

NOTICES TO COMPLETE AND FORFEITURE OF DEPOSITS

PETER CRAMPIN QC

RADCLIFFE CHAMBERS

11 New Square

Lincoln's Inn

pcrampin@radcliffechambers.com

A party does not need to serve a notice to complete in order to seek the enforcement of the contract, eg by suing for specific performance. So long as he is himself ready, able and willing to complete he can sue for specific performance as soon as the contractual completion date has past — indeed, he can sue for specific performance before then.

The objective of a party serving a notice to complete may be tactical, to increase pressure on the other party with the threat of terminating the contract if the notice is not complied with. But the primary objective in serving a notice to complete is to put the party in a position to terminate the contract on the other party's default.

A notice to complete achieves this by making time of the essence with respect to completion, ie a condition the breach of which is treated in law as a repudiation of the contract entitling the innocent party to accept the repudiation — as it is usually said, to rescind the contract — thereby bringing the contract to an end with respect to all future obligations thereunder; further entitling the innocent party, if he be the vendor, to forfeit the deposit, to re-sell the property as absolute owner, to exercise any other contractual rights conferred on him, such as the right to recover any shortfall on a re-sale as liquidated damages, and to sue for damages (including damages for loss of bargain) at common law*; and entitling the innocent party, if he be purchaser, to recover the deposit and sue for damages (including damages for loss of bargain) at common law.

Time is generally not originally of the essence: see eg Standard Condition 6.1.1. But the character of the subject-matter, eg wasting or speculative property, may make it impliedly so: see **Halsbury's Laws of England**, vol 42 (Reissue), para 120. And the parties may in their contract expressly make time of the essence.

A failure to complete may be such as to be evidence of a repudiation by the guilty party such as to justify the innocent party rescinding without making time of the essence. The

* In claiming damages for loss of bargain a vendor must give credit for the deposit: **Ockenden v Henly**; **Howe v Smith**. For case references see the table at the end of this paper.

tension between **Farrant v Olver** (where it was said that a persistent and lengthy refusal to perform the contract made it unnecessary to make time of the essence) and remarks by Lord Templeman, in **Graham v Pitkin**, has probably been laid to rest by Mr Justice Neuberger in **Tennaro v Majorarch Ltd** where he said [71]: “What [Lord Templeman] was saying, as I see it, is that, where time is not of the essence and there has been unreasonable delay, one cannot always infer that there has been a repudiation: one has to look at all the circumstances.”

Moreover, in principle, the serving a notice to complete should not be the only way of terminating a contract of sale of land on grounds of delay. Other forms of repudiatory conduct should also entitle the other party to rescind: see eg **Decro-Wall International v Practitioners in Marketing Ltd** where at page 369 Lord Justice Salmon spoke of the defendants’ breaches being such as “reasonably to shatter the plaintiffs’ confidence in the defendants’ ability to pay” and saying that the consequences of such breaches could be regarded as going to the root of the contract so that “the plaintiffs would have been entitled to refuse to continue doing business with the defendants.”

These other methods of terminating a contract of sale of land are, of course, important. But unless time was originally of the essence a notice to complete will generally be the method of choice.

Whether a notice be served under the common law or pursuant to an express contractual right, the server must be ready, able and willing to complete at the time when he serves. It is this aspect of a notice to complete which is one of the concerns of this talk. It has already been mentioned in the context of an action for specific performance: the claimant for specific performance must aver and prove that he is ready, able and willing to perform his own outstanding obligations under the contract.

In order to appreciate this requirement, and the way it changes, in important ways, at different stages, it is necessary to consider the legal character of the completion of a contract of sale. The obligations of vendor and purchaser on completion fall to be performed simultaneously: the vendor must deliver the conveyance in exchange for the price and the purchaser must pay the price for the conveyance, while neither needs to tender performance unless and until performance is tendered by the other. This makes the obligations of the parties on completion dependent, concurrent obligations. The performance of the obligations of one party is a condition precedent to the performance of the obligations of the other, and neither party can maintain an action without alleging and proving that he has performed, or is ready and willing to perform, his own obligations: **Halsbury’s Laws of England**, vol 13 (2007 Reissue), para 269; **Forrestt and Son Ltd v Aramayo**.

The concurrent nature of the obligations on completion also means there are implied mutual obligations of co-operation. "Completion by one cannot be effected without the co-operation of the other": **Quadrangle Development v Jenner**.

The consequence of neither party being ready to perform is that neither can complain of the other's non-performance: **State Trading Corp of India v M Golodetz Ltd**.

Thus where, on the contractual completion date, time not being of the essence, one party is ready but the other is not the party who is not ready is in non-repudiatory breach (**Ranieri v Miles**), but until he is ready he can neither sue for specific performance nor serve a notice to complete. Since time is not of the essence, the party who *is* ready cannot terminate the contract. He will be in non-repudiatory breach of contract if he subsequently ceases to be ready; but when and so long as he is ready to complete he can sue for specific performance (without needing to serve notice to complete) or, after the contractual completion date, serve a notice to complete.

Where on the contractual completion date, time not being of the essence, neither party is ready, both are in non-repudiatory breach of contract: neither can terminate or sue for specific performance or damages (**Forrestt v Aramayo**) and neither can serve a notice to complete. If but only if a party becomes ready to complete can he sue for specific performance or serve a notice to complete.

Where time is originally of the essence (ie as an original term of the contract) and one party is and the other party is not ready at the appointed time, then the party who is not ready is in repudiatory breach. This is so even if he is only ten minutes late: see **Union Eagle Ltd v Golden Achievement Ltd**. Accordingly, unless and until the contract is affirmed by the other party, the party not ready cannot sue for specific performance and cannot terminate the contract. The party who is ready to complete can either affirm the contract and sue for specific performance or accept the repudiation and rescind or terminate the contract.

Where neither party is ready to complete at the appointed time, where time is of the essence, both are in repudiatory breach. Neither can sue for specific performance or terminate the contract, which remains on foot for the benefit of both parties, though neither can enforce it or terminate it until he becomes ready to complete: **Northstar Land v Brooks**, [193].

Standard Condition 6.8 provides that at any time on or after completion date, a party who is ready, able and willing to complete may give the other a notice to complete whereupon the parties are to complete the contract within ten working days of giving a notice to complete, excluding the day on which the notice.

Thus at the date of notice to complete the server must be “ready, able and willing to complete” (hereinafter abbreviated to “ready to complete”). It does not matter that he may previously have been not ready and in breach. The validity of the notice depends on his readiness to complete at the time of service — if he ceases to be ready later, this has no bearing on the validity of the notice: **Aero Properties Ltd v Citycrest Properties Ltd**.

The effect of a notice to complete is to make the time for completion of the essence. This effect binds, and enures for the benefit of, both parties: **Quadrangle Development v Jenner**. Both parties then have whole of the notice period in which to complete. So long as a party is not ready to complete he is in breach, since the contractual completion date has expired. But his breach is non-repudiatory until the last day of the notice period. It is only a failure to complete on the last day of the notice period which places either party in repudiatory breach: **Oakdown Ltd v Bernstein & Co**.

A notice to complete does not substitute a new completion date for the contractual date, and so does not wipe out delay (and any accrued liability for delay): **Raineri v Miles**.

If there are successive notices, each valid as such, then a later notice to complete cannot unilaterally alter the effect of a prior notice; and where the contract has been affirmed after the expiry of a prior notice, either party may then serve a fresh notice making time of the essence in respect of a new completion date: **Schindler v Pigault**.

What makes a notice to complete invalid and what is the effect of its invalidity? The most obvious reason for invalidity is that the server was not ready to complete when he served it.

An invalid notice fails to make time of the essence. Failure to complete in accordance with the notice cannot, therefore, be repudiation by either party. If either party, wrongly assuming the notice to be valid, treats the other party as being in repudiatory breach for non-performance when the notice period expires, he may very well place himself in repudiatory breach. (One must qualify this statement by reference to the difficult case of **Woodar Investment Development v Wimpey Construction UK**, where the House of Lords held that an unjustified rescission does not necessarily constitute a repudiation: the whole circumstances need to be considered in order to see whether the party wrongfully rescinding is to be taken as abandoning the contract. But that case seems to have turned on its own very special facts, and the general position is as I have stated it.)

This being the general legal framework in which notice to complete operate, consider what is at present a not uncommon state of affairs in off-plan investment property purchases. Developers are finding that some contracting purchasers are failing to complete, while in some cases purchasers are finding that the development is taking much longer than

originally estimated. In current market conditions, purchasers want to escape from their contracts and recover their deposits; while vendors may realistically take the view that suing for specific performance will achieve nothing but only lead to rescission at a much later date, and so may want to cut their losses, forfeit the deposits* and re-sell. Prolonged inaction by one party, as we have seen, may constitute repudiation and justify rescission by the other. Generally, however, it will make more sense to serve a notice to complete, where this can be done.

For a vendor, this will mean completing the development and serving notice under the contract to fix the completion date **; waiting for the completion date to pass; and then serving notice in accordance with the conditions of the contract. There are three points in time to which the vendor needs to pay careful attention: first, the time when he serves notice to fix the completion date (are all the conditions precedent to its service satisfied?); secondly, the date of the service of the notice to complete (is the vendor then ready to complete?); and thirdly, the date on which the notice to complete expires (is he then ready to complete?). If the vendor fails to fix a valid completion date, or serves an invalid notice to complete or is not ready to complete on the last day of the notice period, he may find that it is he who is repudiatory breach of contract, rather than the purchaser. A purchaser who receives a notice to complete will wish to investigate carefully whether it is valid, since its invalidity may afford him the only opportunity he will have to escape from the contract and claim the return of his deposit.

A purchaser serving a notice to complete must wait until the vendor has fixed the completion date. Only when that date has passed can he serve a notice to complete. There are then two points in time to worry about: first, the date of the service of the notice to complete and secondly, the date on which the notice to complete expires: is he ready to complete on each date? If the purchaser serves an invalid notice to complete or is not ready to complete on the last day of the notice period, he may find that it is he who is repudiatory breach of contract, rather than the vendor.

* Assuming a deposit has been paid: at the time when this speech was given Exchange Insurance, a company specialising in exchange bonds, which took the place of cash deposits and were much in use in off-plan transactions, had entered administration, leaving vendors without even a deposit to forfeit.

** Normally the developer will be under an obligation to build out the development with no time specified for performing this obligation. No contractual completion date will be fixed by the contract: it will be for the developer to fix it by notice to the purchaser after completion of the works.

What can a purchaser do if the developer has not fixed a completion date and appears not to be moving purposefully forward with the development? In the absence of a contractual completion date, the purchaser cannot serve a notice to complete. He may nevertheless at common law serve a notice to make time of the essence of the developer's building obligation. This follows from the fact that the notion of time being or being made of the essence applies to individual contractual obligations, not contracts: **British and Commonwealth Holdings v Quadrex Holdings**. It is therefore always open to a party at common law to make time of the essence of an independent obligation of the other party, provided, however, that three conditions are satisfied. First, the other party (I am assuming him to be the developer) is in breach of the obligation (ie the obligation to build out the development). Where (as will almost invariably be the case) the contract does not stipulate a completion date for the building works, the law implies a reasonable time, commencing on the date of the contract. The purchaser must therefore first allow the developer a reasonable time, commencing on the date of the contract, to comply with his building obligations. What is a reasonable period depends on all the circumstances existing at the time of the contract, including circumstances which might delay performance by the vendor, so long as he did not cause or contribute to them: see **Hick v Raymond and Reid**; **Charles Rickards Ltd v Oppenheim**. Secondly, at the date when he serves notice to make time of the essence of the developer's building obligation the purchaser must be ready to perform his own outstanding obligations, as and when they will fall due for performance. A purchaser who has no prospect of ever being in funds to complete his purchase cannot serve any kind of notice to make time of the essence. Thirdly, the period allowed by the notice making time of the essence of the developer's building obligations must itself be reasonable in all the circumstances.

The difficulty over deciding on the reasonable time for original performance by the developer and the reasonable time for the notice period make this a strategy which is obviously fraught with risks for a purchaser.

Reverting now to notices to complete, properly so-called, as I have already mentioned the requirement that a party be "ready, able and willing to complete" arises at two points in time for the server of the notice: the date when he serves it and the last day of the period of the notice.

Even if his objective is to bring about a position in which he is entitled to rescind, a party must be "willing" to perform, both when he serves a notice to complete and on the last day of the period of the notice. But this can mean no more than being willing to perform if, but only if, the other party is ready.

Under the Standard Conditions the notion of the server of a notice to complete being

“ready, able and willing to complete” when serving it is partly defined by Condition 1.1: “A party is ready, able and willing to complete: (a) if he could be, but for the default of the other party, and (b) in the case of the seller, even though the property remains subject to a mortgage, if the amount to be paid on completion enables the property to be transferred freed of all mortgages (except any to which the sale is expressly subject).”

More generally, it was held in **Northstar Land**, [187], that the test for either date is whether the party is “poised to complete.” But the court in that case nevertheless distinguished between the two dates in the way in which the test is applied. At the date when notice to complete is being served, a party is ready to complete if he is “poised to complete in the sense that [he is] ready to set in motion any necessary administrative arrangements, which would enable [him] to complete within the time limit specified in the notice”: [188]. However, on the day on which the notice to complete expires “the expression ‘poised to complete’ takes on a rather different meaning. It is not a question of setting in motion any administrative arrangements. The [party] must take steps (or have taken steps) to ensure that completion could take place on that day in accordance with the contract”: [190].

This distinction seems to be correct. Take the contractual completion date (whether or not time is originally of the essence). Each party knows what has to be done on his side in order to be ready to complete on that day. It is not a question of setting up “administrative arrangements,” eg with third party mortgagees; such arrangements need to be made by the party whose responsibility it is to make them, in advance of that day: “[He] must take steps (or have taken steps) to ensure that completion could take place on that day in accordance with the contract.” If completion does not take place on that day, for whatever reason, the parties continue to be under a duty to be ready to complete. Until a new completion date is agreed, however, the previous arrangements for completion on the contractual completion date are all stood down until a new date is fixed by bilateral agreement or unilateral notice. The notion of being ready to complete on the days following the contractual completion date is necessarily concerned with readiness to complete on a future day yet to be determined. The obligation of each party after the contractual completion date has passed is to be “poised to complete in the sense that [he is] ready to set in motion any necessary administrative arrangements which would enable [him] to complete within the time limit specified in the notice.” This is the position on the day when a notice to complete is served: the server must be ready to complete by reference to a future day yet to be determined, save that it is not to be later than the last day of the notice period. On the last day of the notice period, the position is the same as for the contractual completion date: each party knows what has to be done on his side in order to be ready to complete on that day; it is not a question of setting up “administrative arrangements,” and each party “must take steps (or

have taken steps) to ensure that completion [can] take place on that day in accordance with the contract.”

According to the cases, a party may be ready to complete, for the purpose of serving a notice to complete, without having prepared a completion statement: **Carne v Debono**; without having arranged for the discharge of a mortgage: **Edwards v Marshall-Lee**; or without having obtained charge certificates from a mortgagee: **Aero Properties**. Other examples would be executing the conveyance or transfer; obtaining the execution of other documents required for completion; and arranging for the attendance of persons whose attendance is necessary at a yet to be arranged completion meeting.

The test is not purely objective: a party is only ready to complete for the purpose of serving as notice to complete if his solicitor would say that at the relevant time he was ready to complete. If the facts as known to the solicitor would have made him say that he was not ready, then he is not ready even though he would have been ready had he known the true facts: **Cole v Rose**.

By contrast, in relation to the contractual completion date or the last day of the period of a notice to complete, the conveyance must be executed, or the vendor available to execute it for delivery that day; if the property is sold with vacant possession, the vendor must be able to give it on that day; and the purchaser must have the completion monies available for transmission to his or the other party’s solicitors that day etc. See **Northstar Land** [177], [191].

For the reasons already given it is of crucial importance for a party seeking to rescind on the basis of the other party’s non-compliance with a notice to complete himself to be ready to complete when serving the notice and also on the last day of the notice period. For example, a vendor selling with vacant possession cannot sit back and do nothing about clearing the property and claim to be justified in doing nothing by the lack of any responsiveness on the part of the purchaser: unless the purchaser has repudiated the contract and the vendor has accepted the repudiation and rescinded, the contract survives for the benefit of both parties.

Thus if the purchaser tells the vendor that he will not be ready to complete on the last day of the notice to complete, this gives the vendor a choice between rescinding forthwith or affirming. If he affirms, however, he must still be ready to complete on the day. “There is no third choice, as a sort of *via media*, to affirm the contract and yet to be absolved from tendering further performance unless and until [the purchaser] gives reasonable notice that he is once again able and willing to perform”: **Fercometal v Mediterranean Shipping Co** (“**The Simona**”) at page 805.

Coming now to the facts of **Midill (97PL) v Park Lane Estates and Gomba**

International Investments: Gomba was the sole shareholder in Park Lane Estates. Park Lane's only asset was a property at 97 Park Lane. Gomba agreed to sell Midill the entire issued share capital in Park Lane Estates. The contract incorporated the Standard Conditions of Sale (4th ed). There was a special condition relating to completion, which required various acts to be carried out by Gomba on completion: it provided for the delivery by Gomba of duly executed Buyer Stock Transfer Forms in respect of the shares, with certificates for all the shares; for the resignations of the directors and secretary of Park Lane Estates; and for a board meeting at which Midill's nominees would be appointed as additional directors and secretary, and resignations of the retiring directors would be accepted. The price for the shares was £4,000,000 with a 10% deposit on exchange of contracts. Midill was unable to pay the balance on the contractual completion date. Gomba gave notice to complete. When the notice expired, Midill was still unable to complete. Gomba purported to rescind the contract and to forfeit the deposit. Some months later Park Lane Estates sold the property to a third party for £300,000 more than the price on the sale of the shares to Midill. Midill sought damages from Gomba of £300,000 and the return of the deposit. Gomba made no counterclaim for damages.

The basis for Midill's claims was that Gomba had wrongfully repudiated the contract by procuring or permitting Park Lane Estates to sell the property to the third party. The basis of Gomba's defence was it had lawfully rescinded the contract following the service and expiry of the notice to complete when Midill was unable to complete. Midill challenged the validity of the notice to complete, on the basis that Gomba was itself not ready to complete on the day it was served. Alternatively, it claimed that not only was Midill in admitted repudiatory breach on the day when the notice expired: Gomba was also in repudiatory breach, not being ready to complete on that day either.

Midill's position in relation to Gomba's readiness to complete on the date of service of the notice to complete was at best shaky. Its position with respect to the day on which the notice expired was less so. Park Lane Estates was a Jersey company with directors and secretary in Jersey. Resignations, board resolutions etc needed to be sent over from Jersey. It emerged during the trial that the people in Jersey were proceeding on the basis of completion being due on the day after the last day of the notice period. Documents which were couriered over arrived on the following day, too late for completion if Midill had sought to complete on the last day of the notice period.

His Honour Judge Mackie QC nevertheless rejected Midill's claim for damages, saying [25]:

"I have no doubt that, in the real world, should Midill have shown signs of going ahead

the minds of Gomba and its advisers would have become more closely focussed and commercial adrenalin would have taken effect. The fact that in this rather unreal atmosphere all documents were not in fact prepared to the right standard does not mean that they would not have been had Gomba been required to complete. As I see it Midill has failed to show that Gomba were not ready, willing and able to complete on either relevant date.”

It is understandable that the court should have wanted to find for Gomba and should have been concerned not see it defeated by unmeritorious technical arguments. However, for reasons which I have tried to set out, this passage does not seem to me to be correct as a matter of law. To say that it was enough that Gomba would have been ready to complete had it been “required” to do so (ie required by Midill) seems to me to be inconsistent with **The Simona**: irrespective of Midill’s readiness or unreadiness, and notwithstanding the lack of any “requirement” from Midill, Gomba was “required” to be ready to complete on the last day of the notice period by virtue of the contractual obligation which it accepted when serving the notice to complete.

It is not clear who bears the burden of proof with respect to readiness (or unreadiness) to complete. **Aero Properties** assumed (apparently without argument) that it is the party asserting that the other party was not ready. In **Midill** Judge Mackie relied on **Aero** and seems to me to have decided the point against Midill on the burden of proof. The Court of Appeal refused Midill permission to appeal on the burden of proof point (the single Lord Justice having adjourned that matter to the court disposing of the appeal), Lord Justice Carnwath saying [24]:

“As I read it, [Judge Mackie QC] was satisfied that Gomba was ready to complete on the 11th April. . . . His reference . . . to the burden of proof reads as a makeweight, rather than an essential part of the reasoning. The position on 27th April was understandably less clear-cut, for the reasons the judge gave. But he was satisfied that Gomba had gone as far as was reasonable to prepare themselves to complete, had there been any likelihood of this happening.”

At [21] Lord Justice Carnwath nevertheless saw “some theoretical force” in Midill’s case that the burden of proof was on Gomba, since it was Gomba whose case depended on the validity of the notice to complete. But this was obiter dictum. The point appears, therefore, to be open for argument in a future case. In some cases it could be of great significance for a purchaser: where a vendor has rescinded and forfeited the deposit on the basis of the purchaser’s failure to comply with a notice to complete, the purchaser’s only chance may be to assert that the vendor was not ready to complete either when serving the notice to complete or on the day of its expiry or both, so that the vendor has placed himself in

repudiatory breach by rescinding. If the burden of proof were on the purchaser his task might be a hopeless one and he would be vulnerable to suffering summary judgment for the vendor, either on the vendor's claim for damages for loss of bargain or on his own claim for repayment of the deposit. If, however, the burden is on the vendor to prove that he was ready to complete (in the appropriate senses of being "poised to complete") on both relevant dates, then the purchaser's chances of success may be materially altered, with respect both to short-term tactics and to his prospects of ultimate success.

I now turn to the only matter which the Court of Appeal decided on appeal in **Midill**, namely the court's discretionary power under section 49(2) of the Law of Property Act 1925 to order the return of his deposit to a purchaser, notwithstanding that the vendor has a right in law to forfeit it.

A deposit serves several purposes: If the sale is completed it counts as part payment of the purchase price. Primarily, however, it is taken as an earnest or guarantee of performance and as a security in respect of any losses suffered by the vendor by reason of the purchaser's default: **Howe v Smith**. "Even in the absence of express contractual provision, [a deposit] is an earnest for the performance of the contract: in the event of completion of the contract the deposit is applicable towards payment of the purchase price; in the event of the purchaser's failure to complete in accordance with the terms of the contract, the deposit is forfeit, equity having no power to relieve against such forfeiture": **Workers Trust Bank Ltd v Dojap Ltd** at pages 578-9, per Lord Browne-Wilkinson.

The vendor's right to forfeit may arise under a contractual provision: see eg Standard Condition 7.5.2 ("If the buyer fails to complete in accordance with a notice to complete ..."). Or it may be left to the common law, under which there is an implied term that it is forfeit to the vendor if the contract goes off through the purchaser's default: **Howe v Smith**.

The purchaser's right to repayment may arise under a contractual provision: see eg Standard Condition 7.6.2 ("If the seller fails to complete in accordance with a notice to complete ..."). Or it may be left to the common law, under which the deposit is repayable if the contract goes off through the vendor's default: **Dimsdale Developments (South East) Limited v De Haan**.

Where both parties are in default then, unless the contract provides otherwise, the deposit is forfeit to the vendor and not repayable: **Omar v El Wakil** [49], [52]. In that case, the contract was made by reference to the National Conditions of Sale. Condition 22 provided for the forfeiture of the deposit in the event of the purchaser failing to comply with a notice to complete. But no valid notice to complete was served. Both parties were unable to complete. With no contractual provision applying, the Court of Appeal held the deposit

forfeit to the vendor on the basis that at common law a deposit is forfeit if the purchaser defaults.

What is the position where both parties are in default upon the expiry of a notice to complete? If such a case occurs under the Standard Conditions there are two relevant contractual provisions — Standard Condition 7.5.2 (“If the buyer fails to complete in accordance with a notice to complete . . .”) and Standard Condition 7.6.2 (“If the seller fails to complete in accordance with a notice to complete . . .”). But these make contradictory provisions with respect to the destination of the deposit: it is forfeit to the vendor if the purchaser is in default and repayable to the purchaser if the vendor is in default. It is unclear whether in this case the common law rule in **Omar v El Wakil** applies so that the deposit is forfeit to the vendor. Arguably, it is repayable to the purchaser on the ground that by legislating for the position where the parties default with respect to a notice to complete the Standard Conditions have excluded any implied common law rule.

Section 49(2) of the Law of Property Act 1925 provides that “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.” Section 49(3) confines the application of the section to “a contract for the sale or exchange of any interest in land.”

In light of **Workers Trust** the forfeiture of a deposit is unenforceable as a penalty unless either (a) the deposit represents a genuine pre-estimate of the vendor’s losses or (b) the transaction is a sale of land where the forfeiture of a 10% deposit is upheld as a customary, albeit “anomalous” and illogical, exception to the general law of penalties.

In **Midill** this rule and section 49(3) created something of a dilemma: Midill could have argued either (i) that the contract was not a contract for the sale of land, but rather of shares, so that the penalty rules applied, or (ii) that it was a contract within section 49(3), so that the statutory discretion to order repayment arose. There was a danger, however, that the contract might fall into the gap between those two alternatives: on the one hand, from a commercial point of view it was practically indistinguishable from a contract for the sale of land, so that Gomba would have had a good argument that the deposit should be entitled to be included in the exception to the law of penalties; on the other hand, it was not technically “a contract for the sale or exchange of any interest in land” within section 49(3).

In the event the vendor of the shares, Gomba, conceded that section 49(3) applies and the case thereafter proceeded both at first instance and in the Court of Appeal on that footing, albeit without any judicial decision to this effect.

In **Midill** the basis for the claim under section 49(2) was simply the fact that the property had been sold five months after rescission of the contract for £300,000 more than

the contract price. There was no counterclaim by Gomba for any loss suffered from Midill's breach.

There is a remarkable dearth of authority on section 49(2). Prior to **Midill** there were only seven reported cases at first instance: **James Macara Ltd v Barclay, Schindler v Pigault, Michael Richards Properties v St Saviour's Parish, Southwark, Cole v Rose, Maktoum v South Lodge Flats, Dimsdale Developments v De Haan, Safehaven Investments v Springbok Ltd and Tennaro**; and two in the Court of Appeal: **Universal Corporation v Five Ways Properties Ltd** and **Omar v El-Wakil**. There was also an unreported case in the Privy Council, **Bidaisee v Sampath**, on a Trinidadian provision in the same terms as section 49(2).

Of these, five favoured a more liberal view of the discretion: **Schindler v Pigault, Universal Corporation v Five Ways Properties Ltd, Maktoum v South Lodge Flats, Dimsdale Developments v De Haan and Tennaro**; while five favoured a narrower approach: **Michael Richards Properties v St Saviour's Parish, Southwark, Cole v Rose, Bidaisee v Sampath, Safehaven Investments v Springbok Ltd and Omar v El-Wakil**.

In **Omar** Lady Justice Arden said:

"[35] The starting point must be that although section 49(2) is expressed in open-textured terms leaving it to the courts to determine the organising principles, the court must bear in mind that the payment in question was a 'deposit', that is an earnest for performance and that accordingly there should not be relief simply because the Corringham contract never took place . . . The context here is of a conveyancing transaction. It is common knowledge that if a purchaser pays a deposit he is likely to forfeit it if he does not fulfil the contract. Moreover deposits are very usual features of conveyancing transactions and conveyancing transactions are common. It is important that there should be certainty attaching to the consequences of paying a deposit.

"[36] As the judge did not exercise his discretion under section 49(2), or alternatively declined to exercise it on the basis no deposit had been paid, it is open to this court to do so. For the reasons given, I would start from the position that the deposit should not normally be ordered to be repaid. Are there any mitigating circumstances in the present case? . . ."

The Court of Appeal there refused to order the return of the deposit. The claimant was to be taken as knowing that certain consequences would follow if he failed to complete. He had failed to perform his own contractual obligations. The vendor had wrongly trusted him. His conduct did not therefore excite the sympathy of the court. It was irrelevant that the

vendor had not sought to establish any loss. The deposit had not been paid in cash but by way of set-off and it would be wrong to order the vendor to pay cash to the claimant. Lady Justice Arden concluded [37]:

“ . . . [In] a situation where a purchaser could not himself perform, the circumstances which make it appropriate for the court to exercise its discretion under section 49(2) in his favour must be exceptional. Inability to complete is exactly the risk the deposit was intended to guard against.”

Since **Omar** there have been three further cases on section 49(2) at first instance, viz **Tennaro**, **Midill** (which went on to the Court of Appeal) and **Aribisala v St James' Homes (Grosvenor Dock) Ltd.*** In **Tennaro**, Neuberger J purportedly followed both **Omar** and **Dimsdale Developments v De Haan**. Arguably, however, he allowed for repayment of a deposit under section 49(2) solely on the basis that the vendor had re-sold at a profit. **Aribisala** followed **Omar** and **Midill** at first instance, refusing to order repayment solely on the basis of a re-sale at a profit.

In **Midill** at first instance Judge Mackie QC held first, that section 49(2) does not give the court “a broad discretion to do what it thinks just”:[30], [31]; and secondly that “in the ordinary way” the court will not order the repayment of the deposit even if the seller makes a profit on a subsequent sale: [32].

In the Court of Appeal Lord Justice Carnwath based himself primarily on **Bidaisee** and **Omar**. He distinguished, without doubting, **Tennaro**. The correctness of **Dimsdale Developments v De Haan** was doubted, notwithstanding that **Tennaro** was clearly based on it (“ . . . [The] fact that the seller [in **Dimsdale**] had sold the property at a substantially higher price . . . was the crucial factor which justified the return of the deposit”: **Tennaro**, [89]).

After reviewing the authorities, Lord Justice Carnwath said:

“51. Since Arden LJ’s judgment contains the most recent, considered guidance of a majority of this court, I doubt if it would be appropriate for us to depart from it even if we wished to do so. In fact, as the review shows, her approach is in line with the balance of judicial view, including that of the Privy Council. Buckley LJ’s comments, though of course entitled to great respect, are not binding on us, for the reasons given by Arden LJ. Furthermore, they need to be read in the context of the case before him. He was concerned principally to rebut the very narrow line taken by Walton J, which required some “trickiness” or the like by the vendor.

* At an earlier stage of **Aribisala**, it was decided that the discretion conferred by section 49(2) cannot be excluded by contract: see [2007] EWHC 1694.

Similarly, Megarry J's observations on the width of the discretion, whatever their precise intention, must be read as a response to the vendor's argument that the section only applied where there had been "unconscionable" conduct.

- "52. The critical point, on which Arden LJ echoed Lord Nicholls, is that the deposit is 'an earnest for the performance of the contract,' which can be retained by the seller if the buyer defaults, without any necessary regard to the question of actual loss or its amount. That principle, as the Privy Council made clear, is not 'overruled' by section 49(2). There needs to be 'something more'; or, as other judges have said, something special or exceptional to justify overriding the ordinary contractual expectations of the parties.
- "53. The cases at first instance should not be seen as altering the principle, but as illustrations of how it has been applied in particular circumstances. The only one which I would respectfully question is **Dimsdale**, which was decided against the instincts of the judge himself, and without the benefit of the guidance provided in **Omar**. That view is not altered by the fact that it was relied on by Neuberger J to reinforce his conclusion on the second transaction in **Tennaro**. The decision on that transaction is readily understandable, given that the relative attractiveness of the alternative offer available to the vendor at the time of intended completion, arranged by the purchaser, and the lack of any stated reason for rejecting it. I find it unnecessary to express a view on Neuberger J's decision on the third transaction. It is less easy to analyse, since it is not entirely clear whether the vendor had any valid contractual basis for linking Flats 31 and 37.
- "54. Against that background, I return to the present case. In my view, the judge's reasoning was impeccable. He was entitled to find that it was not enough that the vendor sold at a higher price some months after the date for completion. That delay distinguishes the case from **Tennaro**. There is nothing to suggest that the price rise was exceptional, in relation to movements in the market generally. There is no obvious reason why the purchaser should have the benefit of any such price rise. It was the vendor who had borne the risk and cost of holding the property during the intervening period. I also agree with the judge that to decide otherwise would add undesirable uncertainty to the well-established contractual understanding."

As appears from the above Lord Justice Carnwath treated **Omar** as being binding on the Court of Appeal. The result is arguably unfortunate:

- (1) It is debatable whether “the balance of judicial view” favoured the narrower approach.
- (2) No authorities were referred to in the Judgment of the Privy Council in **Bidaisee** and the decision could have been based on the fact that the delay in re-selling the property, caused by the purchaser’s breach in failing to complete, occasioned a loss to the vendor which could be measured by the interest which on the balance of the purchase monies would have earned over the period of the delay. This loss exceeded the deposit, so that the vendor suffered a loss caused by the breach.
- (3) Section 49(2) was not in issue in **Omar**, where the issues were (i) whether money payable under one contract could be treated as a deposit under another and (ii) whether the deposit should be repaid to the purchaser as of right, on the basis that either the vendor alone was in default or both vendor and purchaser were in default. There was no reliance on the “deposit” being a penalty or a part-payment. It is not clear whether there was any reliance at any stage on section 49(2). The trial judge held that the price set-off did not represent a deposit. The Court of Appeal disagreed but held that as the purchaser was in default, the deposit was an earnest or guarantee of performance which the purchaser was not entitled to be repaid even if the vendor was in default as well. The Court of Appeal went on to consider section 49(2), noting that no authorities had been cited on it either to them or to the trial judge and making no reference to any argument on it. Lady Justice Arden, who gave the only reasoned judgment on the point, presumably researched the law herself but referred only to (i) **Universal Corporation v Five Ways**, citing at page 555 Buckley LJ’s view that the discretion should be exercised “in any circumstances which make this the fairest course between [vendor and purchaser],” and (ii) text book writers, all of whom favoured a liberal approach to the jurisdiction.

The result is nevertheless clear, at least in any court below the House of Lords:

- (1) Before the discretion can be exercised in favour of repayment “something more” is needed than the bare fact of the vendor suffering a loss which is less than the amount of the deposit, followed by a re-sale at a profit.
- (2) It is clear that the “something more” includes cases of the type of **Re Scott & Alvarez’s Contract**, where specific performance is refused on equitable grounds.
- (3) No doubt was cast on **Schindler v Pigault** so that it also seems clear that a deposit may be recovered where the purchaser fails to comply with a vendor’s notice to complete for reasons which are attributable to the vendor’s failure, in breach of contract, to provide access to the property for an intended sub-purchaser.

Beyond that, however, the scope of the statutory discretion must await future decisions.

TABLE OF CASES

Aero Properties Ltd v Citycrest Properties Ltd (2002) 2 P & CR 21

Aribisala v St James Homes (Grosvenor Dock) Ltd [2007] EWHC 1694 (Ch)

Aribisala v St James' Homes (Grosvenor Dock) Ltd [2008] EWHC 456 (Ch)

Bidaisee v Sampath, 3 April 1995, unreported (Privy Council) (see Lawtel)

British and Commonwealth Holdings v Quadrex Holdings [1989] 1 QB 842

Carne v Debono [1988] 1 WLR 1107

Charles Rickards Ltd v Oppenheim [1950] 1 KB 616

Cole v Rose [1978] 3 All ER 1121

Decro-Wall International v Practitioners in Marketing Ltd [1971] 1 WLR 361

Dimsdale Developments (South East) Limited v De Haan (1983) 47 P & C R 1

Edwards v Marshall-Lee (1975) 235 EG 901

Farrant v Olver (1922) 91 LJ Ch 758, 759

Fercometal v Mediterranean Shipping Co [1989] 1 AC 788, 789, 805

Forrestt and Son Ltd v Aramayo (1900) 83 LT 335

Graham v Pitkin [1992] 1 WLR 403

Hick v Raymond and Reid [1893] AC 22

Howe v Smith (1884) 27 Ch D 89

James Macara Ltd v Barclay [1944] 2 All ER 31

Maktoum v South Lodge Flats (1980) The Times, 22 April

Michael Richards Properties v St Saviour's Parish, Southwark [1975] 3 All E R 416

Midill (97PL) v Park Lane Estates and Gomba International Investments [2008] EWHC 18 (Ch); [2008] EWCA Civ 1227

Northstar Land v Brooks [2005] EWHC 1919 (Ch)

Oakdown Ltd v Bernstein & Co (1984) 49 P & CR 282

Ockenden v Henly (1858) E B & E 485

Omar v El Wakil [2001] EWCA Civ 1090

Quadrangle Development v Jenner [1974] 1 WLR 68

Raineri v Miles [1981] 1 AC 1050, 1051, 1085, 1086, 1095

Safehaven Investments v Springbok Ltd (1995) 71 P & CR 59

Schindler v Pigault (1975) 30 P & C R 328

Re Scott & Alvarez's Contract [1895] 2 Ch 603

State Trading Corp of India v M Golodetz Ltd (1989) 2 Lloyd's Law Rep 277

Tennaro Ltd v Majorarch Ltd [2003] EWHC 2601 (Ch)

Universal Corporation v Five Ways Properties Ltd [1979] 1 All ER 552

Union Eagle Ltd v Golden Achievement Ltd [1997] 1 AC 514

Woodar Investment Development v Wimpey Construction UK [1980] 1 WLR 277

Workers Trust & Merchant Bank Ltd v Dojap Investments Ltd [1993] AC 573