

The Right to Interest and Rent when Settlement is Delayed

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I: INTRODUCTION

Delay in the completion of sales of land is common. Often settlement will occur after the date specified in the contract. This may be due to the lender taking more time than anticipated to process the loan application or altogether refusing it, title or conveyancing difficulties, or another sale upon which the purchaser is dependent for his or her purchase money falling through. When delay occurs two questions arise:

- (i) who is entitled to receive the rents and profits of the property between the settlement date in the contract and the actual settlement date; and
- (ii) who is entitled to receive the interest which the purchase money will earn during the same period?

This article addresses the above questions first in relation to an open contract, where the agreement does not specify the payment of interest, or the right to rents and profits should settlement be delayed; and second, in relation to situations where the parties have modified the general rules.¹

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¹ Appropriation of the purchase money by the purchaser is not considered in this article.

II: AN OPEN CONTRACT

1. The General Rule

While an agreement for the sale of land which is capable of specific performance transfers the vendor's equitable interest in the land to the purchaser,² it has long been settled that the vendor is entitled to possession or to receipt of the rents and profits until full payment of the purchase money.³ However, from the time completion ought to take place, equity holds that the vendor receives the rents and profits as trustee for the purchaser.⁴ This recognises that it would be inequitable for one party to have both the land and the money.⁵ Similarly, after the completion date the vendor is entitled to receive interest on the unpaid money until actual payment.⁶ The prima facie rule is that from the date fixed for completion the purchaser shall receive the rents and pay interest on the purchase money. The justification for this rule is that equity looks on that as done which ought to be done.⁷ This rule:⁸

[W]as founded upon the principle recognized by Courts of Equity, that from the moment of the contract, although no purchase money is paid, the estate is to be considered as the property of the purchaser, and the purchase money the property of the vendor.

Later cases show that the justification for the general rule shifted from this doctrine of conversion to a separate principle: from the date completion ought to take place the purchaser is entitled to possession of the land, and likewise the vendor is entitled to the purchase money. In *Birch v Joy*,⁹ Lord St Leonards stated:¹⁰

From the time at which the purchaser was to take possession of the estate he would be deemed its owner, and he would be entitled as owner to the rents of the estate, and would have kept them

2 *Shaw v Foster* (1872) LR 5 HL 321, 338.

3 *Acland v Gaisford* (1816) 2 Madd 28, 32; 56 ER 245, 247; *Lysaght v Edwards* (1876) 2 Ch D 499, 506.

4 *De Visme v De Visme* (1849) 1 Mac & G 336, 346; 41 ER 1295, 1299 (reversed on other grounds in *Vickers v Hand* (1859) 26 Beav 630; 53 ER 1041); *Monro v Taylor* (1850) 8 Hare 51, 70; 68 ER 269, 277.

5 *Fraser v Perpetual Trustees Estate and Agency Co of New Zealand Ltd* [1978] 1 NZLR 620, 624.

6 *Burton v Todd* (1818) 1 Swans 255, 260-261; 36 ER 380, 382; *Leggott v Metropolitan Railway Co* (1870) 5 Ch App 716, 719; *Davies v Littlejohn* (1923) 34 CLR 174, 185-186.

7 Sugden, *The Law of Vendors and Purchasers of Estates* (14th ed 1862) 627; Meagher, Gummow & Lehane, *Equity Doctrines and Remedies* (3rd ed 1992) para 339.

8 *Burton v Todd*, supra at note 6, at 261; 382.

9 (1852) III HLC 565; 10 ER 222.

10 *Ibid*, 590-591; 233. A modern statement of this principle is found in *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd* [1986] 1 AC 207, 236-237 per Lord Templeman.

without account[.] From the same period the seller would have been deemed owner of the purchase-money, and that purchase-money not being paid by the man who was receiving the rents, would have carried interest, and that interest would have belonged to the seller as part of his property. A Court of Equity, as a general rule, considers this to follow. The parties change characters; the property remains at law just where it was, the purchaser has the money in his pocket, and the seller still has the estate vested in him; but they exchange characters in a court of equity, the seller becomes the owner of the money, and the purchaser becomes the owner of the estate.

However, this rule is not absolute.¹¹ The right to interest or rent may vary depending on whether the vendor or the purchaser is in default and which party has possession.

2. Default

Default is not a term of art, it is a purely relative term:¹²

It means nothing more, nothing less, than not doing what is reasonable under the circumstances - not doing something which you ought to do

Although this definition has been criticised,¹³ it corresponds with the definition of default in the Shorter Oxford Dictionary: failure to perform some legal requirement or obligation.

Wilful [default] ... implies nothing blameable It amounts to nothing more than this, that he knows what he is doing, and intends to do what he is doing, and is a free agent.¹⁴

Moral blame, intentional delay, or wilful obstruction are not necessary for a party to be in default.¹⁵ Default, by itself, is not enough to affect a party's right to interest or rents and profits. It must also be proved that the default caused delay of completion. In *Re Mayor of London and Tubb's Contract*,¹⁶ Chitty J said:¹⁷

11 *Paton v Rogers* (1822) 6 Madd 256, 257; 56 ER 1088, 1089.

12 *Re Young & Harston's Contract* (1885) 31 Ch D 168, 174 (CA) per Bowen LJ.

13 *Re Hewitt's Contract* [1963] 1 WLR 1298, 1303 per Wilberforce J.

14 *Re Young and Harston's Contract*, supra at note 12, at 175. "Wilful default" and "default" are thought to have the same meaning, as the purchaser is never bound to pay interest where the delay is due to the vendor's wilful default: see *Williams on Title* (4th ed 1975) 534 and *Re Woods and Lewis' Contract* [1898] 1 Ch 433 where Romer J uses the terms interchangeably. Cf *Brake v Boote* [1991] 2 NZLR 757, 766 per Holland J.

15 *Re Hetling & Merton's Contract* [1893] 3 Ch 269, 281.

16 [1894] 2 Ch 524, 529; see also *Bennett v Stone* [1902] 1 Ch 226, 236 per Buckley LJ.

17 *Ibid.* For a more recent example of this rule see *Dundee Farm Ltd v Bambury Holdings Ltd* [1978] 1 NZLR 647, 654-655 (CA).

To escape from payment of interest under this contract, the purchaser must shew, first, that the vendors were in default in the performance or discharge of some duty imposed upon them under the contract as vendors, and that such default on their part was wilful; and, secondly, that the cause of the contract not being completed by conveyance on the day named, was this wilful default on the part of the vendors.

3. Purchaser in Default

(a) Vendor in possession

When the purchaser is to blame for delay in settlement there is no injustice in making him or her pay interest on the purchase money, even if the interest amounts to more than the rent the purchaser will receive in return. Thus, if the purchaser is in default and the vendor is in possession, the purchaser must pay the vendor interest on the unpaid purchase money. Furthermore, the vendor will be liable to pay the purchaser an occupation rent if the possession has been beneficial.¹⁸

No doubt it is the ordinary rule as between vendor and purchaser, that after the time fixed for completion the vendor is entitled to interest, and the purchaser to the rents and profits. But when the property is occupied by the vendor for the purposes of his business, and the purchaser makes default in payment of the purchase-money, until payment of which the vendor is not bound to give up possession, the vendor continues the business, not on the account of the purchaser, but on his own behalf, under a pressure arising from the purchaser's default. He carries it on under great inconvenience, for all his arrangements must be made subject to determination on the payment of the purchase-money. In such a case the application of the ordinary rule would not be just and right.

This principle was applied in *Dundee Farm Ltd v Bambury Holdings Ltd*¹⁹ where the Court ordered the rent payable by the vendor to be determined with regard to "any special difficulties experienced by the vendor in carrying on farming operations under conditions of uncertainty pending the outcome of the present litigation".²⁰

(b) Purchaser in possession

If the purchaser is in possession of the property, interest is payable by the purchaser to the vendor, and the purchaser retains any profits from the property.²¹ In an early New Zealand case, Stout CJ said:²²

¹⁸ *Leggott v Metropolitan Railway Co*, supra at note 6, at 719.

¹⁹ Supra at note 17.

²⁰ Ibid, 655.

²¹ *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd*, supra at note 10, at 237 per Lord Templeman.

²² *Agang v Nichol* (1913) 32 NZLR 713, 714-715.

Indeed, so strongly do Courts of equity insist on a purchaser paying the interest on the purchase-money, if he be let into possession and enjoy the rents, that in *Birch v Joyl*²³ Lord St. Leonards ... said that no Court would execute a contract containing a provision that no interest was to be payable.

In summary, a purchaser in default must pay interest to the vendor, no matter who is in possession of the property. If the vendor is in possession he or she will have to account to the purchaser for profits received or pay an occupational rent, unless the occupation was not beneficial. If the purchaser is in possession he or she will be allowed to retain the rents and profits.

4. Vendor in Default

(a) Vendor in possession

If the vendor is in default, and the delay was attributable to this default, it may not be just to force the purchaser to pay interest, which will often be significantly higher than the profit or rent the purchaser will receive in return. In *Esdale v Stephenson*, Sir John Leach VC said:²⁴

If ... such interest is much more in amount than the rents and profits, and it is clearly made out that the delay in completing the contract was occasioned by the vendor there, to give effect to the general rule would be to enable the vendor to profit by his own wrong; and the Court, therefore, gives the vendor no interest, but leaves him in possession of the *interim* rents and profits.

In *Re Hewitt's Contract*,²⁵ Wilberforce J interpreted this statement as showing “that where the sale is delayed by the vendor’s default, the general rule is that the vendor, instead of getting the interest, must be satisfied with ‘the *interim* rents and profits,’ but does not lose both ways”.²⁶ This rule will be referred to as the vendor in default exception. The basis for this exception is the principle that a person should not be allowed to profit from his or her own wrong.²⁷

²³ *Supra* at note 9.

²⁴ (1822) 1 Sim & St 122, 123; 57 ER 49, 50; approved in *Jones v Mudd* (1827) 4 Russ 118; 38 ER 749.

²⁵ *Supra* at note 13.

²⁶ *Ibid*, 1302.

²⁷ *Esdale v Stephenson*, *supra* at note 24; *New Zealand Shipping Co Ltd v Societe des Ateliers et Chantiers de France* (1919) AC 1, 6-8 per Lord Finlay LC, 15 per Lord Wrenbury; *Mulvena v Kelman* [1965] NZLR 656, 658-660; *Halsbury's Laws of England* (4th ed 1983) vol 42 para 202; *Fry on Specific Performance* (6th ed 1921) para 1404.

(b) Purchaser in possession

The position in relation to a purchaser who has elected to go into possession of the estate is less clear. In his original formulation of the vendor in default exception, Sir John Leach did not specify whether it applied only when the vendor was still in possession, or whether it was a general principle applying whenever a vendor was in default, regardless of who had possession. In *Brake v Boote*,²⁸ Holland J held the exception did not apply where the purchaser had been let into possession.²⁹ This was contrary to Somers J's statement in *Fraser v Perpetual Trustees Estate and Agency Co of New Zealand Ltd*:³⁰

A vendor may not, however, profit by his default so that if interest exceeds the rents and profits he is entitled to the latter only

In *Fraser v Perpetual Trustees* settlement was delayed due to a family protection claim which prevented the vendor distributing the estate, and thus meant the purchaser (already in possession as a tenant holding over), who intended to set-off his share of the estate against the purchase money, could not settle. Somers J held that the vendor was not in default, but appears to have assumed that the vendor in default exception applies when the purchaser is in possession:³¹

The next question is whether the vendors were in default so that they are not entitled to recover by way of interest any greater sum than the rents and profits.

Fraser v Perpetual Trustees was not followed in *Brake v Boote*,³² where Holland J held that a purchaser who has been let into possession before paying all the purchase money will be liable to pay interest on the outstanding purchase money. His Honour came to this conclusion in three steps. First, he dismissed the authorities relied on in *Fraser v Perpetual Trustees* as not supporting Somers J's conclusion, considering the issue "as if the Judge had not said what he had in *Fraser's* case on this aspect of the matter".³³ Second, he examined the relevant texts in the area and concluded:³⁴

28 *Supra* at note 14.

29 *Ibid*, 766-767. In *Boote v Brake* [1992] 3 NZLR 136 the Court of Appeal reversed the decision of Holland J, but did not decide this point. The Court held that the vendor in default exception did not apply to the situation of mortgagor and mortgagee (at 143): "[U]nlike the position in equity of vendor and purchaser, the mortgagor remains both the legal and equitable owner of the estate which is security for the obligation of the mortgagor to pay sums owing in terms of the mortgage. It must follow that there is no basis for importing into the relationship of mortgagor and mortgagee the equitable rule of vendor and purchaser".

30 *Supra* at note 5, at 624.

31 *Ibid*, 625.

32 *Supra* at note 14.

33 *Ibid*, 764.

34 *Ibid*, 766.

There is no reference in any of those passages to any rule or principle that a purchaser in possession without paying the purchase money should be relieved of his obligation to pay interest if the delay is due to the default of the vendor.

Finally, Holland J distinguished between the situations where the purchaser is in possession without having paid the purchase money, and where there is a delay in settlement and the purchaser is not in possession.³⁵ In his Honour's opinion, the purchaser in the first situation will always have to pay interest, but the purchaser in the second may be relieved of the obligation if the delay was attributable to default by the vendor and the interest exceeds the rent. His Honour said:³⁶

It is clear that in cases of delay due to the default of the vendor, and usually the wilful default of the vendor, the Courts have relieved the purchaser of his obligation to pay interest. There does not appear to be any case, however, where that has occurred where the purchaser has been let into possession and is in effect in receipt of the fruits of his contract. I am satisfied that the two equitable principles are separate and distinct. On the one hand where there is delay in the settlement of an agreement for sale and purchase of land and that delay is not due to the wilful default of the vendor, the purchaser will be liable to pay interest on the purchase money from the date due for completion irrespective of whether the purchaser has been let into possession. Where, however, the purchaser has been let into possession before paying the purchase money, or all of the purchase money, he will, in the absence of any agreement to the contrary, be liable to pay interest on the outstanding purchase money.

However, it is not entirely clear that the principles are distinct. First, the rationale behind the vendor in default exception is to prevent the vendor from profiting by his own wrong.³⁷ That a purchaser enters into possession does not automatically prevent the vendor from profiting from his or her wrong. The interest received by the vendor may well be greater than the rents and profits enjoyed by the purchaser. Irrespective of which party is in possession, the rents received and the interest paid remain constant. That the purchaser is in physical possession of the land is not a compelling reason for making the principle set out in *Esdale v Stephenson*³⁸ inapplicable. The vendor makes the same profit in both cases. Referring to *Brake v Boote*, Blanchard commented:³⁹

[I]f there is to be a benefit to either party surely it is better that it accrue to the party who is not in default? A purchaser who has possession but not title is at a distinct disadvantage. If the vendor in default is to receive interest there will be relatively little incentive to make good that default in circumstances where the vendor well knows that the purchaser would be reluctant to give a settlement notice and then cancel. The purchaser may want the property. If interest has to be paid at a rate higher than the rents, all the advantage goes, it would seem, to the defaulting vendor.

35 *Ibid.*, 766-767.

36 *Ibid.* Gibson J in *Beresford v Clarke* [1908] 2 IR 317, 319-320 also regarded the two principles as separate.

37 *Supra* at note 27.

38 *Supra* at note 24.

39 "Casenotes" (1991) 5 BCB 273, 274.

In *Brake v Boote*, Holland J considered that one should ask whether the purchaser has suffered loss as a result of the vendor's default, and not whether the vendor should be permitted to profit from his or his own default. However, his Honour felt that in the case before him the answer was the same. He said:⁴⁰

The vendors have not profited by their default. By receiving interest they are receiving no more than what they might have expected to receive if the contract had been carried out according to its letter. Likewise the purchaser in being ordered to pay interest is no worse off than if the contract had been carried out according to its letter. He has either had the benefit of receiving interest on the moneys or not having to pay interest on moneys borrowed to enable him to meet his obligations under the agreement for sale and purchase.

This proposition is difficult to accept. Although the purchaser had the benefit of possession, this benefit is considerably limited by the liability of possession without the security of legal title. Furthermore, even though the purchaser received the interest the purchase money was earning, this was likely to be significantly less than the interest Holland J ordered him to pay to the vendor, and the purchaser probably had to pay interest to the lender in order to keep the loan alive. There is little justification why the vendor, who is in default and has delayed completion, should receive the same as he or she would have received had the contract been carried out. As Blanchard observed, there is then no incentive for the vendor to remedy the default.⁴¹

In *Hieber v Hieber*,⁴² Richardson J used the principle stated in *Birch v Joy*⁴³ to make a purchaser in possession, who had not paid the purchase money, pay interest even though he was in possession before the settlement date. His Honour did not deal with the two principles distinctly. Indeed, he applied the principles relating to delayed completion to the situation where there was no delay but the purchaser was in possession.⁴⁴ Voumard⁴⁵ states, without specifying if the vendor or purchaser is in possession, "[w]here delay in completion is due to the wilful default of the vendor, the purchaser is under no obligation to pay interest between the proper date for completion and actual completion".⁴⁶ There is no compelling reason why the well established equitable principle that a person should not profit from his or her own wrong should not apply where a vendor has caused completion to be delayed through his own default, and the purchaser has entered into possession.

40 *Supra* at note 14, at 767.

41 *Supra* at note 39, at 274.

42 [1991] 1 NZLR 315 (CA).

43 *Supra* at note 9, at 590-591; 233.

44 *Chinnery v Guild* (1990) ANZ ConvR 156 also involved the question of interest payable by a purchaser in possession where completion had been delayed due to the vendor's default. Jeffries J did not refer to any of the rules developed by the Courts of Equity. He refused to grant the vendors interest because they were not entirely blameless and had "failed to meet their contractual obligations". This decision is contrary to the equitable rules discussed above, as the purchaser has received both the interest and rents and profits.

45 Voumard, *The Sale of Land* (4th ed 1986).

46 *Ibid*, 476. See also *Williams on Title*, *supra* at note 14, at 723.

Somers J's view in *Fraser v Perpetual Trustees* is preferable as it recognises this equitable principle. If a vendor's default has delayed completion, then the interest the purchaser must pay should be no higher than the amount of the rents and profits, and may be less. This means that a defaulting vendor will make no profit from the situation, and may even receive less money than if the purchaser had caused the delay.

5. Neither Party in Default

When the delay in completion has not been caused by either party's default, there is no reason to depart from the general rule that from the date fixed for completion the purchaser shall receive the rents and pay interest on the unpaid purchase money.⁴⁷ As Blanchard comments:⁴⁸

If neither party is in default, the purchaser must pay interest on the balance of the purchase moneys as from the date fixed for settlement in the agreement but, if the purchaser is not in occupation, is entitled to the rents and profits from that date.

*Fraser v Perpetual Trustees*⁴⁹ is an example of this principle. Settlement was delayed due to a claim under the Family Protection Act 1955. As this delay did not constitute a default by the vendor, but a circumstance binding on both sides and inherent in the transaction,⁵⁰ the purchaser, who was in possession, was liable to pay interest from the date of contractual settlement to the date of actual settlement.

III: THE CONTRACT MODIFIES THE GENERAL PRINCIPLES

1. Interpretation of the Contract

While the courts recognise that the general equitable principles are subject to the provisions in a particular contract, their interpretation of the contract is made

47 *Esdaile v Stephenson*, supra at note 24, at 123; 50; *Plews v Samuel* [1904] 1 Ch 464, 468-469; *Agang v Nichol*, supra at note 22, at 714-715; *Fraser v Perpetual Trustees*, supra at note 5, at 624.

48 Blanchard, *A Handbook on Agreements for the Sale and Purchase of Land* (4th ed 1988) para 406.

49 Supra at note 5.

50 *Ibid*, 625.

against the background of equitable principles.⁵¹ Any stipulation to the contrary is carefully scrutinised.⁵² Nevertheless:⁵³

[I]f the contract between the parties is clear, one must adhere to the words of the contract [I]t is only in a case where there is ambiguity or doubt about the words used in the contract that it would be appropriate to look at the general rules of equity.

As Fisher J stated in *Kitenga Developments (Tauranga) Ltd v Supercool Marketing Ltd*:⁵⁴

As in most contract cases, it is a question of objectively interpreting the actual communications between the parties viewed within the matrix of facts and law within their contemplation at the time.

There are several ways of creating a contractual provision contrary to the normal position in equity. In *Kitenga Developments* Fisher J identified three ways that the parties could have excluded the purchaser's right to receive the rents and profits while the vendors were in possession after the completion date.⁵⁵ First, the parties could expressly agree that, notwithstanding the purchaser's liability to pay interest for late settlement, there would be no set-off for rent during the same period. Second, the parties could impliedly exclude the purchaser's prima facie right to rent. Third, the parties could substitute a fresh settlement date for the old one.

2. Express Agreement

The parties may expressly state the rules that are to apply. The most common method in New Zealand is found in the fifth edition of the Real Estate Institute of New Zealand and New Zealand Law Society Agreement for Sale and Purchase of Real Estate ("the REI-NZLS Agreement"). Clause 3.0 "Possession and Settlement" provides:

3.3 If from any cause whatever save the default of the vendor any portion of the purchase price is not paid upon the due date for payment the purchaser shall pay to the vendor interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment; but nevertheless this stipulation is without prejudice to any of the vendor's rights or remedies including any right to claim for additional expenses and damages. For the purposes of

⁵¹ *Re Priestley's Contract* [1947] Ch 469, 480; *Re Hewitt's Contract*, supra at note 13, at 1302 per Wilberforce J; *Terry v Merriview Pty Ltd* [1983] 2 VR 548, 551-552 per Crockett J; *Harvela Investments Ltd v Royal Trust Company of Canada (CI) Ltd*, supra at note 10, at 236.

⁵² *Birch v Joy*, supra at note 9, at 590; 233; *Strahorn v Strahorn* (1905) V SR (NSW) 382, 386.

⁵³ *Re Hewitt's Contract*, supra at note 13, at 1302 per Wilberforce J.

⁵⁴ High Court, Auckland. 11 February 1993 CM 720/92 Fisher J, p10; noted 16 TCL 4; partially reported (1993) ANZ ConvR 630 ([1993] DCR 49 reversed).

⁵⁵ *Ibid*, p9.

this subclause a payment made on a day other than a working day or after the termination of a working day shall be deemed to be made on the next following working day and interest shall be computed accordingly.

3.4(1) Subject to paragraph (2) of this subclause, if for any cause whatever save the default of the purchaser the vendor does not offer to give possession (and where the agreement calls for it, vacant possession) when the purchaser is entitled to possession the vendor shall pay to the purchaser a fair market rent for the property until possession is offered and the vendor shall also compensate the purchaser for any expenses incurred and damages suffered by the purchaser (including the purchaser's reasonable costs of temporary accommodation for persons and for chattels) resulting from the failure of the vendor to give possession on the date aforesaid to the extent that such expenses and damages are greater than the fair rental for the property.

3.4(2) As a condition of giving possession prior to settlement the vendor may require the purchaser to provide reasonable evidence of the purchaser's readiness, willingness and ability to perform the purchaser's obligations and, where the purchaser does not upon request by the vendor provide such evidence, the vendor shall not be required to pay or give credit for any amount under paragraph (1) of this subclause.

3.4(3)(a) Where the purchaser or any person claiming through the purchaser elects to go into possession of the property prior to settlement the purchaser shall pay to the vendor on settlement a fair rental for the property during the period of possession prior to settlement; provided that in respect of any period when the purchaser is obliged to pay interest under subclause 3.3 the purchaser shall not be required to pay both that interest and rental under this paragraph and the purchaser's obligation in respect of that period for payment of interest and rental shall be limited to payment of whichever amount of such interest or rental is the higher.

3.4(3)(b) In respect of any period when delay in settlement is caused by the default of the vendor, rental payable under this paragraph (3) shall be reduced to the extent necessary to ensure that the purchaser, by paying rental, will not be financially disadvantaged by taking possession, by comparison with the position applicable if possession had not been taken prior to settlement.

This clause broadly restates the general rules, while modifying their harshness in some respects. The result is as follows.

(a) Purchaser in default

(i) Vendor in possession

If the vendor is in possession subcl 3.3 provides that the purchaser must pay the vendor interest at the interest rate for late settlement on the portion of the purchase price unpaid from the due date for payment until actual payment. This is the same as the general equitable rules. However, the REI-NZLS Agreement does not state

that the vendor must hold the rents and profits for the purchaser, or pay an occupation rent. The courts have dealt with this omission by applying the general equitable rule that the vendor will be liable to pay the purchaser an occupation rent if possession has been beneficial.

In *Kitenga Developments*,⁵⁶ for example, the parties had entered into an agreement for the sale and purchase of land using the third edition of the REI-NZLS Agreement.⁵⁷ Completion of the sale was delayed due to the purchaser's inability to raise the purchase price. The purchaser agreed to pay interest for late settlement on the unpaid money. Judge Duncan in the District Court held that as the purchaser had agreed to pay interest for late settlement, there was an obligation on the defendant to account for rental received from the date set for completion.⁵⁸ Fisher J allowed the appeal on other grounds, but did not disagree with Judge Duncan's conclusion on this issue.⁵⁹

I think it perfectly clear that if in the present case the situation had simply been that the respondent had delayed ... before settling, then without more the appellant would have been entitled to interest at a reasonable rate but only after giving credit for the rent ... received in the interim. In those circumstances there would have been nothing to rebut the assumption that ... the appellant had received the rents purely as trustee for the respondent.

*Dundee Farm Ltd v Bambury Holdings Ltd*⁶⁰ provides another example of the courts applying the general rule to the REI-NZLS Agreement. The case involved an agreement for the sale and purchase of a farm where the provisions in the contract were in effect the same as the REI-NZLS Agreement. Both in *Kitenga Developments* and in *Dundee Farm* the courts held that the vendor in possession had to pay rent to the defaulting purchaser, who was paying interest, although that the contract did not mention the purchaser's right to rents. In effect, the courts said that as the contract did not deal with this situation the equitable rules had not been displaced. Therefore, to exclude the equitable rules the contract must expressly set out alternatives.

The contrary view is that by expressly stating that the defaulting purchaser is to pay interest, and by omitting any reference to the vendor in possession paying rent, the parties intended that the vendor would receive both interest and rents. In *Kitenga Developments* Fisher J took this view of a subsequent agreement which provided for the purchaser to pay interest but said nothing about the vendor paying rent.⁶¹

[T]he letter ... has been drafted by one lawyer and approved by another. On its face it is a comprehensive one. There is little room for the contra proferentem rule in a short and simple

⁵⁶ Ibid.

⁵⁷ On this point the third edition is not materially different from the fifth edition.

⁵⁸ *Kitenga Developments (Tauranga) Ltd v Supercool Marketing Ltd* [1993] DCR 49, 58-59.

⁵⁹ Supra at note 54, at p9.

⁶⁰ Supra at note 17.

⁶¹ Supra at note 54, at p11.

exchange between two lawyers. If a right of set-off with respect to rent had been intended I would expect to have seen it there.

However, one can argue that the parties did not set out the right to rent because they believed the general rule would apply. Expressly stating the right to interest allowed the parties to control the rate of interest, rather than having it determined by the courts. It is difficult to reconcile Fisher J's first conclusion, that even though the contract does not mention any right to rent a defaulting purchaser who pays interest under the REI-NZLS Agreement is entitled to rent, with his conclusion that because the subsequent agreement did not mention the right to rent, then there was no such right. Both agreements were comprehensively drafted by lawyers so there can be no distinction on this basis. One commentator stated:⁶²

Given that neither party had considered this question and that it was not part of any express agreement between them, it is suggested that the normal equitable principle of interest in exchange for rents and profits should not be lightly rejected.

Fisher J's decision that the purchaser was not entitled to receive rent is contrary to the equitable principle that one party should not receive both the land and the money. A well established equitable principle should not be displaced by omission.⁶³ The correct inference to be drawn from silence on the right to rents is that the purchaser who pays interest is entitled to receive the rents.

(ii) Purchaser in possession

If the vendor has allowed the defaulting purchaser to enter into possession of the land prior to completion of the contract, subcl 3.4(3)(a) provides that the purchaser must pay the *higher* amount of either the interest payable at the interest rate for late settlement on the unpaid purchase money, or a fair rental for the property. This clause modifies the general rule which forces the purchaser to pay interest but allows him or her to retain the rents and profits of the property, even if they are more than the interest paid. The modification in the REI-NZLS Agreement is commendable as it recognises the principle that a person should not be permitted to profit from his or her own wrong. Subclause 3.4(3)(a) ensures that the defaulting purchaser will not receive profits from the land that are greater than the interest paid to the vendor.

⁶² McMorland, "Rent Apportionment on Late Settlement" (1993) 6 BCB 182, 183.

⁶³ *Brake v Boote*, supra at note 14, at 768.

*(b) Vendor in default**(i) Vendor in possession*

Subclause 3.4(1) obliges the vendor to offer to give possession to the purchaser when the purchaser is entitled to it, or if this is not done, to pay a fair market rent for the property until the vendor offers possession to the purchaser. The vendor must also compensate the purchaser for certain expenses incurred. The REI-NZLS Agreement does not, however, address the question of the purchaser paying interest on the unpaid purchase money when default by the vendor has delayed completion of the contract. Subclause 3.3, which provides that the purchaser is to pay interest for late settlement, does not apply if the vendor is in default.⁶⁴ The courts have turned to the equitable rules to determine whether the purchaser must pay interest on the unpaid purchase money. When considering the same clause in an earlier edition of the REI-NZLS Agreement Holland J stated:⁶⁵

I am not persuaded that any valid reason exists to infer by implication that because the contractual obligation to pay interest does not arise when delay is due to the default of the vendor, that that should be read as a provision that the equitable principle should be excluded where delay was due to the default of the vendor. Had the parties wished so to provide in the contract they clearly could have done so, but I am satisfied they should be required to do so expressly.

The most suitable approach for the REI-NZLS Agreement is that interest be limited to an amount equivalent to the rents and profits. The effect of combining the equitable rule with the REI-NZLS Agreement is that the defaulting vendor in possession must pay a fair occupation rent and will receive interest on the unpaid purchase money, but such interest will be no higher than the rent the vendor has paid.

(ii) Purchaser in possession

If the purchaser has entered into possession of the land, subcl 3.4(3)(a) provides that the purchaser must pay to the vendor a fair rental for the property during the period of possession. The purchaser does not have to pay interest under subcl 3.3 if the delay was caused by the vendor's default.⁶⁶ The court will not imply an obligation on the purchaser to pay interest as this would result in the vendor receiving a double benefit of rent and interest. This inverts the equitable rule which provides that the purchaser in possession must pay interest but may retain the rents and profits.

64 Ibid.

65 Ibid.

66 Ibid.

Subclause 3.4(3)(b) adds that the rent the purchaser must pay for the property is to be reduced, if necessary, so that he or she will not be financially disadvantaged by choosing to take possession, instead of waiting until settlement. This proviso was inserted into the fifth edition of the REI-NZLS Agreement, probably in response to Holland J's decision in *Brake v Boote*.⁶⁷ Thus, if the rent the purchaser in possession must pay is greater than the interest he or she would pay if not in possession, then the rent is to be reduced to that lesser amount. Consequently, the defaulting vendor does not receive a windfall as a result of the purchaser choosing to enter into possession. The rent that the purchaser in possession must pay will be equal to or lower than the rent that the vendor in possession would pay to the purchaser, which is a fair market rent. The proviso has achieved its aim, albeit in a complicated way: it prevents the purchaser being financially disadvantaged by entering into possession.

While the vendor in default exception and the REI-NZLS Agreement both aim to prevent the vendor from profiting from his or her own default, the outcome under the two methods may be different. Under the equitable rules the amount the purchaser in possession must pay is limited to the rents and profits the property earns, whereas under the REI-NZLS Agreement the limit is the rent that the vendor in possession would have paid, which is a fair market rent. A fair market rent is not necessarily the same as the rents and profits the property earns; it is usually lower to enable the tenant to make a profit.

(c) Neither party in default

If the vendor has not offered possession of the property to the purchaser then, under subcl 3.3, the purchaser must pay the vendor interest on the unpaid purchase money at the interest rate for late settlement from the date when payment was due until actual payment. Under subcl 3.4(1) the vendor must pay the purchaser a fair market rent for the property until he or she offers possession. This is the same as the equitable rule.

If the purchaser is in possession, subcl 3.4(3)(a) provides he or she must pay the higher of either interest at the interest rate for late settlement on the unpaid purchase money, or a fair rental for the property. The result is a little different to the equitable rules which require the purchaser to pay interest but keep the rents and profits earned from the land. Equity allows the purchaser to make a profit if the rents and profits are greater than the interest he or she has to pay. Under the REI-NZLS Agreement the vendor will always receive the higher amount. While this modification is commendable in relation to a purchaser in possession who has caused delay through his or her own default, it is somewhat harsh when applied to a purchaser who has not contributed to the cause of the delay. If neither the vendor nor the purchaser are to blame for the delay then it is unfair to always give the

⁶⁷ *Ibid.*

higher amount to the vendor. The outcome under the equitable rules is fairer: the vendor is advantaged if interest is higher and the purchaser is advantaged if rents and profits are higher.

(d) A suggested amendment to the REI-NZLS Agreement

There are some problems with the REI-NZLS Agreement. Expressly stating one party's obligations, but sometimes leaving the other's to be determined by the general rules of equity is confusing and ambiguous. It invites litigation. Parties are more likely to settle out of court if all their rights and obligations are explicitly set out. Although this will make the clause longer, it will make it clearer, especially for a layperson trying to understand his or her position. Nonetheless, the subclauses contain valuable modifications to the equitable rules so they should be retained, rather than leaving the parties' rights and obligations to be determined by the equitable rules.

The following is one suggested amendment to subcls 3.3 and 3.4 of the REI-NZLS Agreement which would cover *all* parties' rights and obligations:⁶⁸

3.3(1)(a) If from any cause whatever save the default of the vendor any portion of the purchase price is not paid upon the due date for payment the purchaser shall pay to the vendor interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment.

3.3(1)(b) If from the default of the vendor any portion of the purchase price is not paid upon the due date for payment the purchaser shall pay to the vendor the lower amount of either interest at the interest rate for late settlement on the portion of the purchase price so unpaid from the due date for payment until payment, or the rental the vendor would pay under subclause 3.4(1) if the vendor were in possession.

3.3(2) This subclause is without prejudice to any of the vendor's rights or remedies including any right to claim for additional expenses and damages.

3.3(3) For the purposes of this subclause a payment made on a day other than a working day or after the termination of a working day shall be deemed to be made on the next following working day and interest shall be computed accordingly.

3.4(1)(a) Subject to paragraph (3) of this subclause, if for any cause whatever the vendor does not offer to give possession (and where the agreement calls for it, vacant possession) when the

⁶⁸ Subclauses 3.4(4) and 3.4(5) of the fifth edition would remain unaltered.

purchaser is entitled to possession the vendor shall pay to the purchaser a fair market rent for the property until possession is offered.

3.4(1)(b) In respect of any period when delay in settlement is caused by the default of the purchaser, rental payable under paragraph (1)(a) of this subclause shall be reduced to the extent necessary to ensure that the vendor only pays rental equivalent to the benefit he or she has received from continuing in possession, and if the vendor has received no benefit from remaining in possession then no rental is payable.

3.4(2) Subject to paragraph (3) of this subclause, if for any cause whatever save the default of the purchaser the vendor does not offer to give possession (and where the agreement calls for it, vacant possession) when the purchaser is entitled to possession the vendor shall also compensate the purchaser for any expenses incurred and damages suffered by the purchaser (including the purchaser's reasonable costs of temporary accommodation for persons and for chattels) resulting from the failure of the vendor to give possession on the date aforesaid to the extent that such expenses and damages are greater than the fair rental for the property.

3.4(3) As a condition of giving possession prior to settlement the vendor may require the purchaser to provide reasonable evidence of the purchaser's readiness, willingness, and ability to perform the purchaser's obligations and, where the purchaser does not upon request by the vendor provide such evidence, the vendor shall not be required to pay or give credit for any amount under paragraph (1) of this subclause.

3.4(4)(a) Where the purchaser or any person claiming through the purchaser elects to go into possession of the property prior to settlement the purchaser shall pay to the vendor on settlement a fair rental for the property during the period of possession prior to settlement; provided that the purchaser shall not be required to pay both interest and rental.

3.4(4)(b) In respect of any period when delay in settlement is caused by the default of the purchaser, the purchaser's obligation in respect of that period for payment of interest and rental shall be limited to payment of whichever amount of such interest or rental is the higher.

3.4(4)(c) In respect of any period when delay in settlement is not caused by the default of either party, the purchaser's obligation in respect of that period for payment of interest or rental shall be limited to payment of rental.

3.4(4)(d) In respect of any period when delay in settlement is caused by the default of the vendor, the purchaser's obligation to pay interest or rental in respect of that period shall not be greater than, and may be less than, the amount of interest payable if possession had not been taken prior to settlement.

The amended provisions include the equitable rule that when a vendor in default remains in possession after the completion date the purchaser must still pay interest, though it cannot be greater than the rent the vendor is paying. Further, they include the rule that a vendor who remains in possession after completion has been delayed due to the purchaser's default must pay rent if the occupation was beneficial. The liability of the purchaser in possession where delay in completion was caused by neither party has been altered so that he or she does not have to pay the higher amount of interest or rent as occurs under the present REI-NZLS Agreement. Instead, the purchaser will always have to pay rent. This means if the rent payable is higher than the interest the purchaser is disadvantaged, but if it is lower the vendor is disadvantaged. This is fairer because neither party is always disadvantaged. Finally, when completion is delayed due to the vendor's default, subcl 3.4(4)(d), which prevents the purchaser in possession before settlement from being financially disadvantaged, is simplified.

3. Implied Exclusion

The second method of contracting out of the equitable rules is to enter into an agreement which excludes the equitable rules by implication.⁶⁹ However, silence on the matter does not imply an intention to exclude the equitable rules.⁷⁰ In *Terry v Merriview Pty Ltd*,⁷¹ the Supreme Court of Victoria accepted that a court should only interpret a contract as excluding an equitable rule if it has no other choice.⁷² For the equitable principles to be excluded it must be a necessary implication from the contract that they do not apply.

In *Terry v Merriview Pty Ltd* the Court held that the contract necessarily excluded the operation of the equitable rule that where completion is delayed one party should not receive both interest and rents and profits. It was held that the effect of the contract was, by implication, that the purchaser was not to have the rents and profits before acceptance of the title and full payment of the purchase price. Since another clause gave the vendor the right to interest, the vendor had become entitled to both the money and the land.

Similarly, in *Kitenga Developments*,⁷³ the parties to a contract excluded the equitable principles by implication. Fisher J held that by making a subsequent agreement that interest was to run on the outstanding balance of the purchase money from the original settlement date, the parties had by implication excluded the purchaser's right to rent.⁷⁴ Fisher J's decision is dubious, especially in light of

69 *Kitenga Developments (Tauranga) Ltd v Supercool Marketing Ltd*, supra at note 54, at p10.

70 *Terry v Merriview Pty Ltd*, supra at note 52, at 552 per Crockett J.

71 *Ibid.*

72 *Ibid.*, 550 per Starke J.

73 *Supra* at note 54.

74 *Ibid.*, p11.

*Terry v Merriview Pty Ltd.*⁷⁵ Stating in the contract that one party is entitled to interest does not necessarily imply that the other party is not entitled to rent.

4. A New Settlement Date

The third and final method by which the parties may exclude the general rules of equity is to enter into a subsequent agreement which provides a new settlement date. The effect of such an agreement would be to “remove the purchaser’s right to rent because there would no longer be a post-settlement date default period, and hence no longer a period during which the vendor [would be] receiving rent as constructive trustee for the purchaser”.⁷⁶ This also means that the vendor’s right to interest no longer exists, because equity does not deem the vendor to be the owner of the purchase money until the settlement date has passed.⁷⁷ However, the parties may provide for either of these rights in their agreement.

In *Kitenga Developments*, Fisher J held that the correspondence which had passed between the parties constituted a variation of the original contract, and substituted a new settlement date,⁷⁸ overruling Judge Duncan’s finding that correspondence between the parties had merely dealt with the vendor’s rights under the settlement notice.⁷⁹ It has been strongly argued that a new settlement date had not been substituted, but simply an extension of time granted under the existing settlement notice.⁸⁰

IV: CONCLUSION

While the equitable rules which deal with parties’ rights and obligations regarding interest and rents and profits when delay occurs are detailed and contain exceptions, generally they are clear and well settled. The only area of uncertainty is the purchaser in possession’s liability to pay interest where completion is delayed due to the vendor’s default. The general principle of law that a person should not be allowed to profit from his or her own wrong demands that the purchaser’s liability to pay interest be limited to the amount of rents and profits the purchaser receives. For any number of reasons the parties may wish to vary these rules. The most common form of alteration in New Zealand is found in the provisions of the REI-NZLS Agreement. However, some of the subclauses in the REI-NZLS Agreement are confusing because they do not set out all of the parties’ rights with respect to possession and settlement. This forces the courts to return to

⁷⁵ *Supra* at note 51.

⁷⁶ *Kitenga Developments (Tauranga) Ltd v Supercool Marketing Ltd*, *supra* at note 54, at p9.

⁷⁷ *Birch v Joy*, *supra* at note 9, at 591; 233.

⁷⁸ *Supra* at note 54, at p12-13.

⁷⁹ *Supra* at note 58, at 56.

⁸⁰ *McMorland*, *supra* at note 62.

the equitable principles. Amending this Agreement so that it comprehensively states both the purchaser's and the vendor's rights in all situations would make it a more accessible and fairer statement of their positions when completion is delayed. This would speed settlement of delayed sales and minimise litigation.

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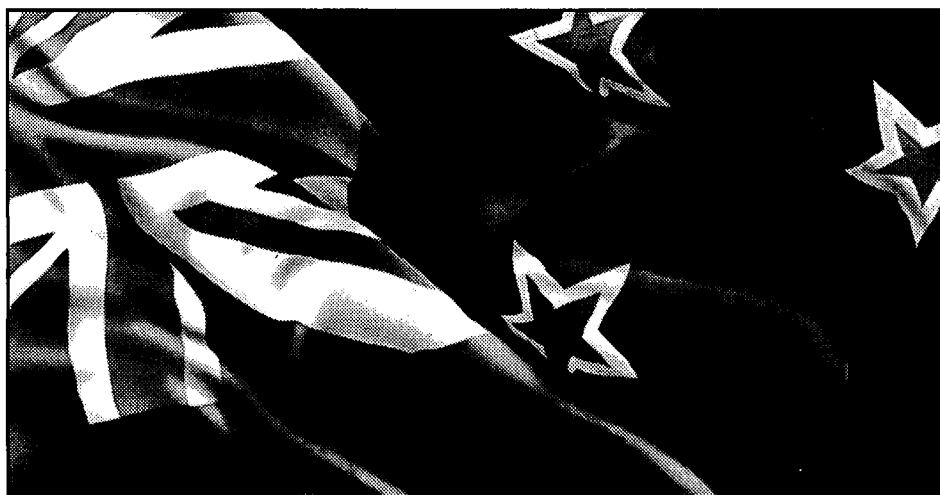
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