

# Stewart Title

## Residential Conveyancing Webinar

4<sup>th</sup> May 202

### Lockdown Issues

#### Webinar Notes

##### 1. Introduction

In these turbulent times conveyancing practices are continuing to progress transactions that are capable of progression and looking to hibernate transactions that are not. This webinar will explore some of the key issues generated by the current extraordinary circumstances.

Despite the current extraordinary circumstances and the difficulties for everyone it remains important to remember the basics –

- What is the objective of the client (either seller or buyer) ?
- Ensure that client (or clients) can give informed consent

Poignant advice has been given by the Law Society which stated

“It’s obviously very important to take your clients instructions about how they want to proceed, to advise them as to the risks and benefits and to obtain confirmation from them in writing that they understand the risks and wish to proceed in writing.”

(Coronavirus (COVID-19): Guidance for using the variation agreement  
Last updated: 29 March 2020)

The point made is a simple repetition of the obligation on a conveyancer to provide an explanation of terms, processes, rights, and obligation. You will recall the cases of *County Personnel Ltd v Alan R. Pulver & Co. Ltd* (1987) 1 WLR 916 and *Balogun v Boyes Sutton and Perry* [2017] EWCA Civ. 75 which examine the duty to explain can be examined in .

We can extract from these cases that where a provision in a conveyancing document is vague or ambiguous or a clause warrants the use of rules of construction the client needs to be advised that litigation might arise as a consequence with all of the litigation risks that flow. Reciting the terms of a document or providing the client with a copy of the document are not enough further comment is required and advice given.

As well as the specific issues generated by the lockdown the following more general matters require consideration -

- a) A conveyancer has no duty to advise on the commercial wisdom or otherwise of a proposed property transaction or a choice within the transaction.
- b) In certain circumstances it may be incumbent on the conveyancer to go beyond the point made and actively advise the client of risks associated with the transaction. Lord Justice Hoffman gave appropriate advice in the case of *Haigh v Wright Hassall & Co.* [1994] EG 54 (CS) “The Solicitor is not a business advisor , he is a lawyer . Although most good solicitors will offer business advice , and will , to some extent, try to protect clients from themselves, it would be wrong, in my judgement, to hold that there was invariably a legal duty to do so. It must of course depend on the facts of the case. There will be situations in which it is clear to the solicitor that the client is commercially wholly inexperienced and is deluding himself. In those circumstances there may well be a duty on the part of the solicitor to probe further.”
- c) The statements above have been accepted and developed in later case law. For example in *Carradine Properties Ltd v DJ Freeman & Co. (A Firm)* [1999] Lloyds Rep PN 483 where Donaldson LJ said – “ A solicitor’s duty to his client is to exercise all reasonable skill and care in and about his client’s business. In deciding what he should do and what advice he should tender the scope of his retainer is undoubtedly important, but it is not decisive. If a solicitor is instructed to prepare all the documentation needed for the sale or purchase of a house, it is no part of his duty to pursue a claim by the client for unfair dismissal. But if he finds unusual covenants or planning restrictions , it may indeed be his duty to warn of the risks and dangers of buying the house at all, notwithstanding that the client has made up his mind and is not seeking advice about that. I say only that this may be his duty , because the precise scope of that duty will depend inter alia upon the extent to which the client appears to need advice. An inexperienced client will need and will be entitled to expect the solicitor to take a much broader view of the scope of his retainer and of his duties than will be the case with an experienced client.”

The Conveyancing Protocol provides some basic principles including -

1. There are many uncertainties in any conveyancing transaction and you cannot be definitive at the beginning of the process. You need to manage your client’s expectations at the start and throughout the transaction.
2. Solicitors are bound by professional obligations to their clients throughout the transaction.
3. A solicitor is required to act in the best interests of each client and those obligations will take precedence over this Protocol.
4. To ensure that the transaction can proceed smoothly, a conveyancer should ensure that all information is shared, subject to any confidentiality obligations that have not been waived.

## 2. Government Advice

- Advice to Clients

The UK Government has urged parties involved in home moving to adapt and be flexible to alter processes and of course this transmits through to the conveyancers involved.

Although it is emphasised transactions can still proceed but the guidance to stay at home and away from others at all times, including the specific measures for those who are presenting symptoms, self-isolating or shielding remains.

If the target property is vacant then the transaction can proceed subject to the guidance on home removals.

If the target property is occupied the Government advice is that parties should be encouraged to do agree alternative dates to move, for a time when it is likely that stay-at-home measures against coronavirus (COVID-19) will no longer be in place.

The guidance highlights that critical home moves are exempt from the emergency enforcement powers in the event that a new date is unable to be agreed.

The Government has :

1. Provided guidance, developed with Public Health England, to home buyers and those involved in the selling and moving process.
2. Agreed with lenders that mortgage offers should be extended where delay to completions takes place in order to prioritise safety.
3. Worked with conveyancers and professional bodies to develop a standard legal process for moving completion dates.

The Public are advised -

- If contracts have been exchanged and the property is currently occupied then all parties should work together to agree a delay or another way to resolve this matter.
- Where moving is unavoidable for contractual reasons and the parties are unable to reach an agreement to delay, people must follow advice on staying away from others to minimise the spread of the virus.
- Anyone with symptoms, self-isolating or shielding from the virus, should follow medical advice which will mean not moving house for the time being, if at all possible. All parties should prioritise agreeing amicable arrangements to change move dates for individuals in this group, or where someone in a chain is in this group.

UK Finance confirmed that, to support clients who have already exchanged contracts for house purchases and set dates for completion, all mortgage lenders are working to find ways to enable clients who have exchanged contracts to extend their mortgage offer for up to 3 months to enable them to move at a later date.

If a client's circumstances change during this 3 month period or the terms of the house purchase change significantly and continuing with the mortgage would cause house buyers to face financial hardship, lenders will work with clients to help them manage their finances as a matter of urgency.

Prospective sellers are warned that putting property on the market may be more challenging than usual in this period as estate agents, prospective buyers and valuers are all visitors to the property contrary to the isolation rules.

Government advice recommends that the current time is used for gathering together all of the information required for the contract bundle.

Where the target property is on the market advice states that it can be advertised as being for sale but personal viewings are not permitted.

Within lockdown the buying and selling process can continue during this period but there are obvious constraints and the process is likely to take longer than normal.

- If the property being purchased is unoccupied the transaction can continue as normal.
- If the property is currently occupied the Government recommends parties should work to either delay the exchange of contracts until after the period where stay-at-home measures to fight coronavirus (COVID-19) are in place, or include explicit contractual provisions to take account of the risks presented by the virus.

Specific advice is provided to estate agents :

- Agents should work with their clients and other agents to broker a new date to move where sales are due to complete on occupied properties in the current period where emergency measures are in place to fight coronavirus (COVID-19).
- Agents should prioritise support for anyone with symptoms, self-isolating or shielding from the virus, and those they are in chain with, to agree a new date.
- In line with advice for certain businesses to close, agents should not open branches to the public during this period, or visit people's homes to carry out market appraisals.
- Agents should ensure that employees can work from home, to support existing clients and advise potential new clients.
- Agents should continue to progress sales where this can be done whilst following guidance to stay at home and away from others.
- Agents should advise clients to be patient and not to exchange contracts unless the contracts have explicit terms to manage the timing risks presented by the virus.

The legal profession has not been forgotten by the Government who advise that conveyancers should –

- Continue to support the sales process as far as possible
- Make sure their clients are aware of the difficulties of completing transactions in the lockdown period
- Continue to support the sales of unoccupied properties as far as possible.
- Make every effort to support clients who are due to complete on occupied properties in the stay-at-home period to change this date.
- Advise their clients who are ready to move not to exchange contracts on an occupied property unless they have made explicit provision for the risks presented by the virus.
- Prioritise supporting anyone with symptoms, self-isolating or shielding from the virus and those they are in chain with, and to urge all concerned to agree new date to be agreed in these circumstances.

Finally surveyors should not expect to carry out non-urgent surveys in homes where people are in residence, and no inspections should take place if any person in the property is showing symptoms, self-isolating or being shielded.

Survey work may be possible online and also carry out urgent surveys on empty properties, or those where the occupants are out of the property or following guidance to stay at home and away from others.

Surveyors should follow the latest government guidance which currently (26 March 2020) states that work carried out in people's homes can continue, provided the tradesperson is well and has no symptoms of coronavirus (COVID-19).

### **3. Advice to Conveyancers**

The basic principle is that conveyancers must ensure ‘prioritising the health of individuals and the public must be the priority.’

The Government advises that transactions involving occupied properties should only take place where contracts have already been exchanged and it where it has proved impossible for the parties involved to agree a deferral.

Clients should be encouraging clients to agree an appropriate deferral. Clients should only be advised to proceed if deferral has proved impossible.

Police emergency powers are disapplied only for critical home moves.

Transactions involving unoccupied properties may continue subject to –

- a) At completion or when ever it takes place and the parties are physically moving house they must do so in a way which takes account of the guidance currently in force from Public Health England and Public Health Wales. Conveyancers are required to advise and help your clients to make themselves aware of the requirements applicable at the time they’re looking to move.
- b) Conveyancers must conduct transactions to try and avoid allegations that the conveyancing profession is encouraging its clients to carry out transactions against the spirit as well as the letter of government requirements.
- c) Once a conveyancer has provided advice about deferring the transaction and the client or clients gives written instructions to continue to complete the contract then those instructions must be followed if legally possible.

Conveyancers need to keep up to date with guidance as it evolves and changes with health advice. The guidance requires the use and application of common sense.

#### 4. Amending existing contracts

The Law Society, Society of Licensed Conveyancers, Conveyancing Association, CILEx and Bold Legal Group, have formulated a process for deferring a completion date.

The advice is that every case should be treated on an individual basis and any clauses or processes suggested should be amended and tailored to those individual needs.

Care should be exercised in connection with advice to be given to clients. That advice includes

- Clients understand the benefits and risks and are advised in accordance with their own circumstances.
- Most lenders have agreed to extend the mortgage instructions for three months you should establish whether any formal confirmation is necessary and if the lender to provide it.
- Normal obligations apply to the client and lender and in that regard consideration should be given as to whether searches should be refreshed.
- Conveyancers have a duty to advise clients of the potential for additional costs involved in managing their transaction whether those are your own costs or additional disbursements.
- Where an exchange of contracts has taken place the conveyancers should directly or through your estate agent that your transaction can be deferred.

Dealing with the above point –

- 1) Completion should be delayed until the end of the current stay-at-home period and the requirements about physical distancing.
- 2) Completion should be capable of being extended where the government restrictions are extended.

The variation contract should state that once the restrictions end there will be a period of time agreed before legal completion to enable the conveyancers to the parties to prepare.

It follows that it is important to make sure the timescale for legal completion provides time to find removals and arrange the move especially where things like removal firms are in increased demand or are unavailable.

Before a variation agreement can be entered into a conveyancer should –

- Obtain express authority from the client to enter into the variation agreement.
- If acting for a buyer who is buying a property with the aid of a mortgage the conveyancer should check whether written confirmation is required from the lender to extend the mortgage offer. (Lenders generally have agreed to extend mortgage offers by three months).

In giving advice to the client consideration should be given to the client suffering a change of circumstances during the lockdown period. What would the position be if the client became unemployed. Other factors to be drawn to the client's attention include fluctuating property values, lender's lending criteria changing, mortgage offers being withdrawn.

Just as with giving advice concerning bridging finance remember the buyer or seller's circumstances could change meaning they may not be financially able to proceed.

These uncertain times will come to an end but even when lockdown finishes or restrictions are removed there may be other unavoidable delays or issues preventing completion. The client should be advised that additional delays might require agreement for a further delay or seek to end the contract.

When acting for clients when contracts have not yet exchanged advice should be given that the transaction can continue.

When clients have instructed you in connection with a critical move the conveyancer must ensure that the move is critical and it is safe for the parties to proceed. The guidance confirms where the property is empty it is usually safe to proceed but where the empty property is in a chain, it may not be possible to complete without breaking the chain.

Clients should be advised to comply with the advice from Public Health England and Public Health Wales on social distancing and that they must not endanger themselves or others during your move.

Government advice requires that the parties should complete a deep clean when practical completion takes place if the client knows, or has reason to believe, that the previous occupants, or someone which they had been in contact with, has coronavirus.

### 3) The Variation Agreement

Again going back to basics where parties have agreed to defer the completion date, in order to comply with Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989, meaning conveyancers should exchange a written agreement to vary the contract.

The written agreement will require execution although to prevent contamination by use of a physical document, the parties are entitled to either e-sign the agreement to vary the existing contract or authorise their conveyancer to sign as agent on their behalf.

The process to vary the contract requires a formal exchange process. The agreement must specify that the parties do not intend to create a new contract; only an intention to vary the existing contract.

The guidance specified that conveyancers should effect exchange using one of the Law Society's formulae. Care needs to be exercised when giving undertakings at exchange of contracts as they need to be altered to confirm that the original document will be sent when the coronavirus COVID-19 restrictions are lifted.

The Law Society specimen clause annexed to these notes is intended to be reviewed for use in limited circumstances where contracts have already been exchanged, but completion has not yet taken place.

The clause is intended as a starting point to identify some of the issues which could legitimately justify delaying completion of transactions where contracts have already been exchanged.

- Giving Advice
  1. Despite the need for goodwill and co-operation the current situation requires consider whether the clients' best interests are served by varying the contract.
  2. What will the impact on your client be if the contract is varied.
  3. Advise the clients of the risks of varying the contract and of not doing so. Some clients could find themselves worse off if the contract is varied and some could benefit.
  4. The effect of any clause which is to be added to a contract, where exchange has already taken place, is fully explained to clients, confirmed to them in writing/email and written/email authority obtained from both/all clients for whom you are acting to act accordingly.
  5. An explanation as to the position if the contract is not varied. The time that the deferral might last is unknown. There may be one or more extensions of the stay-at-home period and the requirements about physical distancing. The longer this period lasts the more likely it is that other issues will arise as we have already seen.
- Tips and traps with the Variation Agreement

a)The provisions of the agreement require good faith on the part of all parties.

b) The provisions of the variation agreement accord with the original contract. Take particular care with regard to definitions.

c)The possible 'delay provisions' may not be relevant and other delay provisions may need to be drafted.

d)The 'no later date' needs to be agreed between the parties to reflect the circumstances of the transactions involved and the needs of the parties.

e)The 'long stop date' should take into account the same considerations.

f) The Guidance highlights that clause 3 could be problematical as to whether a Delay Event has occurred. The problem could be alleviated by a provision ‘PROVIDED THAT if the parties, acting reasonably, do not agree that the Delay Event has ceased to apply, then the completion date shall be the date thirty (30) working days after the date on which the Regulations are withdrawn or otherwise cease to apply’, depending on the requirements of the individual transaction. Alternatively some sort of ADR provision could resolve the issue.

This clause is not a ‘one size fits all clause’ and requires variation to meet the needs of the clients and the circumstances.

g) Where the transaction is part of a chain it is essential that a common clause is used throughout. If this is not the case the potential for different provisions imposing completion dates and less obviously the contracts could permit different reasons for rescission. This point creates a significant practical issue namely how you will know what clauses the other parts of the chain are using and how you will know if these are varied before exchange of the variation agreement.

h) Both the original contract and the variation agreement need to be considered where it is necessary to serve a notice on the other contractual party. Where email is to be used to serve notices pursuant to any variation then consider reviewing your existing contract to assess whether this is permissible or not under the standard or special conditions and, if not, agree a variation limited to this.

i) The guidance highlights If you intend to use email to obtain authority to sign on your client’s behalf – there are legal constraints here and you will need to consider this carefully.

j) Be careful to ensure if there is to be an exchange of the variation agreement that the position with regard to the dispatch of the contract to the other side on exchange.

Note -

Where there are chains that involve properties in Wales or transactions that involve properties with boundaries that cross England and Wales you may consider whether or not any of the defined or rescission events differ according to the regulations operating at the time the client is looking to enter into the variation agreement.

## 5. Delayed Completion

### 5.1 The Normal Contractual Position

Assuming a variation agreement has not been entered into the normal contractual position needs to be re-examined.

- The Standard Conditions of Sale (5 edition 2018 Revision) (SCS)

Either buyers or sellers who do not complete on the contractual 'completion date' may be liable to pay compensation. (SCS 7.2)

As you will recall If the contractual completion date has passed and completion has not taken place the party who is 'ready, able and willing' to complete can serve a notice to complete on the other, requiring completion to take place by a certain date (SCS 6.8) and failure to comply when served on a buyer can result in loss of their deposit. (SCS 7.4)

Of course to avoid the consequences arising under SCS the parties are encouraged to make alternate arrangements with each other on the basis that no-one is at fault but an external event beyond the control of the buyer and seller is preventing completion taking place on the date originally agreed.

Government guidelines encourage that the parties approach this process in a spirit of good faith.

Despite the unusual circumstances generated by the lockdown and the Government guidance clients whether buyers or sellers should be informed about all their options and the consequences.

Where the situation creates an innocent and defaulting party the conveyancers should advise buyers and sellers to consider rescission of the contract and of course explain the consequences of doing this.

The rationale of rescission is that both parties would be put back largely in the position that they were in before contracts were exchanged. As for the deposit this should mean the the deposit monies would be returned in full and neither party would have any claim against the other.

When a contract for the sale of property falls through, the normal expectation is that where the fault lies with the buyer, the deposit paid on exchange of contracts will be forfeited. It must be appreciated that the Court has a discretion as to what to do and the position is not that clear.

To try and determine what the approach of the Court will be. In the late 1970's the Court declared that the jurisdiction of Section 49(2) is "one to be exercised where the justice of the case requires". The word "justice" was interpreted in a very wide sense, indicating that repayment must be ordered in any circumstances which makes this the fairest course between the parties. A case which highlights the wide jurisdiction of the courts is *Universal Corporation v Five Ways Properties Limited* [1979] 1 ALL ER 553 where Lord Justice Buckley said

‘a discretion which must, of course, be exercised judicially, and with regard to all relevant considerations, including the very important consideration of the terms of the contract into which the parties have chosen to enter . . . the jurisdiction is one to be exercised where the justice of case requires. In this connection I take the word ‘justice’ to be used in a wide sense, indicating that repayment must be ordered in any circumstances which make this the fairest course between the two parties.’

The 1980s saw several decisions indicating that in circumstances where a seller was able to resell at a profit the fairest course was to order repayment. However, in 2001 the case of *Omar v El-Wakil* [2001] All ER 131 which brought about a significant change of position.

In this case the Court of Appeal applied what has later been described as “a slightly stricter” approach. The importance of attaching certainty to the consequences of paying a deposit was recognised and, in a victory for sellers, it was held that if a buyer pays a deposit he is likely to lose it if he does not fulfil the contract; that should be the starting point. Indeed, the Court even went so far as to state that the circumstances which make it appropriate for the Court to exercise its discretion to return the deposit to the buyer must be exceptional. In *Omar* the deposit was not 10% but 31% and it was acknowledged by the Court that the property might be re-sold for a profit; yet the Court still did not order repayment.

The next case to examine is *Tennero Limited v Majorarch Limited* [2003 EWHC 2601]. In this case, the Court was asked to determine whether the deposits paid on three related transactions, the sale and purchase of three luxurious flats, should be returned. In a departure from the *Omar* case, the Court held on this occasion that if special circumstances are needed to justify the return of a deposit where the buyer is in breach of contract, the fact that the seller has or would be able to resell the property elsewhere for a profit would constitute such special circumstances. The Court was so persuaded by the valuation evidence available at the hearing that it concluded that the deposits on the two flats which were clearly capable of resale at a profit were in principle repayable notwithstanding the buyer’s default. Conversely, the seller was entitled to retain the deposit for the remaining flat for which the valuation evidence demonstrated that the sale price had declined. The message from the Court following *Tennero* was therefore that the resale value of a property is a highly persuasive factor in determining the Court’s discretion whether to allow a deposit to be forfeited. Understandably, practitioners could have been forgiven for assuming as a result of this case that where a profitable re-sale had occurred or was likely, the deposit would in all likelihood have to be returned irrespective of the buyer’s default. The extent of that discretion was tested in the case of *Midill (97PL) Limited v Park Lane Estates Limited & Anor* [2008] EWHC 18 (Ch).

In this case on Christmas Eve 2005, the Claimant (“Midill”) agreed to pay the Second Defendant (“Gomba”) £4,000,000 for all the shares in the First Defendant (“Park Lane”) a company whose only asset was a commercial property in London. The price was to be paid in tranches including a 10% deposit upon execution of the agreement. Subsequently Midill was unable to complete notwithstanding service of a Notice to Complete. Thereafter Gomba sought to rescind the agreement and the property was subsequently sold by Park Lane to an unconnected company for a sum in excess of the original purchase price agreed.

Part of the dispute before the Court was to determine whether Gomba was entitled to forfeit the deposit paid by Midill upon exchange irrespective of the profit which had been achieved as a result of the subsequent sale of the property to an alternative third party.

The law on this issue is contained in Section 49(2) of the Law of Property Act 1925 which states:

“Where the Court refuses to grant specific performance of a contract, or in any action for the return of a deposit, the Court may, if it thinks fit, order the repayment of any deposit”.

This provision gives the Court an unqualified discretion to order the return of a deposit even if the buyer has failed to complete the purchase following service of a Notice to Complete.

Midill argued that the circumstances of its case fitted fairly and squarely within the principles enunciated by the Court in *Tennero*. The seller had resold the property elsewhere for a profit and therefore the deposit should be returned. However, the Court rejected that argument. In a departure from *Tennero* the Court did not order repayment of the deposit notwithstanding the fact that the seller had made a profit on a subsequent sale to an alternative buyer. The Judge’s view was that if the position were otherwise and the liability to repay a deposit were to depend upon some future sale price, there would be considerable uncertainty.

The above is precisely what the notion of a fixed deposit was intended to avoid. The Court was also influenced by the fact that the parties were sophisticated professionals and therefore well aware of the risks involved in failing to complete a deal, although that fact would equally have applied to the parties in *Tennero*.

In *Midill* it was suggested by the Court that the parties could have expressly provided, in the contract, had they so wished, for the liability to repay the deposit in the event of a default to depend upon the outcome of a subsequent resale. However, it is probably unlikely from a seller’s perspective that this would be an acceptable point of negotiation.

A question that has been posed is whether the seller can exclude the ability of the buyer to invoke Section 49(2) altogether. The case of *Aribisala v St James Homes (Grosvenor Doc) Limited* 14<sup>th</sup> March 2008.

In July 2006, contracts were exchanged for the sale of two leasehold properties for a purchase price of £2.16m. A 10% deposit was paid on exchange. The contract stipulated that “Section 49(2) of the Law of Property Act 1925 shall not apply”. The buyer failed to complete and a Notice to Complete was served. The deposit was thereafter forfeited and a claim for repayment instigated. The seller sought to rely on the contractual exclusion of section 49(2) to defend the claim. The Court faced with this situation firmly held that a provision excluding the Court’s ability to exercise its discretion was effectively an attempt to remove the jurisdiction of the Court which was void on the grounds of public policy. Accordingly the provision in the sale contract was of no effect and could not exclude the buyer’s right to apply to Court for relief.

Another case worth exploring this issue is *Hardy v Griffiths* [2014] EWHC 3947 (Ch)

In this case the Defendants entered into a contract on 1 April 2011 to buy Laughton Manor in East Sussex from the claimants. The price was £3.6 million and an initial deposit of £150,000 was paid on exchange with the balance of the 10% deposit, £210,000, becoming payable on service of a notice to complete the purchase.

Despite the house being built in the mid 19th century and being a substantial country residence, the Griffiths proceeded without obtaining any survey. They relied on their own

visits to the house and, so they claimed, what they were told by the sellers. The sellers had bought the house in 2006 without a survey and had substantially renovated it, including dealing with areas of damp.

In answer to the Enquiries before Contract relating to damp, the sellers stated they were not aware of any issues but pointed out that this was an old house and they could give no warranty as to its condition.

The Griffiths were in some difficulty in completing on time and agreed to pay a further £35,000 for additional time to complete but they never did complete. On 30 April 2012, the vendors served notice to complete but, relying on their surveyor's inspection of the house on 3 May 2012, the Griffiths sought to pull out. Their surveyor had noted rising and penetrating dampness and local wet and dry rot.

The Griffiths alleged misrepresentation by the sellers but not only was the Court satisfied there had been none but it could find no evidence that the Griffiths had ever seen the Replies to Enquiries or relied upon what the vendors had said. The Court was satisfied that the dampness seen by the Griffiths' surveyor over a year after exchange of contracts was either new or would not have been evident to the sellers at the time of exchange of contracts.

The Court held that the Griffiths, like any other buyer were subject to the rule of caveat emptor (buyer beware). It was for them to satisfy themselves as to the state of the property and, like any purchaser, they should have obtained a survey before committing themselves to the purchase, not afterwards.

The Court also held that the Griffiths could not seek to rely upon what they claimed the sellers had told them verbally about the damp and about some additional land being included in the sale. The Contract limited any reliance to just representations made by or through their solicitors. The Court was satisfied that the Griffiths were not misled in any way.

Finally, the Court confirmed that both a deposit paid up front, and a balance payable at a later date, stand to be forfeited or paid if the purchaser wrongly fails to complete. And there was nothing exceptional in this case to relieve the Griffiths from losing their deposits even though the sellers had re-sold the property a year later for the same price, £3.6 million.

Accordingly, including the additional £35,000 payable for the time extension, the Griffiths lost £395,000 on this purchase and, of course, have to pay the costs of the Court proceedings.

A word of caution is required when a deposit is paid that is greater than 10 per cent. The starting point here is the case of *Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd* [1993] 2WLR 702 which is a Privy Council decision where a deposit of 25% of the purchase price was paid. The Privy Council ordered the return of the deposit paid by the buyer despite the buyer being the defaulting party. The thinking was that this deposit was a penalty.

Clarification on this point was obtained in the case of *Cavendish Square Holding BV v Talal El Makdessi* [2015] UKSC 67 where the Supreme Court explained - "The true test is whether the impugned provision is a secondary obligation which imposes a detriment on the contract breaker out of all proportion to any legitimate interest of the innocent party in the enforcement of the primary obligation. The innocent party can have no proper interest in simply punishing the defaulter. His interest is in performance or in some appropriate alternative to performance.

It follows that a deposit paid of greater than 10% can be challenged as a penalty unless there is evidence at the date of contract the parties had a valid reason to agree a higher sum. Case

law suggests if the payment is deemed a penalty a defaulting buyer may be able to reclaim the entire deposit not just the excess above 10%.

## 5.2 Deferred Completion

As we have seen if one or both parties still wish to proceed a variation to the contract will be required so that the completion date is deferred to a time when it is possible and safe to proceed. The purpose of the variation agreement is to propose a framework for this situation where completion cannot take place because of some aspect of the impact of coronavirus and the parties do not wish to rescind the agreement.

Formal or informal bridging finance may be possible to enable transactions to proceed. If a buyer has friends, family or other “angel” investors who are willing to help out and cover the period until the buyer is able to source/obtain the funds, that is of course the ideal solution but rarely seen in practice. Such a facility generates a number of problems including risk for the investor/lender, vulnerability for the borrower(s) and of course a need for caution to be exercised by the conveyancer for the borrower(s).

As we have previously examined a solution is for the buyer to enter into negotiations with the seller and agree to extend the completion date, by way of a variation agreement, thereby giving the buyer more time to obtain the completion funds. It is not uncommon for a buyer to incentivise the seller by:

- increasing the purchase price;
- paying a premium to extend the completion date instantly and not when completion actually takes place;
- releasing the 10% deposit to the seller as agent so that the seller can use the deposit funds instantly, which could be helpful for the seller’s cash flow purposes; or
- allowing the seller to charge interest, at the contractually agreed amount (usually 4% above the base rate), on the purchase price from the original contractual completion date until the date of actual completion.

An option or a position arising by default due to inactivity by a buyer occurs where a does nothing and waits to see if the seller rescinds the contract. If after the ten working day notice period expires the seller delays and does not rescind the contract, it could be considered a waiver of the notice to complete and then time no longer becomes of the essence in the contract relying upon the decision of *Hakimzay Ltd v Robin Swailes* [2015] EWHC B14 (Ch).

## 5.3 Notices to Complete

Standard Condition 6.8.2 and standard commercial property condition 9.8.2 provide that on service of a valid notice to complete completion must take place within 10 working days exclusive of the day of service.

To be valid a notice to complete must be served by a party that is ready willing and able to complete on the day of the notice and of course is ready to complete during the notice period.

A case which highlights that the serving of a Notice to complete makes time of the essence for both parties is *Clarke Investments Limited v Pacific Technologies Ltd* [2013]EWCA Civ 750 . In this case the buyer which served the Notice to Complete were not ready to complete on the date the Notice to Complete expired and was held to be in breach of contract and the seller was entitled to rescind. The Court held that the failure to provide a Completion Statement that accurately reflected all matters remaining to be settled (in the face of the Notice to complete) was not something that could or should prevent completion by tendering or paying over the correct sum due.

There are other matters that require attention –

- a) Waiver is possible with regard to a Notice to Complete and a second notice to complete can be served but it is not possible to extend an original Notice to Complete. As we have seen where the parties agree to extend the date for completion that agreement should comply with Section 2(1) of the Law of Property (Miscellaneous Provisions) Act 1989.
- b) Although it is possible for an estoppel to arise to prevent an action arising from a delayed completion. It would certainly be dangerous to rely on an estoppel as can be seen in the case of *Northstar Land Ltd v Maitland Brooks and Jacqueline Brooks* [2006] EWCA Civ 756. In this case on the day of completion the solicitor for the buyer suggested that completion be postponed for seven days. The seller’s solicitor understandably advised he would take instructions and would revert back to the buyers solicitor but did not do so.
- c) The *Northstar* case also assists us in determining the attitude of the Court with regard to the concept of working days and completion. At first instance the trial Judge considered that a working day would end at 5.30pm or 6pm or a few minutes later. Of course the Standard Conditions of Sale 6.12 (residential) and Standard Commercial Condition 9.1.2 state that if the completion monies arrive after 2pm they are deemed to arrived on the next working day for the purposes of the seller being entitled to contractual interest
- d) A failure by Party B to complete on the contractual completion date does not give rise to an automatic right for Party A to terminate the contract. The SCS (6.1.1) and SCPC (8.1.1) both state that in relation to completion, “time is not of the essence of the contract unless a notice to complete has been served”. Where time is not of the essence in a contract, a failure to comply with an obligation by a specified date does not give rise to a right to terminate. To make time of the essence, if Party A is ready, willing and able to complete, then it should serve a notice to complete on Party B. The notice to complete will specify that completion must take place by a particular date (within 10 working days, excluding the day on which the notice is given, under SCPC 8.8.2 and SCS 6.8.2) and makes time of the essence in relation to that date.

There are a number of cases that can provide some guidance on the issues to be considered when considering serving a notice to complete or when one is served.

*Singh v Sardar Investments Ltd* [2002] EWCA Civ 1706

As we have seen a buyer who serves a notice to complete, thereby making time of the essence for the completion, must be in a position to perform his own contractual obligations as at that date. Failure to do so amounts to a repudiation of the contract. The buyers did not have the purchase money at completion date..)

Cantt Pak Ltd v Pak Southern China Property Investment Ltd [2018] EWHC 2564

A party serving a notice to complete need only be “ready, willing and able” at the time it gives the notice. There is no requirement for it to remain ready, willing and able throughout the notice period

Oakglade Investments Ltd v Dhand [2012] EWCA Civ 286

Here the buyer agreed to buy three properties from the sellers at specified prices. The sellers alleged that the parties had orally agreed to increase the price of each property by £10,000. Completion did not take place on the contractual completion date and the sellers served notices to complete at the increased prices. The buyer did not respond. Each party alleged that the other was in repudiatory breach of contract. The buyer subsequently issued proceedings seeking the return of his deposit.

The trial Judge rejected the sellers’ evidence of the alleged oral agreement, and consequently held that the notices were invalid on the basis that the sellers were not ready, willing and able to complete. Thus the sellers were in repudiatory breach of the agreement and the buyer was entitled to the return of his deposit. The sellers appealed.

In dismissing the appeal the Court of Appeal held the notices to complete were invalid, not only because the sellers were not ready, willing and able to complete, but also, more fundamentally, because the notices related to contracts different to those binding upon the buyer.

LJ Mummery clarified the position at paragraph 29:

“The focus of the question whether the notices to complete were valid must turn on the object and terms of those notices construed in their contractual setting. The notices required [the buyer] to complete contracts different from the contracts that he had in fact entered into with the [sellers]. That is because the prices that the [sellers] were requiring him to pay for the Properties according to the completion statements, which were followed by the notices, were different from the prices that he had in fact agreed to pay.”

Before we leave Notices to Complete it is important to consider how a Notice to Complete should be served.

The National Conditions of Sale 5<sup>th</sup> Edition specify –

- The Notice must be in writing (1.3.1)
- Notice on a party’s conveyancer is service on the party (1.3.2)
- The Notice is validly given or sent by fax, or by email to an email address for the intended recipient given in the contract (1.3.3)
- The Notice is given when it is received (1.3.4)

- A Notice sent via DX is received when it is available for collection (1.3.5(a)) and is treated as received before 4pm on the first working day after the day on which it would normally be available for collection by the addressee (1.3.7(c))
- A Notice received after 4pm on a working day or on a day which is not a working day is to be treated as received on the next working day 1.3.5(b)
- Where an automated response to a Notice sent by email is received saying the recipient is out of the office this is to be treated as proof that the Notice was not received. (1.3.5(c))
- A Notice sent by first class post is treated as being received on the second working day after posting (1.3.7(a))
- A Notice sent by second class post is treated as being received on the third working day after posting (1.3.7(b))
- A Notice sent by fax is treated as being received one hour after dispatch (1.3.7(c))
- A Notice sent by email is treated as having been received before 4pm on the first working day after despatch.

Subject to the existence and content of the variation agreement put simply serve a Notice to Complete by fax for the fasted deemed service .

There are a number of important points to note –

- a. Where completion does not take place advise the client (the innocent party) of the availability of serving a notice to complete and the benefit of doing so .
- b. Take instructions from the client and explain the procedure in particular that the notice permits the defaulting party ten working days to effect completion
- c. There is no guarantee that the innocent seller will be entitled to retain the deposit

## 6. Remedies

- Sellers Remedies

- a) Specific Performance

When a buyer fails to complete a seller has a choice of accepting the buyer's repudiatory breach and treating the contract as repudiated or seeking an order for specific performance and or damages.

The choice will depend on the state of the market as if the market is strong the retention of the deposit and reselling the property would make sense. In the rare situation the buyer has the means to complete an order for specific performance should be advised.

The major issue with specific performance is that it is an equitable remedy which is available at the discretion of the Court.

- b) Rescission

Condition 7.4 Standard Conditions states that if the buyer fails to complete the seller may rescind the contract, forfeit and retain the deposit and accrued interest, resell the property and claim damages.

- Buyers Remedies

The starting point when examining remedies for the buyer is to explore Standard Condition 7.1.1 which provides –

- (a) Where there is a material difference between the description or value of the property , or of any of the contents included in the contract , as represented and as it is , the buyer is entitled to damages.
- (b) An error or omission only entitles the buyer to rescind the contract :
  - (i) Where it results from fraud or recklessness, or
  - (ii) Where he would be obliged, to his prejudice , to accept property differing substantially (in quantity, quality or tenure ) from what the error or omission had led him to expect.

## 7. Property Litigation

The courts and tribunals are open for business .

There are a number of general issues for Residential Tenancies

- All possession hearings have been suspended for 90 days;
- new notices served with the object of obtaining possession will have an inbuilt delay of three months, thus delaying a landlord from obtaining possession;
- Possession proceedings: New PD51Z

By way of Practice Direction 51Z, the Master of Rolls has suspended all ongoing housing possession actions, so that no hearing can progress to a stage where an individual can be evicted. This applies to occupation in the private and public sector, including licenses and mortgagee cases. This has been put in place for an initial period of 90 days, up to the end of June 2020.

- Terminating Tenancies

Assured Tenancies, section 8 procedure:

The relevant provisions are section 81 and Schedule 29 of Coronavirus Act 2020. Landlords seeking to obtain possession of an assured tenancy for cause, have to first serve a notice under section 8 of the Housing Act 1988 on the tenant setting out the grounds relied on.

Previously, section 8, specified varying periods within which proceedings could be brought following the service of a section 8 notice, which depended on the particular ground relied on. Now, pursuant to Paragraph 6 of Schedule 29 of Coronavirus Act 2020, in all cases, proceedings cannot be commenced earlier than 3 months from the date the notice was served.

Although a uniform date seems a little unsuitable, particularly where the grounds for possession span non-payment of rent and anti-social behaviour cases, in practice, given the moratorium on possession hearings under the new PD 51Z, it will have no immediate impact on the recovery of possession.

Assured Tenancies, section 21 procedure:

Previously, pursuant to section 21 of the Housing Act 1988, an assured shorthold tenancy granted for a fixed term could be terminated on or after the expiry of the contractual term by giving not less than two months' notice in writing in the prescribed form. Now, pursuant to Paragraph 7 of Schedule 25 of Coronavirus Act 2020, landlords are required to give not less than three months' notice in writing.

It should be noted that nothing in the Act invalidates notices validly served prior to the commencement of the relevant period.

## Rent Act 1977 tenancies

The termination of a contractual tenancy under the Rent Act 1977 is brought about by the service of a notice to quit. Once the contractual term is brought to an end, a landlord can obtain possession by bringing possession proceedings and making out grounds.

Section 5 of the Protection from Eviction Act 1977, prescribes that at least 4 weeks' notice needed to be given to terminate the contractual tenancy. Paragraph 2(1) of Schedule 29 of Coronavirus Act 2020 extends that period to 3 months, so that the earliest the contractual period can be brought to an end is 3 months from the date of the notice.

Further, until 30<sup>th</sup> September 2020, paragraph 2(3) of Coronavirus Act 2020 introduces a new notice that the landlord must serve before commencing proceedings. The landlord must serve a notice of intention to commence possession proceedings. In that notice, the landlord must set out the grounds that will be relied on and a date after which proceedings will be commenced, which must not be a date earlier than 3 months from the date of the notice.

## Secure Tenancies

Section 83 of the Housing Act 1985 prescribes the notice that the landlord must serve on secure tenants if it wants to terminate their tenancy on grounds. Paragraph 3(c) of Coronavirus Act 20 provides that when that notice inserts a date after which proceedings can be begun, it must give at least 3 months. Similar provision is made in respect of notices for possession sent in anti-social behaviour cases under s.83ZA of the 1985 Act, again at least 3 months must be provided for.

## Flexible tenancies, Introductory tenancies, Demoted tenancies

In all these types of tenancy, schedule 29 of Coronavirus Act 2020 increases the prescribed period in the notices for stipulating when proceedings will be commenced from 2 months to 3 months.

## Tenancy statutory requirements

The Coronavirus Act 2020 has not abrogated landlord's duties in respect of safety in the accommodation, nor the sanctions that can be imposed if they are not complied with. In particular, gas safety checks are not only mandatory, but if missed can impact on a landlord's ability to recover possession.

## 8. Conclusions

- Communicate effectively with clients
- Do the simple things well
- In the current situation think about –

Search validation policies

Pared down search policies where searches are incomplete

Electronic ID checks

Stewart Title have kindly sponsored this webinar and are open for business. If you have any title indemnity or search identity issues contact

Robert Kelly [robert.kelly@stewart.com](mailto:robert.kelly@stewart.com) tel :0741 524 0703