of considerable importance in conveyancing practice. The generally accepted view in England before *Raineri* v. *Miles* was that the victim of the delay could not recover damages because, where time was not expressed to be of the essence, failure to complete on that date did not amount to a breach of contract.

Williams on Vendor and Purchaser stated:

> where time is not essential, a party failing to complete a sale of land on the day fixed therefore by the agreement does not then commit a breach of contract either in equity or at law; it is only on failure to complete within a reasonable time after that day that the contract is broken.[2]

No authority was cited for this proposition.

The leading case prior to *Raineri* v. *Miles* was *Smith* v. *Hamilton*.[3] In that case, the purchaser could not complete on the agreed date

[2] (4th ed., 1936) Vol. 2 at 991.
[3] [1951] 1 Ch. 174.

because he was unable to obtain the necessary finance for that day. The contract did not provide that time was to be of the essence. Harman, J. had to decide whether the vendor was entitled to rescind the contract and to forfeit the deposit.[4] It was held that the vendor could not rescind and forfeit the deposit nor could he counterclaim for damages because, as time was not essential, there was no breach of the agreement.

Despite *Smith* v. *Hamilton,* there was support for the opposing view. In a number of cases damages had been awarded for delay in completion. In *Jacques* v. *Millar*[5] (agreement for a lease), Fry, J. decided that the damages suffered by the lessee,

> May be reasonably said to have naturally arisen from the delay [of the lessor], or which may be reasonably suposed to have been in the contemplation of the parties as likely to arise from the partial breach of the contract.[6]

In *Royal Bristol Permanent Building Society* v. *Bomash*[7] (mortgagees exercising power of sale) and in *Jones* v. *Gardiner*[8] (vendor and purchaser), the innocent party was allowed to recover damages suffered as a result of delayed completion. Although the conveyancing transaction in these cases were of different kinds, the common element in all was that failure to complete on the agreed date amounted to a breach of contract, giving rise to a right to damages. As Megarry and Wade suggested,

> whether time is of the essence or not a party who is actually injured by breach of a time stipulation can recover damages.[9]

Phillips v. *Lamdin*[10] may also be cited as authority for this view. In that case Croom-Johnson, J.[11] decided that damages for breach of contract for delay were recoverable even after the purchase and the sale of goods had been completed. His Honour distinguished this from the case where the delay was so unreasonable as to enable the innocent party, before completion, to rescind the contract and sue for damages. In his Honour's view, there was no distinction to be drawn in general between contracts for sale of land and any other contracts (except for the rule in *Bain* v. *Fothergill*[12]). The general rule is that a contractual provision merges on completion, when the right to enforce the con-

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[4] Forfeiture of deposit is a conveyancing term, i.e. the vendor is allowed to keep the deposit for the purchaser's breach of the contractual term.

[5] (1877) 6 Ch. D. 153, the decision was overruled in *Marshall* v. *Bridge* (1881) 19 Ch. D. 233, on the ground that there had been no effective agreement.

[6] *Id.*, 160.

[7] (1887) 35 Ch. D. 290.

[8] [1902] 1 Ch. 191.

[9] Megarry and Wade, *The Law of Real Property* (4 ed., 1975) at 586.

[10] [1949] 2 K.B. 33.

[11] *Id.*, 42-3.

[12] (1874) L.R. 7 H.L. 158. The rule is to the effect that where a vendor fails to show a good title because of some defect which is not due to his own fault, he is not liable to pay damages for the purchaser's loss of bargain.

tractual provisions disappears (unless the parties can show that the rights conferred by the provision are enforceable after completion). The writer suggests that the right to sue for damages in the case of delayed completion constitutes an exception to that general rule.

The Position in Australia.

In Australia, the High Court has not been called upon to decide the question whether damages are available for delayed completion where time is not expressed to be of the essence. However, throughout the years, there has been some judicial comment which tends to support the view that damages are recoverable. In the early case of *Skinner* v. *The Australian and British Land, Deposit and Agency Co. Ltd.*,[13] Hodges, J. held that, although the purchasers may not have been entitled to rescind the contract, they were entitled to damages from a vendor who was in breach of contract in failing to bring the land under the Transfer of Land Act. In *Tobin* v. *McCauley*,[14] damages were awarded to a purchaser for loss of rents and profits due to the vendor's delay in the giving of possession. In *Canning* v. *Temby*,[15] Griffiths, C.J. held that a suit for specific performance could not be maintained because the vendor no longer had title to the property, but this was "no answer to an action for a breach of contract by the other party" because:

> The Courts of Equity never held that a party who had made default in performance of his contract was not liable for damages for the breach, but they treated the stipulation as to time not as a condition, but as an independent term of the contract, the breach of which might be compensated for by damages. Of course, a party asking specific performance of a contract, notwithstanding that he was himself in default, could only obtain that relief on doing what was fair to compensate the other party for any loss by reason of his default.[16]

These cases show that the right to sue on the contract arises irrespective of an action for specific performance. Griffith, C.J. in *Canning* v. *Temby* stated that the innocent party might be able to recover damages. It is submitted that his Honour meant that the normal principles for recovery of damages for breach of contract will be applied, and that he was not questioning the existence of the right to sue for the breach.

A distinction has to be made between a failure to complete on the agreed date and failure to complete at all. In *Ogle* v. *Comboyuro Investments Pty. Ltd.*,[17] the vendor accepted an anticipatory breach by the purchaser, so the sale was never completed (as distinguished

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[13] (1889) 15 V.L.R. 674 at 683.
[14] (1892) 14 A.L.T. 72.
[15] (1905) 3 C.L.R. 419.
[16] *Id.*, at 424.
[17] (1976) 50 A.L.J.R. 580.

from *Raineri* v. *Miles,* where completion did take place). Gibbs, Mason and Jacobs, JJ. thought that "it may perhaps better be said that the first breach is a failure to complete on the due date and the later breach is a failure to complete at all".[18] Therefore,

> the damages will be those which result from the breach which entitled the vendor to rescind and those which flow from any earlier breach which had been waived as a ground for rescission. Damages for the latter breach would not be for loss of the contract but for breach of a term which must be treated as non-essential, for example, for delay.[19]

It is clear from this that, their Honours considered that, a delay may not by itself justify rescission, nevertheless, it is a breach of contract which may result in the recovery of damages.

The Decision in *Raineri* v. *Miles*

The majority of the House of Lords, consisting of Lords Edmund-Davies, Fraser, Russell and Keith (Viscount Dilhorne dissenting), held that failure to comply with a clause which requires completion on a fixed date is a breach of contract entitling the innocent party to sue for damages, and that the breach is not discharged by subsequent compliance with a notice to complete.

The Majority Judgments

1. *Effect of Delay in Completion*

Wiejski had argued that there had been no breach of the contract, because, since time was not of the essence, completion was permissible within a reasonable time after the stipulated date. The majority of the House rejected this argument.

Lord Edmund-Davies held that there were substantial grounds for holding that failure to complete a contract for the sale of land on the specified date constitutes a breach thereof, even where time is not expressed to be of the essence, and entitles the other party to recover any damages properly attributable thereto. The former courts of equity did not rewrite contracts, nor did they hold that a man who had broken his word had kept it. They differed from the common law courts only in the granting of remedies and not in the recognition of rights. Contractual terms as to completion offered but one example of these general principles.[20] His Lordship referred to *Phelps* v. *Prothero*[21] where Turner, L.J. said that a plaintiff who had legal rights and came to a court of equity for its aid, having sued for specific performance, was bound to submit his claim for damages to the judgment of the court and was not entitled to proceed at law otherwise than by the

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[18] *Id.*, at 586.
[19] *Id.*, at 587-8.
[20] *Supra* n. 1 at 857-8.
[21] (1855) 7 De G.M. & G. 722.

court's leave, but that certainly a court of equity was competent to award damages.[22]

Wiesjki further contended that the effect of s.41 of the Law of Property Act was to make the stated date a mere "target date". Lord Edmund-Davies rejected this contention. Section 41 of the Law of Property Act, 1925 provides that:

> . . . stipulations in a contract as to time or otherwise, which according to rules of equity are not deemed to be or have become of the essence of the contract, are also construed and have effect at law in accordance with the same rules.[23]

His Lordship concluded that the fact that time had not been declared to be of the essence did not mean that the express date for completion could be supplanted by the court's treating it as a mere "target" date and, in effect, enabling the defaulting party to insert into the contract some such words as "or within a reasonable time thereafter".[24] His Lordship said there was no discordance between common law and equitable treatment of a claim for damages in such a case as the present, and that therefore there was no cause to invoke s.41 of the Law of Property Act. Lord Edmund-Davies held that *United Scientific Holdings Ltd.* v. *Burnley Borough Council*[25] was distniguishable because in that case no question of damages was involved, the House of Lords in the *United Scientific Case* refused to regard non-compliance by one party with the strict requirements as to completion as entitling the other to treat such default as amounting to repudiation. Or more fundamentally, the case involved no breach of contract at all.[26]

Lord Fraser gave the other leading judgment. He pointed out that *Stickney* v. *Keeble*[27] had been relied on extensively in argument. There, Lord Parker of Waddington said:

> where [equity] could do so without injustice to the contracting parties it decreed specific performance notwithstanding failure to observe the time fixed by the contract for completion, as an incident of specific performance relieved the party in default by restraining proceedings at law based on such failure . . . it was *only* for the purposes of granting specific performance that equity interfered with the remedy at law.[28]

One would think that the use of the word "only" in Lord Parker's judgment in *Stickney* v. *Keeble,* implied that in all other circumstances

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[22] *Id.,* at 733-4. An equity court could award damages only in a limited sense and such damages would not be the type of damages known to the common law.

[23] The wording of s.41 is different from s.13 of the Conveyancing Act, 1919 (N.S.W.), but the substance is the same.

[24] *Supra* n. 1 at 859.

[25] [1978] A.C. 904.

[26] J. Carter, (1981) 97 L.Q.R. 195.

[27] [1915] A.C. 386.

[28] *Id.,* at 415-416.

equity would not interfere with the remedy at law. Earl Loreburn and Lord Atkinson expressed similar opinions in *Stickney* v. *Keeble*[29]. Lord Fraser[30] thought the learned Lords who made those statements unquestionably regarded any breach of a stipulation as to time in a contract for the sale of land as a breach of the contract. The party in breach might be relieved of the full consequences of his breach to the extent of allowing him to obtain specific performance of the contract, but he would not be relieved from any liability for damages. Indeed, as mentioned above, damages had been awarded in such cases as *Jacques* v. *Millar, Bomash's Case, Jones* v. *Gardiner* and *Phillips* v. *Lamdim.* These cases showed a trend of authority against the appellant's argument and were consistent with *Stickney* v. *Keeble.* However, Lord Fraser criticized Fry, J.'s statement in *Jacques* v. *Millar* that the delay in completion was a "partial breach" of the contract. His Lordship thought Fry J. must have had in mind a breach which was not so serious as to go to the root of the contract. With respect to Lord Fraser, his explanation was not any clearer, because the expressions "root of the contract" and "partial breach" are both metaphors.[31] In America, a distinction is drawn between "partial breach" and "total breach". The innocent party can only recover damages for a "partial breach" of the contract whereas a "total breach" allows him to recover damages in addition to being discharged from the contract. In *Hirji Mulji* v.*Cheong Yue Steamship Co. Ltd.,*[32] (a case concerning frustration of contract) Lord Sumner was influenced by this American distinction when his Lordship spoke of a "total breach" of contract. Likewise, Lord Fraser thought that the principle which emerged from the authorities was that a breach of such a time stipulation would not entitle the innocent party to treat the contract as terminated, nor would it prevent the defaulting party from suing for specific performance. Nevertheless, it was a breach of contract and the injured party could recover damages for the loss thereby suffered.

Lord Fraser referred to cases such as *Smith* v. *Hamilton* where it was said that damages were not recoverable for delay in completion and held that the decision in *Smith's Case* itself was not relevant to the appeal. His Lordship did not further explain the reason, but *semble* he did not like the reasoning in *Smith* v. *Hamilton.*[33] The writer suggests that the reason why *Smith* v. *Hamilton* was irrelevant was that it dealt with another issue. Harman, J. in that case held that the purchaser was allowed to recover her deposit, notwithstanding her

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[29] *Id.*, at 400-401.
[30] *Supra* n. 1 at 866-869.
[31] For a clear analysis of a party's obligation under a contract, see Lord Diplock's judgment in *Photo Production Ltd.* v. *Securicor Transport Ltd.* [1980] 2 W.L.R. 283 at 283-296.
[32] [1926] A.C. 497.
[33] *Supra* n. 1 at 869-70.

delay in completion *because* there was no breach of contract as she could complete within a reasonable time. The decision in *Smith's Case* was correct, but, with respect to Harman, J., for the wrong reasons. The purchaser's delay would not prevent her from seeking specific performance, thus the contract had to be kept on foot and was not rescinded. Although the breach was not so fundamental as to discharge the innocent party's (Vendor's) obligation under the contract, nonetheless it was a breach which should have given rise to damages. In *Smith's Case* the vendor should have been allowed to counterclaim for damages.

2. *Effect of Service of Notice to Complete*

Lord Edmund-Davies[34] stated that, as a notice to complete cannot be served until the specified date has passed, and that thereafter the innocent party has an accrued right to damages, no waiver of this right is involved by service of a notice to complete. The effect of the notice is simply to make time of the essence. Therefore, Condition 19 of the Society's conditions of sale did not operate to introduce into the contract a new term for completion within twenty-eight days. His Lordship referred to *Woods* v. *Mackenzie*,[35] where the vendor served a notice to complete on a purchaser who delayed completion. Megarry, J., held that condition 19 confers specific rights against the defaulting party but it does not exclude the rights and remedies otherwise existing at law and in equity if no such notice is relied upon. It is interesting to note that Gibbs, J. in *Balog* v. *Crestani,* thought the object of such notice was to

> limit the time for performance, and to indicate to the party in default that he will be in breach of an essential obligation if he delays further.[36]

In the light of these authorities, the view in both England and Australia is that a notice to complete operates independently of any rights which are enforceable by the innocent party, namely, the right to damages for delay in completion.

3. *The Reason for Delay in Completion*

The *Smith* v. *Hamilton* approach necessarily raised the problem of what constitutes "improprietry" on the part of the defaulting party. This is a question of fact which would vary according to circumstances in each case. The House of Lords thought that the reason for delay in completion was not a relevant issue in the present case. Lord Edmund-Davies regarded it as settled law that "blameworthy conduct may well preclude a vendor from equitable relief", but that it was irrelevant to the question whether damages are recoverable for breach

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[34] *Id.*, at 862.
[35] [1975] 1 W.L.R. 613, 615-16.
[36] (1975) 49 A.L.J.R. 156 at 160.

of contract.[37] It is clear from the judgment that the reason for the delay was not seen as important in *Raineri* v. *Miles* because the duties of a vendor and purchaser in a contract for the sale of land must be strictly complied with.[38] This is but one instance of the general law of contract that liability for breach of contract is strict. Moral fault is irrevelant to the question whether there is a breach of contract.[39]

4. *The Dissenting Judgment*

Viscount Dilhorne held that the plaintiffs could not recover damages because the stipulated date for completion was no more than a target date.[40] His Lordship did not base this on any preference for the *Smith* v. *Hamilton* approach; rather he based his decision on the construction of the special condition of the contract, having regard to the other provisions of the contract and the surrounding circumstances.[41]

What Kind of Damages are Recoverable?

Raineri v. *Miles* has clarified the law in England. Damages are recoverable for delay in completion. *Dicta* in the Australian decisions referred to earlier suggest that a similar approach will be adopted here. But what kind of damages are recoverable? In the past damages had been awarded for loss of rents[42] and profits.[43] One commentator has suggested that damages may be recovered where due to the vendor's delay a purchaser has incurred expenses living in a hotel and putting his furniture in storage.[44] It may be that the innocent party could recover damages for interest charged bridging finance made necessary by the delay. However, there could be the problem in all these cases whether the test in *Hadley* v. *Blaxendale*[45] as to recovery of damages is satisfied. The loss has to be a "natural consequence" arising from the breach or it has to be within the "reasonable contemplation" of

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[37] *Supra* n. 1 at 862.

[38] *Contra Re Daniel* [1917] 2 Ch. 405, where Sarjant, J. thought "wilful default" was the same as "bad faith", at 410 and *Bennett* v. *Stone* [1902] 1 Ch. 226, at 232-3 Buckley, J. thought "wilful" connotates a breach of duty but it does not have to be intentional.

[39] The writer thinks that "wilful default" suggests some kind of equitable fraud or unconscionable conduct. It is not fraud in the *Derry* v. *Peek* (1889) 14 App. Cas. 337 sense, yet it has to be something more than mere negligence. In *Jones* v. *Gardiner*, supra n. 8 at 194-5 it was suggested that the reason for the delay was "the vendor not having cared or troubled or taken *reasonable pains* to perform his contract". In *King* v. *Poggioli* (1922) 32 C.L.R. 222, the High Court held that a purchaser was entitled to damages when the Vendor *deliberately* refused to give up possession.

[40] *Supra* n. 1 at 855.

[41] The effect of the Judicature Act is clear in Australia, the two streams of jurisdiction, do not mingle their waters: *per* Windeyer, J. in *Felton* v. *Mulligan* (1971) 124 C.L.R. 367 at 392. However, the position in England is not so clear because Lord Diplock in the *United Scientific Holding Case, supra* n. 25 thought the streams of jurisdiction do run together.

[42] *Tobin* v. *McCauley, supra* n. 14.

[43] *Jacques* v. *Millar, supra* n. 5.

[44] C. T. Emery "The Date Fixed for Completion" [1978] *Conv.* 144 at 155-6.

[45] (1854) 9 Exch. 341.

the parties when they entered into the contract. Another commentator has speculated on the likelihood of practitioners restricting damages for delayed completion by special conditions in a contract.[46]

Conclusion

The decision in *Raineri* v. *Miles* is to be welcomed. Prior to *Raineri's Case,* the court had to look at the reason for the delay to decide whether damages were recoverable. For example, whether there had been some "impropriety"[47] on the part of the purchaser or whether the delay was a result of "improper conduct".[48] *Raineri* v. *Miles* helps to eliminate the problem which previously arose. In principle and fairness, an innocent party who has sustained loss as a result of delay in completion should be allowed to recover damages for breach of contract.

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[46] H. W. Wilkinson, "Damages for Delayed Completion" (1980) *N.L.J.* 108 at 101.
[47] *Supra* n. 3.
[48] *Green* v. *Serim,* (1879) 13 Ch.D. 589.