SALE CONTRACTS

- Are You In Or Are You Out?

by

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Introduction

1. In an ever changing market proposed property sales frequently become the subject of disputes, whether by those seeking to withdraw from a deal or those seeking to enforce it. This seminar will explore some of the interesting issues that might arise in such disputes with reference to recent cases.

Compliance with formalities?

2. The first port of call is to ask whether the contract is valid. S. 2 of the Law of Property (Miscellaneous Provisions) Act 1989 provides:
"A contract for the sale or other disposition of an interest in land can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document or, where contracts are exchanged, in each."

3. The contract therefore has to be made by signed writing and the relevant documentation has to incorporate all agreed terms in order to be valid. As you all know, before the Act it was possible to make a valid oral contract for the sale of land which would be enforceable <u>if evidenced</u> by signed writing. S.2 obviously adds an addition layer or two of formality.

4. So the Act can be useful for a party who has had a change of heart as the effect may be to provide a potential get out clause even if they have genuinely contracted:

5. Although it has been said that it was no part of the Law Commission's intention to make it easier for people who have genuinely contracted to escape their contractual obligations, the court's approach to s.2(1) demonstrates that because of the rigorous discipline it imposes on parties to sale contracts, it does indeed enable people who have genuinely contracted to do just that.

6. As LJ Briggs said in *North Eastern Properties Ltd v Coleman & Quinn Conveyancing* [2010] 1 WLR 2715, the reality was that:

> "… It enables parties to land contracts who have changed their minds to look around for expressly agreed terms which have not found their way into the final form of land contract which they signed, for the precise purpose of avoiding their obligations, on the ground that the lack of discipline of their counterparty, or even their own lack of discipline, has rendered the contract void."

7. A full review of the courts' treatment of the various aspects of s 2 falls outside the scope of this seminar. However, there is often overlap between claims of uncertainty and those of failure to comply with s 2, and recent cases highlight, that if purchaser argues that there is a 'contractual blank' in that the contract is either incomplete or too uncertain or fails to comply with s.2, the court will have recourse to the usual principles of interpretation of contract.

8. One fairly recent example of a purchaser 'getting out' of the sale contract on this basis of is *Francis v F Berndes Ltd [2011] EWHC 3377 (Ch); [2012] All ER (Comm) 735*, where the parties had evidently agreed a sale and purchase agreement but, without legal advice, had adopted a form of letter which was simply a counter-signed offer and did not identify the freehold or set out the obligation to purchase the property was held not to comply with s 2. The purchaser sought to enforce the agreement when the Vendor refused to complete in favour of selling to a third party.

9. There was an important point of distinction emphasized in the judgment – and that's the distinction between (a) ascertaining what the parties actually agreed i.e. that's the process of construing the contents of the letter by reference to the surrounding circumstances and admissible extrinsic evidence, on the one hand and (b) the question of whether the letter set out in writing all the express terms of the agreement, on the other hand. When looking at s. 2, one is looking at the second point. The judge recognised that this was a "technical" distinction but said:

> "[even though it may] be thought that [to be highly technical distinction, and one which may be productive of injustice in cases

where the nature of the "missing" term is obvious once the document in question is construed in its factual context. However, one of the main purposes of the 1989 Act was to produce certainty in relation to contracts for the sale of land, and to reduce as far as possible the need for extrinsic evidence in order to establish the terms of the contract."

10. So that demonstrates a technical approach being adopted – and one to be aware of if a client is in the same position.

11. But happily for us, it is never as simple as that, because the courts have also emphasized the need to construe the s. 2 in a common sense way. So, in *North Eastern Properties Ltd [2010],* the Court of Appeal said that:

    11.1 "if it can be construed so as to prevent or mitigate the injustice of enabling genuine contracting parties to escape from their obligations, it ought to be" (Briggs LJ at para.45).

    11.2 "This section is not intended to be a charter for those wishing to disown apparent contracts for the sale of property to go behind the document and search for statements made in pre-contract negotiations, then to claim that they were intended to be terms of the contract and thus bring the whole contractual edifice crashing to the ground." (Longmore L.J. at para.81).

What if the contract is part of a larger transaction?

12. Interesting questions also arise where the contract forms part of a larger transaction and the parties deliberately choose to "carve off" expressly agreed terms which have some association from the signed contract of sale into a separate contract. That issue arose in *North Eastern Properties Ltd v Coleman & Quinn Conveyancing [2010] EWCA Civ 277; [2010] 1 W.L.R. 2715*[1] where the

[1] *Grossman v Hooper [2001] EWCA Civ 615, [2001] 3 F.C.R. 662* considered.

parties had contracted for the sale of land and, in a separate agreement, had agreed a finders' fee. The purchaser attempted to get out of the contract on the basis that the sale contract fell foul of s. 2 for failing to include the provision as to the finder's fee, which it was argued, was an agreed term of the sale. That argument was rejected on the facts by the Court of Appeal and the court adopted a "common sense" approach to interpretation of s2, with half an eye on preventing parties who had genuinely contract from avoiding their obligations – and rejected the purchaser's argument holding that the 11 contracts were not void despite the omission of that particular term.

13. The case is useful as it identifies the approach which is to be adopted if such an argument is to succeed. It was not enough simply to show that the sale contract formed part of a larger transaction and there was nothing in s.2 was designed to prevent parties to a composite transaction from structuring their bargain to create two or more genuinely separate contracts. The key message was that a party seeking to avoid a land contract under s.2 on the basis that the sale contract forms part of a larger transaction will have to establish that the contracts are not "genuinely separated" in the sense that, on a true construction of the whole of the agreement, performance of the land sale is *in fact* conditional upon the obligations in the separate contract. In those circumstances, they will be able to say that the separate contract included an expressly agreed term *that related to the sale of the land* which was not found in the single exchanged document. On the facts, the obligation to pay the finder's fee was not a condition of the sales contract and was not a term relating to the sale of the land.

What if there has been an oral variation?

14. Another line of argument arises if there has been an oral variation of the sale contract. Imagine you have a s.2 compliant contract but one or more of the terms to the contract was subsequently re-negotiated and a variation was agreed - whether it be to price or extent or something else. Might that give rise to grounds for not enforcing? The answer is possibly.

15. Two specific points arise. The first point is that the variation which a party has negotiated in good faith, may not be binding. That is because where there has been a variation of a written contract – which has been agreed orally or by exchange of correspondence and which incorporates some of the terms of the old contract, the new contract must be looked at in its entirety and if the new contract, by reason of s.2 of the 1989 Act, is invalid, it cannot operate to effect a variation of the original contract: *McCausland v Duncan Lawrie Ltd [1997] 1 W.L.R. 38* (See also *Keay v Morris Homes (West Midlands) Ltd [2012] EWCA Civ 900; [2012] 1 WLR 2855*, for a more recent example to similar effect. Note, however, the formalities apply only to variations that are "material to the contract for the sale or other disposition of an interest in land" (Morritt LJ at 49). In most cases, it will be obvious what constitutes a "material" term – provisions as to the price, the completion date which are obvious contenders for a variation are almost certainly material.

16. The second point is that, even if the varied contract is unenforceable for not being s.2 compliant, it could impact the original agreement if the original agreement can be taken to have been rescinded as a result of the later oral agreement. A written contract can be rescinded by express oral agreement between the parties, and if on the facts parties to a written agreement subsequently agreed orally to put an end to that agreement and replace it with a fresh one on different terms, the oral agreement would be effective to rescind the first agreement even though statutory provisions made the new contract unenforceable. This boils down to the parties' perceived intentions: "If the new agreement reveals an intention to rescind the old, the old goes; and if it does not, the old remains in force and unamended" (*United Dominions Corp (Jamaica) v Shoucair (Michael Mitri) [1969] 1 A.C. 340*). In *McCausland* where the parties solicitors agreed by an exchange of letters to move the contractual completion date forward by two days – the purported variation was ineffective and the parties continued to be bound by the original contract).

Exclusions from formalities?

17. Contracts for sale made at auction are excluded from the requirement: s. 2(5)(b).

18. And then there is estoppel: even if a client is being advised that an oral or 'back of an envelope' agreement is not s.2 compliant, if the parties have acted in reliance on the void contract, the circumstances may be enough to give rise to a proprietary estoppel or constructive trust.

19. Those kinds of claims give rise to a series of issues and one such issue is the extent to which proprietary estoppel can still be relied on in a commercial context following the decision of the House of Lords in *Cobbe v Yeoman's Row Ltd [2008] 1 WLR 1752*, (applied in *Herbert v Doyle [2010] EWCA 1095*). In *Cobbe*, the House of Lords in effect determined that a commercial claimant cannot establish that it is entitled to relief on grounds of proprietary estoppel unless it can show that it acted in the belief that it had a legal right and a legally enforceable claim. That has led academic commentators to regard the decision as being something of a watershed and as having consigned proprietary estoppel to legal history, as far as commercial cases are concerned (see e.g. "The Death of Proprietary Estoppel" [2008] LMCLQ 449 by B McFarlane and A Robertson). At the very least the limit imposed by Lord Walker imposed a very significant restriction on the doctrine's operation.

20. One of the main difficulties is that Lord Scott expressed the view that section 2 of the 1989 Act had been a nail in the coffin of proprietary estoppel. Lord Scott said "*My present view is that proprietary estoppel cannot be prayed in aid in order to render enforceable an agreement that statute has declared to be void. The proposition that an owner of land can be estopped from asserting that an agreement is void for want of compliance with the requirements of section 2 is, in my opinion, unacceptable. The assertion is no more than the statute provides. Equity can surely not contradict the statute*." However, in *Whittaker v Kinnear* [2011] 2 P & CR DG20, the High Court held that despite those obiter comments in *Cobbe*, the doctrine of proprietary estoppel in cases involving the sale of land had survived the enactment of s 2 and that each case must turn on its own facts. What is clear is that there is a distinction to be drawn between commercial and domestic cases (see *Cobbe* and *Thorner v Major [2009] UKHL 18, [2009] 1 W.L.R. 776*). Note that it is the nature of the parties' dealings, and not the nature of the property, which determines whether a case should be regarded as commercial or domestic.

***Void for Uncertainty*?**

21. In addition to the s.2 point, a contract for sale may be void for uncertainty. It is well established that an agreement to agree is void for being too uncertain, as is an agreement to negotiate: *Walford v Miles [1992] 2 AC 128; Little v Courage (1995) 70 P & CR 469.* So, an agreement for the parties to use reasonable endeavours to agree the subject of a planning permission or the terms of a joint venture is too uncertain to be capable of enforcement: *Little v Courage* (195) 70 P & C; *London & regional Investments v TBI* [2001] EWCA Civ 355.

22. The test is whether "the parties have reached agreement as to what each of its essential terms is or [they] can with certainty be ascertained" (per Lord Diplock in *Sudbrook Trading Estate Ltd v Eggleton [1983] 1 A.C. 444*, at 478). For there to be a valid and enforceable contract, therefore, the court must be able to ascertain objectively what the parties have agreed.

23. The fact that an agreement leaves certain elements to be the subject of further agreement between the parts will not necessarily render the agreement void. The court is less likely to find the agreement void if the scope of the future agreement is limited, the subject matter of the agreement can be ascertainable with sufficient certainty and there is sufficient objective criteria by which to evaluate the performance of the obligation. Also, in some cases agreements to use best endeavours to agree terms have been upheld. In *Jet2.com v Blackpool Airports [2012] EWCA Civ 417; [2012] 2 All ER (Comm) 1053* a contractual obligation to use reasonable endeavours to promote another's business was not too uncertain to be enforceable.

24. Equally the fact that a particular clause is uncertain does not necessarily invalidate the entire contract. In *Petromec v Petreolo Brasileiro [2006] 1 Lloyds Rep 121* the agreement to negotiate in good faith was an express obligation which was part of a complex agreement. The clause that was uncertain, an agreement to negotiate the cost of an upgrade, was simply one part of the agreement. There was no suggestion that the whole of the agreement was void. In those circumstances, Longmore LJ stated:

> ”It would be a strong thing to declare unenforceable a clause into which the parties have deliberately and expressly entered. I have already observed that it is of comparatively narrow scope. To decide that it has “no legal content” to use Lord Ackner's phrase would be for the law deliberately to defeat the reasonable expectations of honest men…”

Conditional Contract?

25. Another point which often arises is where the contract includes a condition to use reasonable endeavours to obtain some form of permission from a third party (e.g. planning permission) or to negotiate terms with a third party (such as obtaining the releases of a restrictive covenant. Such clauses are, in principle, enforceable: see *Yewbelle v London Green Developments [2007] EWCA Civ 475; [2008] 1 P & CR 17* in which the Court of Appeal upheld an agreement to use all reasonable endeavours to obtain a s. 106 planning agreement.

26. If a party is seeking to get out of a contract on the basis that a condition to use “best”, “reasonable” or “all reasonable” endeavours has not been complied with, the question arises as to the degree of effort that must be made in attempting to secure the agreed objective. That there is a distinction between such obligations, although doubted in earlier cases, now seems clear. In *Rhodia International Holdings v Huntsman International LLC [2007] All ER (Comm) 577* the judge stated:

> “An obligation to use reasonable endeavours to achieve the aim probably only requires a party to take <u>one reasonable course</u>, not all of them, whereas an obligation to use best endeavours probably requires a party to take <u>all the reasonable courses</u> he can. In that context, it may well be that an obligation to use all reasonable endeavours equates with using best endeavours…”

27. Although each case is fact specific, where there is an agreement to use <u>best</u> endeavours to obtain a particular result it is considered that the contracting party must, if necessary, subordinate his own financial interests under the contract to the obtaining of that result. In *Jet2.com v Blackpool Airports* (above) the operator of

an airport entered into an agreement with an airline. The agreement required the parties to "co-operate together and use their best endeavours to promote Jet2.com's low cost services from" the airport. The Court of Appeal held by a majority that the obligation was enforceable. One issue that arose was the extent to which the party under the obligation could have regard to his own financial interest, in particular whether the airport was obliged to allow the airline outside the normal opening hours when to do so would cause the airport to make a loss. Moore-Bick L.J. said:

> "It was a central plank of [the airport's] argument before the judge that the obligation to use best endeavours did not require it to act contrary to its own commercial interests, which, in the context of this case, amounts to saying that [the airport] was not obliged to accept aircraft movements outside normal hours if that would cause it financial loss….I think the judge was right in saying that whether, and if so to what extent, a person who has undertaken to use his best endeavours can have regard to his own financial interests will depend very much on the nature and terms of the contract in question….I approach with some caution the submission that [the airport] was entitled to refuse to accept aircraft movements outside normal opening hours if that caused it to incur a loss, because on the judge's findings the ability to schedule aircraft movements outside those hours was essential to [the airline's] business and was therefore fundamental to the agreement. In those circumstances one would not expect the parties to have contemplated that [the airport] should be able to restrict [the airline's] aircraft movements to normal opening hours simply because it incurred a loss each time it was required to accept a movement outside those hours, or because keeping the airport open outside normal hours proved to be more expensive than it had expected. On the other hand, I can see force in the argument that if, for example, it were to become clear that [the airline] could never expect to operate low cost services from Blackpool profitably, [the airport] would not be obliged to incur further losses in seeking to promote a failing business."

28. Longmore L.J. said:

> "The fact that he has agreed to use his best endeavours pre-supposes that he may well be put to some financial cost, so financial cost cannot be a trump card to enable him to extricate himself from what would otherwise be his obligation. As AT Lawrence J said in the *Sheffield District Railway Co* case, best endeavours does not mean second best endeavours. But I would agree with Moore-Bick LJ … that, if it became clear that [the airline] could never expect to operate low cost services profitably from Blackpool, [the airport] could not be expected themselves to incur losses after that time in seeking to promote (or effectively propping up) a failing business."

29. From that case it is clear, however, that there are limits upon such an obligation; the party under the obligation may not be required to incur loss if to do so would benefit neither party.

30. By contrast, the courts are sympathetic to the view that in identifying whether a party has complied with an obligation to use reasonable endeavours, they are entitled to consider their own commercial interest when assessing what efforts to make and not required to do anything which is commercially harmful to them. In *P & O Property Holdings v Norwich Union Life Insurance Society (1994) 68 P & CR 261* it was argued that an obligation to use reasonable endeavours to secure tenants as part of a development agreement obliged the contracting party to offer reverse premiums to attract tenants to take underleases of units not yet let. The House of Lords thought that it did not. The parties could not be taken to have agreed to be bound to accept such terms as would be acceptable to a reasonable landlord acting according to principles of good estate management, whilst disregarding the actual terms of the agreement they had made.

31. It seems that the same approach will be taken to an obligation to:

    31.1 use "all reasonable" endeavours (*Yewbelle*, above),

    31.2 use "all reasonable but commercially prudent" endeavours (see *CPC Group v Qatari Diar Real Estate Investment Company [2010] EWHC 1535 (Ch))* and

31.3 "use all reasonable endeavours" expected of a "normal prudent commercial developer experienced in developments of that nature" (albeit that such an obligation was more onerous than an obligation to use reasonable endeavours: see *EDI Central Ltd v National Car Parks Ltd [2010] CSOH 141)*.

32. The exception to the above is where the contract requires specific steps to be taken as part of the fulfilment of the reasonable endeavours obligation (*Rhodia International Holdings*, above).

33. In most cases, the question whether the taking of a particular course of action would have constituted a reasonable endeavour is essentially one for the judgment of the court, considering the facts of the particular case. It has been said that the issue is whether the particular course of action would have had a "significant" or "substantial" chance of achieving the desired result: *Yewbelle v London Green Developments above)*.

34. Finally, when does an obligation to use reasonable endeavours to obtain a desired result end? A party must continue until the point is reached when all reasonable endeavours have been exhausted.[2] In *Yewbelle Ltd v London Green Developments Ltd* (above) Lewison J. said:

> "I come back to the question: for how long must the seller continue to use reasonable endeavours to achieve the desired result? In his opening address, [counsel] said that the obligation to use reasonable endeavours requires you to go on using endeavours until the point is reached when all reasonable endeavours have been exhausted. You would simply be repeating yourself to go through the same matters again. I am prepared to accept this formulation,

[2] Where an agreement is subject to an agreed condition, there will be a concluded contract although it will not be enforceable unless and until the condition is fulfilled (see per Farwell J in *Caney v Leith [1937] 2 All E.R. 532*, at 533). Thus, the parties are not free to resile but must await fulfilment or not of the condition. In this sense the contract is binding. Thus the purchaser under a conditional contract has been held by the Court of Appeal to become the owner in equity of the land pending even fulfilment of the condition (*Gordon Hill Trust Ltd v Segall [1941] 2 All E.R. 379* and see also *Chattey v Farndale Holdings Inc [1997] 06 E.G. 152, CA*).

subject to the qualification that account must be taken of events as they unfold, including extraordinary events."

35. In the same case Lewison J added that, if there is an insuperable difficulty in obtaining the desired result, the obligation ceases (or is discharged) even though other difficulties are capable of being surmounted. That accords with the approach taken in *Jet.2 v Blackpool Airport* (above), albeit in relation to a more stringent requirement.

Can you terminate for breach?

36. Most sale contracts incorporate the Standard Conditions of Sale (currently in its 5th Edition) in addition to special conditions.

37. Under the Standard Conditions the buyer may terminate if:

    37.1 There is a material difference between the description or value of the property, or any of the contents included in the property, as represented and as it is if the seller's error or omission results from fraud or recklessness or, where he would be obliged to his prejudice to accept property substantially (in quantity, quality or tenure) from what the error or omission had led him to expect (7.1.1(b));

    37.2 The seller fails to comply with a notice to complete (7.5).

38. The seller may terminate the contract if the buyer fails to comply with a notice to complete (7.4).

39. Where the property is leasehold and consent to assign, let or sub-let is required, either party may terminate the contract by notice to the other party if three working days before the completion date the consent has not been given or the consent has been given subject to a condition to which a party reasonably objects (8.3).

40. In addition, contracts for the sale or other disposition of interests in land often expressly include provisions as to termination to which the usual rules of

interpretation of contacts apply. Depending upon the circumstances this might mean that such a term allows a party to terminate only where there is a significant breach, i.e. a fundamental breach that goes to the heart of the contract (as to which see below).

41. Thus, in *Dominion Corporate Trustees Ltd v Debenhams Properties Ltd [2010] EWHC 1193; [2010] 23 EG 106 (CS)*, Kitchen J. considered the words of a clause in an agreement for a lease of units in a shopping centre which provided that either party may terminate "if either party shall in any respect fail or neglect to observe or perform **any** of the provisions of this Agreement". It was accepted that, "stripped of their context and the relevant background … may be understood to mean that either party may terminate the Agreement if the other party fails or neglects to perform any provision of the Agreement in any respect, however minor the provision and however insignificant the failure or neglect may be". The agreement provided for three instalments to be paid but the claimant failed to pay the second instalment within the stipulated period and the next day the defendant purported to terminate the agreement. After restating the established aim in construing a contract as being to ascertain the meaning to a reasonable person possessing the parties' background knowledge, Kitchen J. proceeded to say:

> "It is equally well established that, absent a contractual termination provision, a party to a contract may terminate it on the ground of breach by the other party only if the breach is of a condition, or of some other term (a so called innominate or intermediate term) where the effect of the breach has been to deprive the innocent party of substantially the whole benefit which it was the intention of the parties as expressed in the contract that he should obtain.
>
> In these circumstances it is hardly surprising that the courts have shown some reluctance to interpret a termination clause in a complex contract containing many innominate terms as providing a party with the right to terminate for any breach, however minor."

42. Accordingly, he construed the clause so as not to flout common sense but as only applying to a default that amounts to a repudiatory breach, or if an insolvency event arises. He then held that time had not been of the essence of the payment

and that the delay in payment had not been a repudiatory breach entitling the defendant to terminate the agreement.

Repudiatory Breach?

43. Whether a breach is repudiatory very much depends upon the facts of the individual case. It might include: (a) a breach of condition; (a refusal to perform; (c) a sufficiently serious breach of a term. The breach needs to be sufficiently fundamental to justify rescission, or an activity that effectively brings the purpose of the contract to an end.

44. So what amounts to a repudiatory breach? In the absence of any express term providing for termination for breach of a term, the right to terminate always depends upon the nature of the breach. Breach of a trivial term will not give rise to a right to terminate the contract; there must be a breach of a fundamental term, or an activity that effectively brings the purpose of the contract to an end.

45. Whether a breach is repudiatory very much depends upon the facts of the individual case. The courts have referred, inter changeably, to the test as to whether a breach is sufficiently fundamental being if it strips the innocent party of "substantially the whole benefit" or "a substantial part of the benefit" of the contract: see *Telford Homes (Creekside) Ltd v Ampurious Nu Homes Holdings Ltd [2013] EWCA Civ 577; [2013] 4 All ER 377*, per Lewison LJ, which is an illustration of the test being applied in practice.

46. On the facts a property company tried to terminate an agreement to purchase 999-year leases in four mixed-use blocks on the ground that the construction company's delay of one year in building two of the blocks had been a repudiatory breach of contract. Lewison LJ (at para.54) said that:

> "On the face of it to deprive someone of <u>one year out of 999 years</u> does not deprive him of a substantial part of the benefit he was intended to receive, let alone substantially the whole of that benefit."

47. However he broke the analysis down into two stages in this way:

> "51 Whatever test one adopts, it seems to me that the starting point must be to consider what benefit the injured party was intended to obtain from performance of the contract …
>
> The next thing to consider is the effect of the breach on the injured party. What financial loss has it caused? How much of the intended benefit under the contract has the injured party already received? Can the injured party be adequately compensated by an award of damages? Is the breach likely to be repeated? Will the guilty party resume compliance with his obligations? Has the breach fundamentally changed the value of future performance of the guilty party's outstanding obligations?"

What about delay?

46. A common reason that a party seeks to terminate an agreement is because of delay in completion. In the absence of an express term to the contrary, time is not of the essence of a contract unless the nature of the subject-matter of the contract indicate that the fixed date must be exactly complied with. The Standard Conditions of Sale (5th ed.) provide that completion is twenty working days after the date of the contract but time is not of the essence of the contract unless a notice to complete has been served.

47. When notice to complete is served time becomes of the essence and the parties must complete the contract within ten working days, excluding the day on which the notice is given. If the buyer fails to complete the seller may rescind the contract and if he does so he may:

1.1 Forfeit and keep any deposit and accrued interest;
1.2 Resell the property and any contents included in the contract; and
1.3 Claim damages.

48. If the seller fails to complete the buyer may rescind the contract and if he does so:

    a. The deposit is repaid to the buyer with accrued interest;
    b. The buyer is to cancel, at the seller's expense, any registration of the contract.

49. However, the server of a notice needs to take care: It has been said that a notice to complete is a powerful weapon and needs careful handling: *Clarke Investments Ltd v Pacific Technologies Ltd [2013] EWCA Civ 750*; [2013] 2 P & CR 20 (applying *Quadrangle Development and Construction Co v Jenner [1974] 1 W.L.R. 68*.) Once it is served, time is made of the essence for both parties, and if the party serving the notice was not ready to complete by the date fixed in the notice, it would be in breach of an essential condition of the contract and the court would not grant specific performance.

50. A recent practical example of that is *Clarke Investments* which dealt with the effect of the buyer's failure to complete after serving notice, purportedly because of an ongoing dispute over financial matters. The vendor eventually agreed to drop the matter and wrote to the buyer, but there followed a disagreement over the accuracy of the vendor's completion statement. The buyer failed to forward the completion money on the day stated in the notice and the vendor rescinded the contract. The buyer applied for specific performance of the contract on the basis that in the circumstances the parties had been negotiating towards an agreed completion and the vendor could not have believed that the buyer was repudiating the contract by failing to forward the money. It was further argued that the completion statement was not accurate and, by entering into discussions with the buyer about the statement, the vendor had implied that it was not in a position to complete.

51. The Court of Appeal, dismissing the buyer's appeal, held that it would have been clear to a reasonable recipient that the vendor had accepted the buyer's position in relation to the finances and was offering to complete in accordance with the contract but that, *even if* negotiations were continuing that would not excuse the

buyer of its obligation to complete. Moreover, disagreements between solicitors over completion statements were common and if completion was to be delayed until a final completion statement was agreed that ought to have been included in the Standard Conditions of Sale.

52. Contrasting principles apply to deposits. The requirement to pay a deposit, including the time for payment, is ordinarily a condition of a contract for sale of land and time is of the essence in relation to the date for payment. Failure to make timely payment of a deposit amounted, therefore, to a repudiatory breach of contract: *Samarenko v Dawn Hill House [2013] Ch 36 (CA).*

53. Note that exercising the right to rescind for breach of contract does not rescind the contract ab initio and that rights unconditionally acquired prior to the rescission survive it, in the absence of a clear contractual provision to the contrary. So, in *Hardy v Griffiths [2014] EWHC 3947* the buyers had paid part of a deposit before failing to pay the remainder and failing to complete after notice to complete was given. The seller rescinded the contract and the buyers claimed that they were entitled to the return of the part deposit and not liable to pay the remainder. The court rejected the argument. The seller had an accrued right arising prior to the termination of the agreement and was entitled to the remaining sum.

54. As to damages see the recent case of *Hooper v Oates [2013] EWCA Civ 91; [2014] Ch 287*. In that case the Court of Appeal held that the correct valuation basis on which to assess the damages was the date on which the sellers took the property back for their own use and not the date of the breach of contract. The decline of the property market between those two dates was part of the loss for which the seller was entitled to be compensated. Although damages for breach of contract were usually assessed at the date of breach that applied where there was an immediate market for an asset and where that asset was land that was extremely unlikely to be the case.

How is the contract terminated?

55. Termination is not automatic. The innocent party must elect either to accept he breach and treat the contract as discharged or to affirm the contract and press the party to perform. Where a party to the contract has failed to complete and time has been made of the essence of the contract, that party has to make an election. The choice was explained by Lord Wilberforce in *Johnson v Agnew [1980] A.C. 367*:

(1) If the purchaser fails to complete, the vendor has the choice of either treating the purchaser as having repudiated, accept the repudiation, and proceed to claim damages; ***or*** he may seek from the court an order for specific performance with damages for any loss arising from delay in performance[3];

(2) The vendor can keep his options option, by claiming in the alternative until trial, and make his election at the trial[4];

(3) There is no particular period in which the election must be made but while the innocent party is deciding how to treat the contract, he must be careful not to take any step which constitutes an election to affirm, as once the affirmation has been made it cannot be revoked. Once the vendor has made his election (whenever that might be), the election is final; the vendor accepts the repudiation, he cannot thereafter seek specific performance.

Defences to specific performance?

56. If a party to a sale contract seeks specific performance of that contract, there are a number of defences that might be put forward. Specific performance is an equitable remedy and, in considering such a claim, the court will have regard to a

[3] Similar remedies are of course available to purchasers against vendors.

[4] The purchaser's refusal to complete takes the form of a "continuing breach" entitling the vendor to rescind, despite an earlier affirmation of the contract.

wide range of circumstances in determining whether specific performance should be granted. The following are common features in which the remedy will be refused:

Where title to the land is doubtful;

Where such an order would be prejudicial to the rights of third parties;

Where a party has insisted and acted upon a mistaken construction in such a way as to amount to a final election;

Where the party asking for specific performance has been guilty of some act or default which would make it inequitable to grant him the relief asked for;

Where specific performance would impose real hardship on the other party.

Where the party asking for specific performance has been guilty of delay;

Where performance of the contract would be illegal;

Where there is want of mutuality, i.e. the remedy of specific performance must be potentially available for and against each of the parties to the contract.

48. Point 4, where there has been a default by the "innocent party" was recently considered in *Frasers Islington Ltd v Hanover Trustee Co Ltd [2010] EWHC 1514; [2010] 27 EG 85 (CS) [*para 37 of your notes*]* Specific performance had been granted by summary judgment and the vendor argued that it ought not to have been granted on the basis that the purchaser had failed to comply with part of the bargain. That was rejected and the appeal was dismissed on the basis, inter alia, that the default was minor and the vendor had received substantially what they bargained for. The points arising from the judgment when assessing the relative inequity of allowing SP as a result of the C's conduct: are (a) that the relevant date for testing whether a party intended to perform its obligations was not the date of exercise, but the date of grant, and that it is relevant to consider whether at that time the purchaser had decided to act in a way contrary to the bargain; (b) whether there are other factors justifying the default such as financial circumstances (c) whether the vendor has suffered any measurable disadvantage resulting from the default. In the course of his decision Briggs J. rejected any

suggestion that there should be a technical approach to the issue: [at para 40 of your notes].

49. The 5th bullet point (real hardship) might arise if the party in breach is unable to raise funds - what happens there? That issue was raised in *Matila Ltd v Lisheen Properties Ltd [2010] EWHC 1832 (Ch):* sale contract for the purchase of new build apartments; the vendor brought proceedings against the company and two brothers who were owners of the company were sued as guarantors. Various factors, including a downturn in the property market, led to the funding arrangements made by the purchaser having fallen through. The company did not have funding and the brothers pleaded hardship or impossibility.

50. Despite the practical difficulties, the court held that the vendor was entitled to the order sought. It is clear that the court's discretion is wide enough, in a proper case, to refuse specific performance on the ground of hardship even after the contract and not caused by the claimant, and that it does not have to be hardship related to the subject matter of the contract and can extend to personal hardship of the defendant. H.H. Judge Davies referred to the fact that in normal circumstances supervening hardship, (postdating the contract) which cannot be laid at the door of the claimant cannot be a basis for refusing specific performance and said that it was "only 'in extraordinary and persuasive principles [sic]' that hardship can supply an excuse for resisting specific performance".

51. So it all boils down to the evidence – it is not unheard of. If you are stretching for a recent case where the hardship / impossibility defence succeeded look to Ireland: : for an e.g of a successful hardship / impossibility defence see *Aranbel Ltd v Darcy & Crampton [2010] IEHC 272 (HC (Irl))* a decision of Clarke J. in the High Court of Ireland (delivered a few weeks before the judgment in Matila), the proceedings raised the question whether the plaintiff should be awarded specific performance of various contracts. In that case, the court refused to make the orders on the basis that it would be impossible for the defendants to complete the contracts as they did not have sufficient available assets or borrowing capacity to raise the money necessary. In such circumstances, Clarke J. considered that an

order for specific performance would be in vain and ought not to be made. He said:

> "It seems to me, however, that the only point in the court ordering specific performance is if there is some realistic possibility that the sale may complete. If there is no such realistic possibility, then the making of an order for specific performance will be in vain. It will inevitably be followed by a failure to comply and the matter will come back before the court. "

52. It is unclear from the judge's comments whether whether hardship may be established as a defence to the vendor's action for specific performance if the purchaser could raise the money needed to complete by sale of assets. The comments suggest that a court might be unwilling to order the purchaser to sell a family home or business assets to raise the money needed.

53. The judgment is also interesting as it contrasts the position between impossibility and hardship. Positing a case in which a purchaser wrongfully puts himself in a position in which he *cannot* complete, the Judge explained that a defence based on impossibility might yet succeed, as an order for specific performance would still be in vain, even though the impossibility had come about as a result of the purchaser's own action. He said that whether the purchaser's conduct would prevent a successful defence based on hardship would depend on the competing equities of the parties including the extent to which the purchaser had altered his position after completion had become due.

54. It is important to note if you are arguing hardship / impossibility that it is incumbent upon a defendant raising such a defence:

> "…to give the fullest possible disclosure of his financial position so that the other party and the court can be satisfied that this is so, and in this case the Defendants have failed to surmount that high hurdle."

Rescission Ab Initio?

57. Contrast the right to rescind for breach of contract and rescission for misrepresentation and mistake, where the contract is rescinded ab initio.

58. A full treatment of the circumstances in which rescission is available is outside the scope of this seminar. Of interest, however, is the recent case of *Cleaver v Schyde Investments Ltd [2011] EWCA Civ 929; [2011] 2 P & CR 21*. In that case replies as to planning applications in a property information form had become false to the knowledge of the vendor before exchange of contracts. The judge at first instance had found this to constitute an innocent misrepresentation. It was accepted that C's replies to the standard enquiries had contained innocent misrepresentations. The vendor relied upon standard condition 7.1.3 (4th ed), which was incorporated into the contract, and which excluded error or omission except in the case of fraud or recklessness or where the property differed substantially in quantity, quality or tenure from what the purchaser had been led to expect. The judge held that standard condition 7.1.3 was not fair and reasonable in the circumstances and was therefore of no effect by virtue of the Misrepresentation Act 1967 s.3 and the Unfair Contract Terms Act 1977 s.11. S. 3 limits the freedom of parties to contract out of the Misrepresentation Act 1967 by providing that any such attempt must satisfy the requirement for reasonableness in s.11 of UCTA.

59. The point was considered in *Cleaver v Schyde Investments Ltd [2011] EWCA Civ 92,* where there was an accepted innocent misrepresentation but where standard condition 7.1.3 excluded liability for innocent misrepresentation. The buyer had contracted to buy land for development and it was accepted that there was a failure by the Seller in replies to the Commercial Property Standard Enquiries to disclose a planning application for a medical centre on the property that would have been a material consideration in the purchaser deciding whether to buy. That was a material misrepresentation. The vendor effectively said “so what?” by relying upon the standard condition which was incorporated into the contract, which effectively excluded liability for those misrepresentations and the purchaser argued that it was unreasonable. At first instance, the judge held the exclusion was not

fair or reasonable and was therefore of no effect by virtue of the Misrepresentation Act 1967 s.3 and the Unfair Contract Terms Act 1977 s.11.

60. On appeal, Etherton L.J. observed (at para.38) that

> "... there is nothing self-evidently offensive, in terms of reasonableness and fairness, in a contractual term which restricts a purchaser's right to rescind the contract in the event of the vendor's misrepresentation to cases of fraud or recklessness or where the property differs substantially in quantity, quality or tenure from what the purchaser had been led to expect, and to confine the purchaser to damages in all other cases. That is a perfectly rational and commercially justifiable apportionment of risk in the interests of certainty and the avoidance of litigation. While each case turns on its own particular facts, the argument in favour of upholding such a provision as a matter of the commercial autonomy of the contracting parties is particularly strong where, as here, (1) the term has a long history, (2) it is a well-established feature of property transactions, (3) it is endorsed by the leading professional body for qualified conveyancers, (4) both sides are represented by solicitors, and (5) the parties (through their solicitors) have negotiated variations of other provisions in the standard form."

61. The Court of Appeal determined, however, that in the circumstances the judge was entitled to regard that combination of circumstances as taking the case out of the general run and to hold that C failed to show that standard condition 7.1.3 was fair and reasonable in the instant case. It could not therefore be said that the judge had "proceeded on some erroneous principle or was plainly and obviously wrong" (*per* Lord Bridge in *George Mitchell (Chesterhall) Ltd v Finney Lock Seeds Ltd [1983] 2 A.C. 803*). However, despite the outcome, because of the guidance, the judgment nevertheless provides some comfort for clients seeking to resist rescission in reliance on such exclusion clauses in the future.

62. The Standard Conditions (4th ed.) have been replaced by the 5th ed. which do not include the former standard condition 7.1.3, so the case may be of little practical importance, although it should be remembered that the right to rescind continues

after completion unless the innocent party has confirmed the contract: *Harsten Developments Ltd v Bleaken [2012] EWHC 2704 (Ch); [2012] 43 EG 114 (CS).*

Ratification

63. On a final note, beware ratification or waiver. Even if a sale contract is otherwise invalid it may be upheld because of the actions of the innocent party. In *Simpole v Chee [2013] EWHC 4444 (Ch)* the vendor denied that he had authorised the sale of the property but, having retained money from the sale where there was evidence that he knew the sale had gone ahead, had ratified the signature of his name on the agreement.

64. In *New Falmouth Resorts Ltd v International Hotels Jamaica Ltd [2013] UKPC 11* a company agreed to sell land to a hotel and property group. The agreement for sale was signed by a shareholder on behalf of the company without the authority to do so. The Court of Appeal of Jamaica determined that the buyer was entitled to the land because, after the shareholder had signed the agreement, it was ratified at a board meeting by a resolution approving the contract for sale. The vendor's appeal was dismissed by the Privy Council which found that there had been a clear ratification of the contract.

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