

# Cantt Pak Ltd v Pak Southern China Property Investment Ltd [2018] EWHC 2564 (Ch)

A seller had been ready, willing and able to complete when it served a notice to complete on its buyer, even though the property was not yet vacant.

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## Facts

A seller (S) entered into a contract to sell property with vacant possession. The contract incorporated the Standard Commercial Property Conditions (SCPC) (Second Edition). Various parts of the property were occupied by third parties.

The buyer (B) (who had taken an assignment of the benefit of the contract) failed to complete on the contractual completion date and so S served a notice to complete on B. S had not taken any steps to clear the property of occupiers and chattels as it wanted confirmation from B that funds were in place before taking any steps to secure vacant possession. B in turn indicated that it required evidence that the property was vacant before it would complete (although it also failed to confirm that it was in funds). S purported to rescind the contract (under SCPC 9.5) once B had failed to complete by the completion deadline.

B argued that S's notice to complete was invalid because vacant possession was not available when the notice was served, meaning S had not at the time been ready, willing and able to complete (as required by SCPC 8.8.1). In addition, B argued that even if the notice was valid, S was in repudiatory breach of contract by failing to secure vacant possession by the completion deadline, meaning that B was no longer obliged to complete itself (and so S was not entitled to rescind the contract).

## Issues

- Was S's notice to complete valid?
- If so, was S now entitled to rescind the contract?

## Decision

The validity of a notice to complete has to be judged at the time it was given. S did not need to give vacant possession until completion and, on the evidence, the judge was satisfied that all third party occupiers would have vacated on a few days' notice (they were all licensees, all the licences were terminable on very short notice and the occupiers had agreed to vacate within a few days). When it served the notice to complete, S was therefore in a position to give vacant possession on or before the completion deadline and was therefore ready, willing and able to complete.

S had committed a repudiatory breach of contract by failing to secure vacant possession by the completion deadline. Where one party to a contract has committed a repudiatory breach, the other party can either accept that breach and treat the contract at an end or ignore the breach and allow the contract to continue. In this case, B had chosen to keep the contract alive, meaning that it was still obliged to

complete. By failing to pay the balance of the completion monies by the completion deadline, B had also committed a repudiatory breach which S had accepted (meaning S was now entitled to rescind the contract).

## Points to note/consider

This case is useful for clarifying that, under the SCPC, a party serving a notice to complete must be ready, willing and able to complete at the point it serves the notice. In other words, there is no requirement that the person giving the notice must remain ready, willing and able to complete throughout the notice period (as long as that person is ready, willing and able to complete again on expiry of the notice to complete if it wants to rescind the contract).

However, the outcome in this case is questionable as it is hard to see how the seller could be said to be in a position to complete when it served the notice given that it would take a few days to secure vacant possession (and the obligation is to give vacant possession on the completion date, not at some point after it).

Where a property is occupied, it is understandable that the seller wants to be sure that the sale is going to complete before terminating the existing occupational arrangements. This case does though show the danger of such an approach. A failure to comply with an obligation to give vacant possession following service of a notice to complete amounts to a repudiatory breach of contract by the seller. If a buyer acts quickly and accepts that repudiatory breach (and seeks termination itself), it would be entitled to recover its deposit and potentially claim damages from the seller. Perhaps in this case it would have been preferable for the seller if its obligation was to give vacant possession within an agreed period of time after completion.

## Contact



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