

TIME IN THE PERFORMANCE OF CONTRACTS

K. E. LINDGREN

SECOND EDITION



BUTTERWORTHS



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**TIME
IN THE
PERFORMANCE
OF
CONTRACTS**

Especially for the Sale of Land

SECOND EDITION

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PREFACE TO THE SECOND EDITION

The five years that have passed since publication of the first edition of this work have seen many important cases decided within the area with which the book is concerned. Some cases which were noted as unreported in the first edition have since been reported. I have been "approved" and "disapproved" by their Honours the judges. Colleagues have said that they would welcome a second edition. For all these reasons, and because of the availability of leave from my university, it seemed timely to write this second edition in the latter part of 1981.

I am thankful to several people for their time in discussing with me aspects of the subject matter of the book. In particular, I should mention his Honour Mr Justice D L Mahoney, Judge of Appeal of the Court of Appeal, Supreme Court of New South Wales, and Messrs P W Young, QC and B W Rayment, both of the New South Wales bar. I also wish to thank Miss Lynn Pollack, Librarian of the Law Courts Library, Sydney and that library's staff for their assistance in my research, my wife Wendy and Miss Catriona Robertson for assistance in proofreading, and last but not least Mrs Carol Issacs for her expeditious and accurate typing of the manuscript in spite of the quality of my handwriting.

I have no doubt that by the time this book is published, further judgments will have been delivered, not all of which can be reported in the Law Reports or the two loose-leaf services available in this field, Butterworths' *Conveyancing Service New South Wales* and CCH's *NSW Conveyancing Law and Practice*, and some judgments noted in the book as "unreported" will have been reported. This, I am afraid, is in the nature of the beast. At galley-proof stage in April 1982 it has been possible to take in brief references to some such developments which have occurred since preparation of manuscript. Unfortunately, however, at that stage the High Court judgments in *Louinder v Leis* and *Perri v Coolangatta Investments Pty Ltd* were still awaited.

K E LINDGREN

21 December 1981

PREFACE TO THE FIRST EDITION

In August 1974 I presented a paper on “Notices to Complete” at the annual weekend seminar held by the Newcastle and Hunter Valley Law Societies at the University of Newcastle. Sydney solicitor, Peter Tebbutt (who attended) and I thought that other legal practitioners would be interested and that it would be appropriate to prepare the paper for publication as an article. This task I embarked upon while I was at the University of Cambridge on sabbatical leave in 1975. But the project grew. Thus, this book.

A primary concern of this book is to explore the question: In what circumstances will a vendor's or purchaser's non-performance of a contractual obligation within the time limited, expressly or by implication, for performance, relieve the innocent party from his obligation to perform the contract further? Since parties to a contract particularly for the sale of property sometimes make their contract “subject to” or “conditional upon” the happening of an event or the existence of a fact (eg obtaining of a consent or approval) within a certain time limit, express or implied, a related question arises: In what circumstances will the non-fulfilment of that condition within that time relieve a party from his obligation to perform the contract further?

One possible introduction to this inquiry would be to make immediately the historical study demanded by s 13 of the Conveyancing Act 1919 (NSW) or its local counterpart¹ of the rules of Equity governing time stipulations. That historical study is undertaken in Chapter 2, but it is more appropriate to proceed in the first instance by noting some general principles relating to contractual terms and the performance of contracts.

And so the book commences with a consideration of general principles relating to contractual terms and their performance and is followed immediately by the historical examination of the rules of Equity as to essentiality of time stipulations. It goes on to consider time stipulations made essential by the contract and the making of time essential by notice and then to examine the operation and effect of contingent conditions and those promissory conditions of which time is the essence. Chapter 6 discusses election between rescission and waiver once an essential time has passed without fulfilment or performance and the book concludes with an examination of various remedies and defences open to the parties.

The principles discussed in this book have arisen in numerous cases decided, particularly in the Supreme Court of New South Wales, within say the last three years. This may be a result of the fact that the standard form of contract for the sale of land in common use in New South Wales is “open” on questions of time, coupled with the fact that we have experienced an economic recession following boom conditions with the possible consequence that purchasers who contracted in hope have procrastinated when the day for performance has arrived. Certainly the contours of the law in this

1 See [201] for the text of Judicature Act 1873 s 25(7) from which the section of the Conveyancing Act (NSW) and its counterpart in other Australian States was derived.

area were and are being reshaped, almost continuously. No doubt by the time this book is published cases referred to in it as "unreported" will have reached the law reports and other cases will have been decided. Yet I believe that contracts for the sale of land are such an important and familiar form of transaction in our economy and in the practice of most law firms, that the significant development which has occurred to date warrants the drawing of a line so that development can be stated and discussed in a comprehensive fashion at this stage.

Although the sequential structure of the performance of contracts for the sale of land is special, much of what is said in this book will apply to questions of timeliness in the performance of contracts of any nature. Moreover, although the genesis of the book was a concern with the relevant law in Australia, the book, as well as having general relevance to all common law jurisdictions, contains numerous specific references to English, Canadian and New Zealand cases.

I wish to record my thanks to the following typists who have typed various parts of the manuscript in one or other of its numerous drafts: Barbara Ward, Larissa McNamara, Robyn Lindgren, Pauline Johns, Cathy Cowan and Jackie Welch. Finally I thank Butterworths and especially the chief editor Mr Kingsley Siebel for their assistance and co-operation in the publication process.

K E LINDGREN

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