

## TIME FOR A SHARP BREXIT:

## VENDORS AND PURCHASERS IN UNCERTAIN TIMES

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As Brexit negotiations begin, how will leaving the EU affect the UK property market? Will we see buyers attempting to escape from contracts they no longer want (or are able) to complete – as we did following the financial crash in 2008-9? If so, a reminder of the legal options available to sellers in such circumstances seems timely.

If the last crash is any guide, problems might be expected in cases involving a lengthy gap between exchange and completion, during which the economics of the transaction change, or a mortgage offer lapses and is not renewed. Examples might include off-plan flat sales, or contracts conditional on the grant of planning consent. If the purchaser is reluctant to complete on the completion date, what are the options available to sellers – and what are the pitfalls to avoid?

Most property transactions take place under Standard Conditions. Both the Standard Conditions of Sale 5<sup>th</sup> Edition (for residential contracts) and the Standard Commercial Property Conditions 2<sup>nd</sup> Edition (for commercial contracts) state that the time for completion of the contract is not “of the essence” unless a 10 day notice to complete has been served.

Absent a notice to complete, this means the innocent party can terminate the contract only if the contract-breaker’s delay deprives the innocent party of substantially the whole benefit of the contract (see Urban 1 (Blonk Street) Ltd v.

Ayres [2014] 1 P&CR 1). This will be very seldom be the case in the context of a sale of real property, where the bargain can still be performed despite the delay.

This has important effects where the seller is itself unready to complete on the completion date – eg where, in an off-plan sale, the construction period has overrun. Unless the buyer serves a valid notice to complete on the seller, the seller’s own delay will not usually entitle the buyer to treat the contract as discharged. Moreover, a buyer cannot serve a valid notice to complete unless he or she is “ready willing and able” to complete – which will not be the case if, say, a mortgage offer has lapsed and the buyer is seeking to escape the contract. Thus, in many cases the buyer will be unable to bring the contract to an end – and will remain bound to complete, when the seller is ready to proceed.

Under both sets of Standard Conditions, service of a notice to complete makes time of the essence of the obligation to complete. If the buyer remains in default at the end of the notice period, the seller can terminate the contract, and retain the buyer’s deposit. The seller can also sue the buyer for damages, if the purchase price is greater than the market value of the property at the date the contract terminates. The service of a notice to complete is thus a preliminary to the seller electing to terminate the contract. The seller may, of course, elect instead to sue the buyer for specific performance of the contract (if the buyer has the funds to complete).

It is sometimes thought that a seller must serve a notice to complete even before suing for specific performance. This assumption is misplaced - though such a notice may in a practical sense encourage the buyer to perform, by making him fear for his deposit. A valid notice to complete may be served only where the seller is “ready willing and able” to complete.

A seller must take care, therefore, in two particular respects. First, if the seller is in subsisting breach of contract at the date it serves a notice to complete, the effect

may be to signify that the seller has “renounced” its obligations the contract, entitling the buyer to terminate the contract, and recover his deposit.

Also, service of a notice to complete makes time of the essence of completion for *both* parties. In Oakdown Ltd v. Bernstein & Co (1985) 49 P&CR 282, at the date the notice expired the server was unwilling to complete because of a religious holiday. The recipient of the notice – who was by then ready - was able to elect to terminate the contract , even though the original delay was his own.

Finally, a seller does not need to serve a notice to complete in order to terminate the contract where the time provision amounts to a condition of the contract in the strict sense. An example of that might be a provision requiring the buyer to pay an extra tranche of deposit if the sale does not complete on the due date: see Samarenko v. Dawn Hill House [2013] Ch 36, which contains a very valuable survey and analysis of the law for those wishing to explore these issues in greater depth.