

Sign of Commitment

The Message:

Failure to make timely payment of a deposit normally allows the seller to end the contract.

The Case:

Samarenko v Dawn Hill House Limited [1 December 2011] considered issues of importance to the property industry concerning the payment of a deposit by the buyer under a contract to sell land. Such a contract almost always requires a buyer to pay a deposit to the seller on exchange. If the buyer is not willing or able to pay the deposit at that point, the seller will usually not exchange contracts, reflecting the deposit's importance as an indication of the buyer's commitment to complete, for fear of the deposit's forfeiture if completion does not occur.

However, there will be cases where the contract has been exchanged even though no deposit has been paid and can a seller terminate the contract if the buyer fails to comply with the obligation to pay the deposit on a specified date?

Mr. Samarenko entered into a contract to sell his property to Dawn Hill House Limited for £5 million with a £500,000 deposit to be paid within 60 working days of Dawn Hill obtaining certain permissions, on which the contract was conditional.

Dawn Hill was unable to obtain the requisite permission and the parties, subsequently, entered into a supplemental agreement reducing the price to £4.5 million and the deposit, proportionately reduced to £450,000, was now due to be paid on 3 March 2011. The balance of £4.05 million was due at a later date and the contract was now deemed unconditional. There was then various correspondence between the parties including Dawn Hill's request to carry out a soil survey, which it said was needed before the transaction could be funded.

3 March passed without the deposit being paid and, on 9 March, Samarenko's solicitors informed Dawn Hill that they were in breach, but would be given five further working days within which to pay the deposit, failing which Samarenko would treat the contract as at an end. However, no payment was made and, reminders having been sent, Samarenko's solicitors informed Dawn Hill that the contract was terminated. Application for summary judgment was made, Samarenko seeking a court declaration that the contract had been validly terminated and the removal of a notice protecting the contract at the Land Registry.

Dawn Hill argued that time was not "of the essence" of the contractual timetable for paying the deposit. If time was of the essence, failure to comply within the time limit would constitute a repudiation of the contract, a "repudiatory breach", enabling Samarenko to terminate.

The High Court rejected Dawn Hill's arguments, whose appeal was also rejected by the Court of Appeal. The Court considered that failure to make timely payment of a deposit, usually, amounts to a repudiatory breach. Payment of the deposit on time is a "condition" or fundamental contractual term, breach of which constitutes repudiation by the buyer. Time is of the essence of the date for its payment. Since the deposit is a guarantee of further performance, failure to pay it on time is taken to demonstrate that the buyer is unwilling to perform the contract as a whole.

Without the deposit, the seller does not know where he stands – he has nothing except a fetter (where the contract has been exchanged) on his freedom to deal with the property.

Even though in this case, the deposit was paid part way through the contractual relationship rather than at its inception, the Court considered that this did not change the fundamental nature and purpose of a deposit, which, in this case, was payable on a fixed date and a significant time before the contractual completion date. There was nothing to take the contract out of the ordinary run of contracts to sell land and the Court decided that, by failing to pay the deposit on 3 March, Dawn Hill committed a breach, entitling Samarenko to end the contract.