## HIGH COURT OF AUSTRALIA

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ

SAMUEL PHILIP CAPPER

**APPELLANT** 

**AND** 

ANDREW CECIL THORPE

RESPONDENT

Capper v Thorpe (P48-1997) [1998] HCA 24 3 April 1998

#### **ORDER**

Appeal dismissed with costs.

On appeal from the Supreme Court of Western Australia

## Representation:

R M Garratt QC with S F Popperwell for the appellant (instructed by Chalmers & Partners)

R L Le Miere QC for the respondent (instructed by Amidzic & Co)

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### **CATCHWORDS**

## Samuel Capper v Andrew Thorpe

Real Property - Notices - Default notice - Service by post - Contract deeming notice to be served 48 hours after posting - Whether consistent with legislative provisions as to notice.

Real Property - Notices - Default notice - Service by post - "served on the purchaser in writing" - Whether service effected upon receipt of a postal notice advising that an article awaits collection.

Real Property - Notices - Default notice - Whether receipt of a copy of notice amounts to service.

Statutes - Interpretation - Intention of the Legislature - Use of legislative debates.

Sale of Land Act 1970 (WA), s 6.

*Interpretation Act* 1984 (WA), ss 75(1), 76.

Interpretation Act 1918 (WA), s 31 (repealed).

GAUDRON, McHUGH, KIRBY, HAYNE AND CALLINAN JJ. Pursuant to the grant of special leave, Mr Samuel Capper ("the vendor") appeals against an order of the Full Court of the Supreme Court of Western Australia, the effect of which was to hold that he had not validly terminated a terms contract for the sale of land to the respondent, Mr Andrew Thorpe ("the purchaser"). The Full Court held that a notice purporting to terminate the contract for failure to pay the balance of the purchase price was of no force or effect. This was because an earlier notice requiring the purchaser to pay the balance had not been served on the purchaser in accordance with the requirements of s 6(2) of the *Sale of Land Act* 1970 (WA) ("the Act"). That provision requires service on a date "not less than twenty-eight days" before the date on which the purchaser was required to pay the purchase price. As a result, the Full Court held that s 6(1) of the Act prevented the vendor from terminating the contract by reason of the purchaser's failure to pay the balance of the purchase price on the specified date.

## 2 Section 6 of the Act enacts:

- "(1) Notwithstanding any stipulation to the contrary, a terms contract shall not be determined or rescinded on account of a breach by the purchaser of any term of the contract unless and until the vendor has served on the purchaser a notice in writing specifying the breach complained of and requiring the purchaser to remedy the breach within the time mentioned in subsection (2) of this section and the purchaser has failed to do so.
- (2) The time referred to in subsection (1) of this section within which the purchaser is required to remedy a breach is -
  - (a) where the breach consists of a failure to pay a sum of money a date stipulated by the vendor being a date not less than twenty-eight days from the date of service of the notice; and
  - (b) in any other case a reasonable time from the date of service of the notice."
- The question in the appeal is whether, consistently with s 6, the parties to a terms contract for the sale of land can lawfully fix the date for the commencement

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of a period specified in s 6(2) by deeming the relevant "default" notice to have been "served at the expiration of ... (48) hours from the time of posting"<sup>1</sup>.

It is important in considering the issues presented by the appeal to keep in mind the objects of s 6 of the Act. Those objects appear, clearly enough, from the language of the section. Contracts of the specified kind may not be determined or rescinded unless a notice in writing has been served on the purchaser. The parties cannot, by their contract, agree to exclude the operation of this requirement. Its object is plainly to afford the recipient of the notice time within which to secure advice and to attempt to cure the default. Quite often the default will have arisen from an inability to raise funds. In that context, each day of the period of notice may be important to the purchaser in default. The provision is a protective one. It should not be construed in a way that would undermine or frustrate the achievement of the clear legislative purpose. The requirement of service of a notice on the purchaser must be understood, and the section construed, in the context of the achievement of that purpose.

## The factual background

The vendor was the registered proprietor of property at 196 Subiaco Road, Subiaco. By a contract dated 26 April 1995, he agreed to sell the land to the purchaser for \$180,000. The contract incorporated the Western Australian Law Society and Western Australian Real Estate Institute "General Conditions". The parties agreed that settlement would take place no later than 5 September 1995. The contract stated that the purchaser's address was "16 Beagle Street, Mosman Park".

Settlement did not take place on the agreed date. On 6 September 1995, the vendor prepared a Default Notice in accordance with cl 16 of the contract requiring the purchaser to remedy, within 28 days after service of the notice, his failure to settle. The notice was sent by certified mail on 6 September 1995 to the purchaser at 16 Beagle Street. Between April and September 1995, however, the purchaser had moved to a new address in Subiaco. The trial judge found that the purchaser had not notified the vendor of the change of address prior to correspondence dated 19 September 1995, which specifically addressed the matter.

In mid-September 1995, the purchaser received a note from the Mosman Park South Post Office stating that it had an article for him that was awaiting collection.

<sup>1</sup> Contract of Sale, cl 21(2).

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The purchaser did not collect the posted Default Notice until 3 October 1995 although he received a copy of it sometime between 15 and 19 September 1995.

On 9 October 1995, the vendor served on the purchaser a notice terminating the contract. Termination was based on the purchaser's failure to remedy the specified default. The vendor retained the deposit money. On 10 October 1995, the purchaser lodged a caveat against the title to the land. The caveat claimed an interest in the land as purchaser of the fee simple.

On 10 November 1995, the vendor issued a summons for the removal of the caveat. The present appeal relates to that summons<sup>2</sup>.

#### The relevant contractual clauses

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Clause 16 is entitled "Default Notice" and provides:

- "(1) Except as otherwise specifically provided in these Conditions -
  - (a) the Vendor shall not be entitled to forfeit any money paid by the Purchaser or take or recover possession of the property on the ground of the Purchaser's default in performing or observing any obligation imposed on the Purchaser under the contract; and
  - (b) neither the Vendor nor the Purchaser shall be entitled to terminate the contract on the ground of the other's default in performing or observing any obligation imposed on that other party under the contract;

#### unless

(i) the party not in default has first given to the party in default a written notice specifying the default complained of, which notice shall require that the default be remedied within the period stipulated in the notice; and

In November 1995, the purchaser commenced proceedings seeking specific performance of the contract. However, pending resolution of the summons to remove the caveat, no further action has been taken on the writ for specific performance.

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- (ii) the party in default fails to remedy the default within the period stipulated in that notice.
- (2) The period stipulated in the written notice referred to in Condition 16(1) shall not be less than fourteen (14) days from the date of service of that notice, or, if the contract is a terms contract, not less than the period of notice stipulated in Section 6 of the Sale of Land Act 1970."

It was common ground that the contract was a terms contract so that s 6 of the Act applied.

- 11 Clause 21 is entitled "Service of Notice" and relevantly provides:
  - "(1) A notice or other communication to be given or made under these Conditions shall be in writing and may be signed by the party giving it or that party's representative and unless otherwise provided in these Conditions is deemed to have been duly given or made if served on the party concerned -
    - (a) by delivering the notice to the party personally;
    - (b) in the case of an individual, by delivering it or posting it to the party at the party's address specified in the contract or other address for service from time to time notified in writing by the party or the party's representative to the other party or that party's representative;

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(2) A notice or other communication posted shall be deemed to be served at the expiration of forty eight (48) hours from the time of posting."

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Section 76 of the *Interpretation Act* 1984 (WA) ("the 1984 Act") also provides for the service of documents. Section 76 enacts:

"Where a written law authorizes or requires a document to be served, whether the word 'serve' or any of the words 'give', 'deliver' or 'send' or any other similar word or expression is used, without directing it to be served in a particular manner, service of that document may be effected on the person to be served -

- (a) by delivering the document to him personally; or
- (b) by post in accordance with section 75(1); or
- (c) by leaving it for him at his usual or last known place of abode, or if he is a principal of a business, at his usual or last known place of business; or
- (d) in the case of a corporation or of an association of persons (whether incorporated or not), by delivering or leaving the document or posting it as a letter, addressed in each case to the corporation or association, at its principal place of business or principal office in the State."

#### Section 75(1) provides:

"Where a written law authorizes or requires a document to be served by post, whether the word 'serve' or any of the words 'give', 'deliver' or 'send' or any other similar word or expression is used, service shall be deemed to be effected by properly addressing and posting (by pre-paid post) the document as a letter to the last known address of the person to be served, and, unless the contrary is proved, to have been effected at the time when the letter would have been delivered in the ordinary course of post."

## The decision of the primary judge

The hearing of the summons for the removal of the caveat came before Owen J in the Supreme Court of Western Australia. The principal issue before Owen J was whether the Default Notice had been properly served on the purchaser having regard to s 6 of the Act and ss 75 and 76 of the 1984 Act. His Honour first considered the position under the General Conditions of the contract (cll 16, 21(2)), as regulated by s 6 of the Act. He held that the Default Notice had been properly served under the General Conditions of the contract. By virtue of

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cl 21(2), the Default Notice could be taken to have been served on a date which is different from, and prior to, the date on which it was actually received by the purchaser. Clause 21(2) does not contain words such as "unless the contrary is shown". Accordingly, his Honour said that it did not create any rebuttable presumption. He held that, under the contract, the Default Notice was deemed to have been received on 8 September 1995, even though there was uncontradicted evidence that the purchaser had not actually collected it until 3 October 1995.

His Honour said that s 6 of the Act provides no guidance on two important questions: (i) what methods of service the parties may use; and (ii) how the "date of service of the notice" under s 6(2) is to be ascertained. The purchaser contended that these two questions could be resolved only by recourse to the 1984 Act while the vendor contended that they were to be resolved by reference to the contract.

Rejecting the purchaser's argument, Owen J held that ss 75 and 76 of the 1984 Act are directory rather than mandatory provisions. He said that the purpose of ss 75 and 76 is not to govern a service regime under a contract to which the Act applies where the contract expressly governs the matter. The aim of ss 75 and 76 is to establish a mechanism for serving documents and fixing the date of service only where no other mechanism exists. His Honour said that no injustice arises by requiring parties to observe their contractual provisions rather than having resort to a general interpretation statute.

Consequently, Owen J held that the purchaser had not raised a serious question to be tried regarding the invalidity of the Default Notice or the Termination Notice. His Honour ordered that the purchaser's caveat be withdrawn.

The purchaser appealed to the Full Court of the Supreme Court of Western Australia.

#### The decision of the Full Court

The Full Court of the Supreme Court of Western Australia allowed the purchaser's appeal. The leading judgment was given by Kennedy J, with whose reasons Pidgeon and Templeman JJ agreed. Kennedy J held that it "would be contrary to the evident purpose of the *Sale of Land Act*, and it would appear to be inconsistent with the opening words of s 6 of the Act" if cl 21 of the contract applied to "a notice of breach of a term of the contract which is required to be served on the defaulting party by s 6". His Honour held that the word "served" in s 6 of the Act brought into play ss 75 and 76 of the 1984 Act. He said that the ultimate question in the case was whether service of the notice was, in accordance

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with ss 76(b) and 75(1), deemed to have been effected when the letter would have been delivered in the ordinary course of post or whether, in accordance with s 75(1), "the contrary is proved". However, the evidence showed that the Default Notice itself, as opposed to the note from the Post Office stating that an article awaited collection, was never delivered to 16 Beagle Street, Mosman Park. The vendor therefore could not rely on the deeming provision in s 75(1). Because there was no other evidence as to service which allowed sufficient time in accordance with the Act, his Honour held that the appeal should be allowed.

## The appeal should be dismissed

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In our opinion, the Full Court was correct in allowing the appeal. It follows that this appeal must be dismissed. However, we would dismiss it for reasons different from those relied on by the Full Court.

Under s 6 of the Act, a terms contract cannot be determined or rescinded on account of breach by the purchaser unless "the vendor has served on the purchaser" the requisite notice in writing. The notice must give 28 days to remedy the breach where the breach consists of a failure to pay money, or give a reasonable time to remedy the breach where it does not involve the payment of money. Where a statutory provision, such as s 6, requires a document to be "served", the statutory command is ordinarily perceived as requiring the contents of the document to be delivered to the person to be served<sup>3</sup>. However, unless the statute says so, a document may be "served" although it is not personally served<sup>4</sup>. Thus, it may be served by posting it to the person required to be served<sup>5</sup>. In many statutory contexts, a document may also be "served" when it is brought to the notice of the person who has to be served<sup>6</sup>. At all events, it will be "served" in such contexts if the efforts of the person who is required to serve the document have resulted in the person to be served becoming aware of the contents of the document. Thus, in Ex parte Portingell, the English Court of Appeal held that a notice of objection had been "served on" the applicant for renewal of a licence when it was handed to a

- 3 *Ex parte Portingell* [1892] 1 QB 15 at 17.
- 4 In re McGrath; Ex parte The Official Receiver (1890) 24 QBD 466 at 467.
- 5 In re McGrath; Ex parte The Official Receiver (1890) 24 QBD 466 at 467; cf In re 88 Berkeley Road, NW 9 [1971] 1 Ch 648.
- 6 Holloway v Coster [1897] 1 QB 346; In re Harris [1931] 1 Ch 138; In re A Debtor [1939] 1 Ch 251.

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boy of 14 on the licensed premises and the magistrates inferred that "the notice had in fact come to the hands of the applicant"<sup>7</sup>.

In its ordinary and natural meaning, therefore, s 6 of the Act requires service in fact of the notice "requiring the purchaser to remedy the breach".

However in Western Australia, as elsewhere in Australia, the Legislature by enacting ss 75 and 76 of the 1984 Act has extended the meaning of the term "serve". In cases falling within the provisions of those sections, a document may be served although it is not in fact received by the person who has to be served. But the provisions of ss 75 and 76 of the 1984 Act do not assist the vendor in this case. The purchaser proved that the default notice was not delivered to his "last known address".

Notwithstanding this finding, the vendor seeks to use the provisions of ss 75 and 76 in another way. He contends that they show that the term "served" in s 6 has a wide meaning, wider indeed than its ordinary and natural meaning. When s 6 of the Act was enacted in 1970, s 31 of the *Interpretation Act* 1918 (WA) ("the 1918 Act") contained provisions comparable to ss 75 and 76. The vendor

- 7 Ex parte Portingell [1892] 1 QB 15 at 16.
- 8 See, for example, Fancourt v Mercantile Credits Ltd (1983) 154 CLR 87; Gem Po-Chioh Cheong v Webster [1986] 2 Qd R 374; cf Alexander v Stocks & Holdings (Sales) Pty Ltd [1975] VR 843; Morris v Hallett Brick Industries (1996) 67 SASR 328.
- 9 "31 (1) Where by any Act any notice or other document is required to be served, whether the expression 'serve' or the expression 'give,' 'deliver,' 'send,' or any other expression is used, the service may be effected on the person to be served -
  - (a) by delivering the notice or document to him personally; or
  - (b) by leaving it for him at his usual or last known place of abode, or, if he is in business, at his usual or last known place of business; or
  - (c) by posting the notice or document to him as a letter addressed to him at his usual or last known place of abode, or, if he is in business, at his usual or last known place of business:

(Footnote continues on next page)

contends that the existence of s 31 shows that the term "served" in s 6 was intended to cover any mode of communication that was *apt to bring* the notice in writing to the attention of the purchaser. The vendor points to the fact that, during the legislative debates on the Bill which enacted s 6, members of the Legislature were aware that in some situations a person might be "served" for the purpose of s 6 although that person had not in fact received a notice.

But it is one thing to hold that the Legislature recognised that, by reason of s 31, situations could arise where the contract would be terminated although the purchaser had not received the notice. It is a different matter altogether to conclude that the Legislature intended that any attempted communication that was apt to bring a notice to the attention of the purchaser meant that "the vendor [had] served on the purchaser a notice in writing". In particular, it does not follow that in enacting s 6 the Legislature of Western Australia accepted that the parties could agree that the purchaser should be deemed to be served by communications or attempted communications falling outside the provisions of ss 75 and 76. There is nothing in the language of s 6 or the legislative debates which gives any ground for inferring that the Legislature intended that s 6 should cover cases of deemed service other than those laid down in the then s 31 of the 1918 Act.

The ordinary meaning of "served on the purchaser ... in writing" therefore requires that the writing be brought to the attention of the purchaser by the efforts of the vendor or those acting on his or her behalf. That meaning is extended by the terms of ss 75 and 76 of the 1984 Act. Ordinarily, then, a vendor cannot terminate a terms contract for breach unless, in the case of non-payment of money,

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Provided that no place shall be deemed the place of business of any person unless he is a principal in the business.

- (2) A notice or document may be served on a corporation by delivering it, leaving it, or posting it as a letter, the notice or document being addressed in each case to the corporation at its principal office in the State, and a notice or document may be served on all the members of a partnership or unincorporated company by being delivered or left or posted as a letter, the notice or document being addressed in each case to the partnership or company at the principal place of business thereof in the State.
- (3) In the case of service by post, whether service by post is required by the Act or not, the service shall be presumed, unless the contrary is shown, to have been effected at the time when, by the ordinary course of post, the letter would be delivered."

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at least 28 days have expired since the vendor in fact served the default notice on the purchaser. Exceptionally, a vendor can also terminate a terms contract where the vendor can demonstrate that the requisite period of notice was given by virtue of the service or attempted service falling within the terms of ss 75 and 76.

In the present case, although the purchaser did not receive the posted Default 27 Notice until 3 October 1995, some time between 15 and 19 September 1995 he received a copy of that notice. For the purpose of s 6, receipt of that copy constituted service upon him. Since the vendor terminated the contract on or about 9 October 1995, however, the purchaser did not have the required 28 days notice of the vendor's intention to terminate the contract. That being so, the Full Court was right to dismiss the appeal.

The vendor contends that, if this Court dismisses his appeal, it should nevertheless remit the matter to the Supreme Court of Western Australia to determine whether, for the purpose of s 75 of the 1984 Act, delivery of the Default Notice had taken place even though the letter containing the Notice was not left at 16 Beagle Street, Mosman Park<sup>10</sup>.

However, the Full Court expressly held that:

"[T]he notice of default was not delivered prior to the time when it was collected by the appellant from the Post Office in Pier Street, Perth. It was never delivered to the premises at 16 Beagle Street, Mosman Park. The respondent is therefore unable to rely upon the deeming provision in s 75(1) of the Interpretation Act that service was effected when the notice would have been delivered in the ordinary course of post."

Although the vendor now contends that the circumstances of the delivery was 30 not an issue in the proceedings before Owen J, no ground of appeal is raised in the Notice of Appeal to this Court in respect of this finding of the Full Court. Moreover, the matter was not raised on the special leave application. That being so, the vendor cannot be permitted at this late stage of the proceedings to have the case remitted to the Supreme Court to determine whether in fact there was a delivery to the premises at 16 Beagle Street, Mosman Park notwithstanding that the letter was later collected from the Post Office in Pier Street, Perth.

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# <u>Order</u>

The appeal should be dismissed with costs.