

## Protecting your property sales in an uncertain market

In an uncertain market, an exchange does not guarantee a completion. Should a buyer fail to complete, you are entitled to terminate the contract and keep the buyer's 10% deposit, but are you and your sales staff risking your entitlement? This Briefing Note poses some regularly asked questions.

### **Are you ready to serve notice to confirm that the property is ready for occupation?**

This may seem like an obvious question if the unit is build complete, but it is important that you understand what you are obliged to provide to the buyers' solicitors once the notice has been served. Every contract is different but the basic requirements are:

- 1) The warranty cover note;
- 2) Evidence of compliance with the relevant pre-occupation planning conditions; and
- 3) The building control final certificate

If you cannot provide the required documents, the notice may not be valid and the buyer could sue you for breach of contract. If a buyer does not want to complete, this could be an easy way for the buyer to walk away from the contract with all their money returned to them.

It is vital to remember that *a notice cannot be retracted*: this means that if a notice is served too early (and even if it is a genuine mistake), that notice will be valid and if you cannot hand over the property within the prescribed time frame, the buyer could sue you for breach of contract.

Accordingly, it is imperative that your staff provide accurate instructions to the lawyers serving the notices. Again, this could give the buyer an easy excuse to get out of the contract.

### **If the buyer fails to complete on the completion date, should you serve a late notice?**

If you serve a "notice to complete", also known as a "special notice", you are making *time of the essence* for the buyer to perform its obligations in the contract and once the clock starts clicking, it cannot be stopped.

The principal reason to serve a special notice is to ensure completion takes place and that the transaction completes, but you should only serve it if you are prepared to terminate the contract and take the unit back upon expiration of the special notice period if completion does not take place. You should consider carefully whether to grant extensions to the special notice period where the buyer provides evidence that the mortgage is delayed or when international banks are slow at releasing funds. Granting extensions might risk your ability to terminate the contract and retain the 10% deposit because it could be argued that you have *accepted the buyer's breach* of contract (their late performance).

Accordingly, demonstrating your intention to retain a 10% deposit and give additional time to complete could be the very reason you lose it.

You must be ready, willing and able to complete on the completion date. This will extend to, but is not limited to, having built the unit on the development, provided facilities (if relevant) and complied with the

relevant planning conditions. If you are not able to perform your obligations under the contract on the completion date, the buyer could serve a special notice on you despite their own breach.

**The buyer has failed to complete, you have served a special notice and you are prepared to take the unit back. You are holding a 10% deposit and a 10% stage payment – should you keep all the money?**

First, it is important to keep stage payments and deposits entirely separate and your contract should clearly differentiate any payment over a 10% deposit as a stage payment or an advance payment.

In the event of a buyer's failure to complete, you are entitled to the 10% deposit without the need to prove any loss. There is a risk that a stage payment could be treated as a *penalty* and this could risk all monies paid under the contract including the 10% deposit (i.e. you could be forced to return all the money paid by the buyer back to the buyer even though you are not at fault). Whether a stage/advance payment might be a penalty or not is a complex and unclear area of law. We can suggest specimen contract clauses that will offer as much protection as possible, but there is no guarantee what a court's interpretation would be. The best way to proceed at present is therefore to separate the payments to protect the deposit monies from refund to the buyer.

Second, it is worth reviewing if a stage payment is necessary for your build programme. A stage payment linked to a construction milestone may be more palatable to a Judge than a simple time-frame linked payment. If your development is close to practical completion, you might want to consider whether you need to and why are you taking a stage payment at all?

Lastly, are you actually utilising stage payments for your build programme or could the stage payments be held in your lawyer's client account? Often the main worry for the buyer's solicitor will be that any payments made over and above 10% of the purchase price (or possibly £100,000) are not protected. The NHBC insolvency cover, for example, only extends to 10% of the purchase price or £100,000 whichever is the lower unless

extended cover is purchased. One solution is for your lawyers to hold the funds.

### What are your staff saying to buyers?

A seemingly innocuous email or a WhatsApp message to a buyer could have catastrophic consequences on your cash flow. It is important that communication with buyers is formal, in writing and professional at all times: it is very easy for an email thread to be forwarded to the wrong parties by mistake.

Disputes over deposits are not uncommon and it is sensible to be well prepared if this happens. In litigation, written communications could be disclosed to a Judge and accordingly, your staff should be careful when confirming anything to a buyer. Moreover, confirmations given in a "trigger happy" email could give rise to a claim of misrepresentation or a claim under the relevant consumer code.

### Further information

If you would like to receive further information on the above we are happy to host a seminar or provide training.

### For further information, please contact:



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