

WRIGGLING OUT OF PURCHASE OBLIGATIONS:

a warm and supportive revision of the basics in the law of rescission

by

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Jonathan specialises in property litigation and professional negligence arising out of it.

Jonathan comes highly recommended in the legal directories: Chambers UK, 2007 [Real Estate] says he is an 'impressive courtroom advocate', with 'extreme cleverness and creativity'.

He is immensely popular not just for his ability to work hard and deliver work swiftly and accurately but also for his skills in winning the confidence and settling the nerves of even the most excitable client. The Legal 500 has said that Jonathan's "easy manner belies a sharp tactical mind which is much in demand".

This year the Legal 500 says that he is 'an excellent fighter, a first-class tactician and is highly responsive and commercial', noting that in recent years Jonathan has successfully extended his property qualifications by developing an enviable mediation practice.

Jonathan is Chambers & Partners Real Estate Silk of the Year 2007/8.

RESCISSION FOR BREACH	Misdescription	A accepts B's repudiatory breach of an essential/fundamental term of the contract, as a result of which the contract is set aside from now on.	No need to pretend the contract never existed: therefore can claim damages.
	Defective title		
	Failure to complete		
RESCISSION AB INITIO	Misrepresentation	Restitutio / Third Party rights / Affirmation / Lapse of time	The contract is treated as if it never existed: no damages unless in the case of misrepresentation, that outcome causes hardship in which case there is s.2(2) Misrepresentation Act (damages in lieu of rescission).
	Mistake		

1. What is the difference between rescission ab initio and rescission for breach?

- 1.1. Rescission for breach is where A accepts B's repudiatory breach of an essential/fundamental term of the contract, as a result of which the contract is set aside from now on
- 1.2. Rescission ab initio is where A treats the contract as if it never existed in the first place because of a common mistake or misrepresentation by B at the time of the formation of the contract which induced it.

2. How does rescission for breach work in practice?

2.1. Contract of sale of land from V to P exchanged.

2.2. P says that it will not be completing on the completion date

2.3. A party who wrongfully treats a contract as not binding on them is in breach.

2.4. V has a choice:

2.5. Option 1: get out

- (1) V is *entitled* to accept this repudiatory breach.
- (2) P's breach does not itself operate to end the contract: two things have to happen before the contract is ended:
 - (i) It must be accepted by V
 - (ii) The acceptance must be communicated to P (either expressly or impliedly, by, say advertising the property for sale)
- (3) P does this by saying 'I rescind' (the same as would be required in the case of a rescission ab initio). It should be clear and prompt (waiver can be inferred if P hangs about or requests V to perfect the title).
- (4) That puts an end to the contract: V is free of the legal rights the contract grants so can re-sell. Once it is done validly, it's all over.
- (5) V cannot now sue for sp - ever (the rescission cannot be retracted)
- (6) The deposit will be forfeited to V.
- (7) V can sue for any shortfall in the deposit too.
- (8) V can sue for damages (loss on the subsequent re-sale plus wasted sales and legal costs with credit for the deposit).
- (9) V does not need to wait for the completion date to elapse to see if P sees through the threat not to complete.

2.6. Option 2: stay in

- (1) V can choose to ignore the repudiatory breach.
- (2) The contract will remain on foot for all purposes so that V can seek sp.
- (3) P will also be liable for damages for any delay in completion. Under Condition 9.3 Standard Commercial Property Conditions 2nd ed, P has to pay compensation at the contract rate on the purchase price. V's damages claim must give credit for this compensation.

2.7. Does V need to wait until the agreed completion date before taking action for sp?

In the case of rescission for breach, although a writ can be validly issued before the contractual date for completion has arrived, the Court will not compel sp to take place on a date before the completion date.

The logic of the Court not compelling sp before the completion date is:

- (1) V only has the contractual right to sp on that date
- (2) Until completion has passed nobody knows if P is going to see through the threat not to complete (and the breach in making that threat has been ignored).

2.8. The same principles apply to the position of the innocent purchaser:

- (1) V is in repudiatory breach.
- (2) P can either accept or ignore - get out or stay in.
- (3) If P accepts, there is a claim for the deposit, interest, damages (loss of bargain) and costs and the contract is over.
- (4) P can put a UN1 on the land for the deposit.

3. What is the scoop with misdescription / defective title ?

- 3.1. A misdescription is a false statement of fact in the contract itself as to the area of the property, the nature of the vendor's interest (say describing leasehold land as freehold) or the restrictions / third party rights affecting it.
- 3.2. It is different from a misrepresentation, which *induces* the contract. A misdescription is a term of the contract itself.
- 3.3. Under the general law, the position is this:
 - (1) If the misdescription is material and substantial:
 - (a) P can rescind (accept the repudiatory breach) and recover the deposit (get out).
 - (b) V cannot get sp even if it is prepared to abate the price: *Donnelly v Weybridge Construction* [2006] EWHC 2678. Any notice to complete served by V will not be effective because V is not ready willing and *able* to complete (see below) at 4.3(3)).
 - (2) P can also choose to stay in. This is not so well known. As long as the error does not affect the whole foundation and substance of the contract, P can seek sp with a reduction in the purchase price for the deficiency. It's a form of equitable estoppel (V cannot say that it was not intended to sell what V really owned). In *Hill v Buckley* (1811) 17 Ves 394, sp with compensation was allowed when there was a deficiency of 28 out of 217 acres.
 - (3) If the misdescription is insubstantial and innocent:
 - (a) P's only remedy is in damages
 - (b) V can get sp if it allows reasonable abatement of the price for the deficiency: Emmet on Title para4.018.
- 3.4. There are usually terms which try to keep the contract alive notwithstanding a misdescription. Condition 9 Standard Commercial Property Conditions 2nd ed provides: 9.1.1: *If any plan or statement in the contract, or in the negotiations leading to it, is or was misleading or inaccurate, due to an error or omission, the remedies available are as follows.* 9.1.2: *When there is a material difference between the description or value of the property as represented and as it is, the buyer is entitled to damages.* 9.1.3: *An error or omission only entitles the buyer to rescind the*

contract: (a) where the error or omission results from fraud or recklessness, or (b) where the buyer would be obliged to its prejudice to accept property differing substantially (in quantity, quality or tenure) from that which the error or omission had led it to expect.”

- 3.5. What this is likely to come to is that rescission will be available only where:
- (1) objectively it can be said that but for the misdescription, a purchaser would not have entered into the contract (*Flight v Booth (1834)* 1 Bing NC 370) because what was bought was so different to what was truly capable of being sold.
 - (2) There is a major physical difference or difference in value: the overall substance of the error is what counts: see *Re Belcham and Gawley's Contract* [1930] 1 Ch 56. How much difference does it really make? Value is only one of the factors.
- 3.6. If V has a defective title, that too is a breach. It gives P the right to rescind by accepting it if the defect is essential/fundamental. The same analysis applies in relation to Condition 9. 'Omission' covers defects in title.
- 3.7. Fundamental defect in title; post contractual date for completion; time not of the essence:
- (1) Has P the right to rescind without first serving a notice to complete (making time of the essence)? YES. P's right to rescind arises at the latest on the contractual date for completion. P does not need to allow V further time to perfect the title. Even though time is not of the essence, P is free to rescind without first serving a notice to complete: *James Macara v Barclay* [1945] KB 148. Notices to complete are for failures to complete.
 - (2) If pre-completion P learns of the defect and decides to stay in (waives) can V obtain sp after completion if the defect in title remains?
 - (a) V can obtain sp if the defect is cured by the completion date.
 - (b) If it is not cured by the agreed completion date, P can rescind by accepting V's breach.

4. When do you need a notice to complete?

- 4.1. When P or V is not completing on the contractual completion date and the innocent one wants to make time of the essence so it can say there's a breach and then rescind by accepting it. This is often re-iterated in standard conditions. Where time is already of the essence you don't need a notice to complete.
- 4.2. Do you need a notice to complete as a prelude to sp (staying in?). No. V is entitled to issue a claim for sp even if it has not served a notice to complete. Sp is an equitable remedy which can be claimed on the basis that p has failed to complete in accordance with the contract. Funnily, a notice to complete is a prelude to rescission not to completion.
- 4.3. Provisions relating to the contents and form of service of the notice are often in standard conditions. There are standard forms. The main thing is to say that this is a notice to complete in accordance with the relevant standard condition and spell out the consequences of it (under Condition 8.8.2 Standard Commercial Property Conditions 2nd ed, time is of the essence of an obligation to complete within 10 working days):
 - (1) Time is then of the essence for both parties;
 - (2) Once given it cannot be withdrawn (you have to agree a variation to effect a further extension).
 - (3) The server must be ready able and willing to complete at the date of service. When V serves there must be no defect in title or anything else of substance that needs to be done. An outstanding administrative matter would not invalidate the notice. If lessor's consent was needed the absence of a licence to assign would not be fatal to the notice as long as the contractual obligation was not to obtain the *licence* rather than just the consent: *Re Davies' Agreement* (1969) P&CR 328; *Midill (97PL) Ltd v Park Lane Estates Ltd* [2008] EWHC 18 (Ch).
 - (4)
 - (a) V serves notice to complete.
 - (b) At the date of service P would have been able to rescind ab initio for misrepresentation but has not.

- (c) Is the notice valid? YES. Similarly the fact that P *could* rescind by accepting a breach on the basis of a substantial misdescription would not invalidate the notice: *Bechal v Kitsford Holdings* [1989] 1 WLR 1055 (60% discrepancy in area).

- (5) An invalid notice can be a disaster:
 - (a) V serves the notice.

 - (b) It is invalid.

 - (c) V doesn't know.

 - (d) V says after it has 'expired', "I rescind".

 - (e) But the notice is invalid.

 - (f) So time has not been made of the essence.

 - (g) So that is a wrongful repudiation of the contract. It is a breach.

 - (h) So P can accept it and rescind: *Riverside Properties v Gray* [1975] Ch 72 (notice not of proper duration).

5. Deposits

5.1.

- (1) When V rescinds by accepting P's breach of an essential/fundamental term of the contract, V is entitled to forfeit the deposit. This can be done notwithstanding that V suffers no loss because a re-sale is at a higher price. (as if).

- (2) V can also recover any part of the unpaid deposit (top-up). This is because the right to the deposit accrued as a debt before the coming to an end of the contract. It is also expressly provided for in some standard conditions.

- (3) V's damages claim, however, is net of the deposit. V can only recover as damages loss over and above the value of the deposit.
- (4) The law of penalties will not help a defaulting party where the deposit is 10%. This is a bit odd given that 10% rarely represents V's actual loss but there we are.

5.2.

- (1) P is entitled to the return of the deposit plus interest when it is P who has rescinded by accepting V's breach, as a matter of law.
- (2) P would only use s.49(2) LPA 1925, under which the Court has a wide discretion to order the return of P's deposit, where the position is less clear cut.
- (3) S.49(2) (which you cannot contract out of) is only in practice used where it is P who cannot perform.
- (4) The Court looks at how close P came to performing the contract, what alternatives it proposed to V and how advantageous those would be when compared with performance of the actual contractual terms.
- (5) Where P can neither perform in accordance with the contract's terms nor offer a realistic alternative, the deposit is returned only in exceptional cases. One exceptional factor might be if V made a profit from P's inability to perform: *Aribisala v St James Homes (Grosvenor Dock) Ltd (No 2)* [2008] EWHC 456 (Ch).

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