

WHEN COMMERCIAL PROPERTY CONVEYANCING TRANSACTIONS GO WRONG

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Time of the Essence

1. What time of the essence means
2. What makes time is of the essence
3. The impact of time being of the essence



What does Time of the Essence mean?

- What 'time of the essence' means
- A date in the contract is not sufficient
- An express provision is ideal



Image source: <https://www.crunch.co.uk/knowledge/article/key-dates-in-the-uk-tax-year>

The Relevant Contract

- Condition precedent sufficient
- Construction of the contract
- Nature of the property/surrounding circumstances/wasting asset

- Notice making time of the essence.
- Waiver of clause stating time is of the essence
- Further notice to that they insist on compliance with a time frame



What is the impact of making time of the essence?



Image source: <https://www.express.co.uk/finance/personalfinance/1804284/bank-to-give-customers-200>

Notices to Complete and Specific Performance



Image source: <https://infomedia.com/blog/tech-office-christmas-party/>



Image source: <https://www.makeitlikeaman.com/2021/05/24/spiced-rum-sour/>

Notices to Complete

1. Standard commercial conditions.
2. Ready, able and willing
3. Consequences of failing to complete in time
4. Does time remain of the essence after notice to complete period expires

Standard Commercial Conditions

- 9.1.1 Completion date is twenty working days after the date of the contract but time is not of the essence of the contract unless a notice to complete has been served.
- 9.8.1 - A party who is ready, able and willing to complete may give the other a notice to complete.
- 9.8.2 - Parties are to complete the contract within ten working days. For this purpose, time is of the essence of the contract.



Ready, Able and Willing

- Distinction between primary and secondary contractual obligations
- Ability to comply with primary obligations by end of period

What happens if goes wrong

- 10.5.2 The seller may rescind the contract, may keep any deposit and accrued interest; resell the property; and claim damages
- 10.6.2 The buyer may rescind the contract, the deposit is to be repaid to the buyer with accrued interest

Time does not remain of essence, unless agreed

- *Hakimzay Ltd v Swailes* [2015] EWHC B14 (Ch) - Court held Seller not entitled to terminate:
 - Effect of time being of essence from notice to complete is to fix a time for performance, failure to comply with that constitutes repudiatory breach.

Specific Performance

1. Threshold for when it will be ordered

2. Bars to specific performance (non-exhaustive)
 - a. Misrepresentation/Procedural unfairness
 - b. Mistake
 - c. Default by claimant seeking specific performance
 - e. Time limits / Delay
 - f. Great hardship

Threshold

- Specific performance is a decree by the court to compel a party to perform his contractual obligations.
- It is an equitable remedy – meaning usually equitable principles apply.
- General rule - where damages would not be an adequate remedy.

Mistake

- Common misapprehension.
- Mistake is unilateral, claimant has contributed to the defendant's mistake
- Mistake was purely that of the defendant



Image source: <https://www.youtube.com/watch?v=-iW4V4HoLr4>

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**Would Joey be forced to buy the
Catalina 22?**

① Start presenting to display the poll results on this slide.

Mistake

- *Malins v Freeman* (1837) 2 Keen 25 - specific performance was refused where the purchaser bid for and bought one lot at an auction in the belief that he was buying a totally different lot, and it would have been a great hardship on him to compel him to take the property
- *Tamplin v James* (1880) 15 Ch. D. 215 - specific performance granted where a purchaser bought an inn and a shop at an auction in the mistaken belief that two plots of ground at the back formed part of the property; the particulars of sale and the plan exhibited at the auction described the property correctly

Misrepresentation/Non-Disclosure/Procedural Unfairness

- Any misrepresentation which justifies rescission, affords a defence to specific performance.
- Mere silence does not prevent specific performance.
- Other vitiating factors, such as economic duress, undue influence and unconscionability

Default by claimant seeking specific performance

- A claimant who seeks to enforce a contract must show that he has performed and is ready and willing to perform, all terms (apart from trivial ones)
- When a vendor is unable to perform the contract falls into three categories:
 - Vendor does not have title
 - Property is subject to incumbrances which should have been disclosed
 - Vendor's title (although not bad) is doubtful.

Time limits / Delay

- Time limits
- Claimant's unreasonable delay in seeking the remedy - laches

Great Hardship

- As the remedy of specific performance is equitable and discretionary, the court will not grant it where it would inflict great hardship on the defendant

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Would our recently inebriated client be forced to sell his warehouse, given that the purchasers did not encourage the drinking?

① Start presenting to display the poll results on this slide.

Great Hardship

- *Blomley v Ryan* (1954) 99 C.L.R. 362 the High Court of Australia refused specific performance against the seller who was “sodden with rum”, who contracted to sell his property at an undervalue to purchasers who knew about and exploited his intoxication by bringing a bottle of rum to the negotiations
- Specific performance refused, even though the defendant “*may not have been drawn in to drink*” by the claimant - *Malins v Freeman* (1837) 2 Keen 25 at 34

Retention of Deposits



Can a deposit be retained?

- The general rule is -Yes.
- Deposits are conventionally 10%
- Failure to complete

What is the position if a deposit is required but it is not paid or partly paid?

- Unpaid deposit can be recovered as damages
- Wide and general discretion under Section 49 Law of Property Act 1925 to order the return of a deposit
- Matters to be taken into consideration include:
 - Conduct of the parties (especially that of the purchaser),
 - The size of the deposit
 - The seriousness of the matters in question

Examples of the approach of the court directing the return of a deposit are as follows:

- Union Eagle Ltd v Golden Achievement Ltd [1997] A.C. 514 10 minutes is too late.
- Schindler v Pigault (1975) 30 P.& C.R. 328



What approach have the courts adopted to the return of deposits?

- Special circumstances or broad discretion?
- Equitable approach Neuberger J in Tennaro Ltd v Majorarch Ltd [2003] EWHC 2601
- Narrower view Omar v El-Wakil [2001] EWCA Civ 1090.
- Midill (97PL) Ltd v Park Lane Estates Ltd [2008] EWCA Civ 1227)

What is the penalties doctrine and how does that relate to deposits?



- Contractual terms which are penal are not enforceable by the parties
- Deposits have long been regarded as an exception to this rule

How are the courts likely to treat excessive deposits?

- *Cavendish Square Holding B.V. v. Talal El Makdessi* [2015] UKSC 67 the SC confirmed
 - (1) That this would not prevent the forfeiture of the customary 10% deposit
 - (2) The penalties doctrine could prevent the forfeiture of “excessive” deposits.
 - (3) The SC emphasised that between commercial parties of equal bargaining power the presumption must be that the parties themselves are the best judges of what is legitimate
 - (4) where the deposit exceeds that of long-established practice (ie above 10%) the vendor must show special circumstances to justify that deposit if it is not to be treated as an unenforceable penalty.
 - (5) The conduct of the parties remains relevant
- *Vivienne Westwood Ltd v Conduit Street Development Ltd* [2017] EWHC 35 (Ch) a provision was unenforceable as it was exorbitant and unconscionable and so was penal in nature

Questions?

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