

**To complete or not to complete?**  
**Notices to Complete and Specific Performance**  
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1. Once the parties to a contract for the sale and purchase of land (or for the grant and acceptance of a lease) become contractually bound, then, other things being equal, neither of them should be able to back out – at least, not without some default of the other party to exploit. Of course, some such contracts are conditional, and the parties do not necessarily become unconditionally bound until some later date, if at all. But when the parties do become unconditionally bound, one or the other of them may ask the question: how can I force the reluctant party to complete? Or, looking at the problem from the other end: when do I have to complete? Can I be forced to complete?
2. And to the property lawyer, two obvious concepts spring to mind at such moments: the notice to complete, and the remedy of specific performance. Depending upon which party is asking the question and why, one then sets about working out how these and other relevant concepts and doctrines work in the particular factual scenario at hand.
3. However, notices to complete are strange, in some ways counter-intuitive, and potentially dangerous, creatures. They are also sometimes confused with other things. Further, their relationship with the availability of specific performance can easily be misunderstood. So, the first thing I want to do is to mark some important conceptual and terminological distinctions which need to be made in this area of the law.

**Exchange and completion**

4. Perhaps the most fundamental, and familiar, distinction, to mark is between exchange of the contract – the moment when the parties execute it, and become bound by their

mutual promises, normally by exchanging counterparts – and completion of the contract – when they carry out their promises, and respectively transfer the land (or grant the lease), and pay the price. It is in this gap between promising to do something, and doing it, that the question of whether one party can force the other to complete arises.

### **Completion date**

5. And when you promise to do something – or rather, when two parties mutually promise to do two different, but complementary, things: to sell and to buy, to grant and accept – they normally say when that is to happen, by identifying a completion date. You don't have to do that – in which case there is likely to be an implied term that that completion is to take place within a reasonable time (*Johnson v Humphrey* [1946] 1 All E.R. 460, at p.463C). But normally the contract identifies the completion date expressly.

### **Fixing the completion date**

6. It's up to the parties to choose the date they want. And if they already know what they want at the time of exchange, they can just name a date. But often, they don't know, at the time of exchange, what date they want, because it depends when something else happens, such as:
  - (a) when some other contract is completed,
  - (b) or some planning permission is granted,
  - (c) or some stage in the construction of something is reached.

So the parties need to use a mechanism to set a completion date, at some point in the future. When this mechanism does its job, it fixes that date.

7. Sometimes, the mechanism can be straightforward. The parties simply provide that completion will be a specified number of days after the relevant event. This can be appropriate when the occurrence of the event will be an objectively determinate fact,

over which there is no room for dispute. In that case the contract can just say: when it happens, complete X working days later.

8. However, often it can't be quite as simple as that, because the question whether the event has occurred is itself potentially controversial, or requires the exercise of some kind of judgment, or decision. Is the planning permission satisfactory? Are the conditions attached to it onerous? Has the building been finished? Is it ready for occupation?

### **Practical completion**

9. And it is worth just pausing here to distinguish another use of the word "completion". Often, where the trigger for completion of the contract is the building of something, the parties will say that completion should take place once the property is practically complete. However, it will not have escaped your notice that the labels for both the trigger, and the consequence, use the word "complete". The parties are saying: "when the flat is (practically) complete, we shall complete (the contract) so many days thereafter". I'm sure we've all experienced situations where that terminological coincidence has caused confusion – but only in the other side, of course!

### **Completion notice**

10. Anyway, returning to my more general point: sometimes the parties agree that completion should take place once some contingency has occurred, but whether it has occurred is potentially controversial, or requires some judgment or decision. Is the condition onerous? Is the property physically ready? In those circumstances the contract often provides for the giving of a notice announcing that the contingency has occurred, which notice is often called a completion notice.
11. Such a notice can work in more than one way.

### ***Announcing the completion date***

- (a) It can announce the event which fixes the completion date, for example that practical completion has occurred. In that case you count from the triggering

event to get to the completion date. So, when read together with the contract, as well as announcing the event, the notice in effect announces the completion date (and the contract may or may not expressly require it to say this).

***Fixing the completion date.***

(b) Alternatively, the notice can itself fix the completion date, as being a certain number of days after the giving of that notice. The parties might decide that mechanism more appropriate where there is an element of judgment, or decision, involved, for example over whether a planning permission is satisfactory.

Again, that contractual detail is up to the parties.

12. This kind of contractual notice, which either announces or fixes the date for completion, can be called whatever the parties want. It can be nameless: “a notice under clause 6.11.1”. Sometimes it is named after the event which it *announces*. For example, it might be called a notice of practical completion, if that is what it does. But it is often named after the event which it *fixes*, namely completion of the contract itself. So is often called a completion notice, either by a definition in the contract, or otherwise just by the lawyers who need a label for it.

**Four different uses of the word “completion”**

13. And so, at this stage, we already have four different uses of the word “completion” potentially in play.

(a) There is the physical, building, concept: practical completion.

(b) There is the notice announcing, and perhaps itself fixing, the completion date: the completion notice.

(c) There is the date when, according to the contract, completion is supposed to occur: the completion date.

(d) And there is the date of legal completion itself – when the selling and buying, or granting and taking, actually occurs: actual completion.

14. And this is before we get to notices to complete themselves, where on occasion the most confusion lurks.

### **When do I (or they) have to complete?**

15. Turning to the question – When do I have to complete? – the first sub-question which this raises is: has the completion date arrived yet? If it hasn't, then you don't have to complete. I'll discuss the effect of the completion date arriving shortly. But before we do, it is worth reflecting that the question whether the completion date has arrived or not can itself be highly controversial. If the event is the grant of a satisfactory planning permission, then it can be controversial whether that has happened. The same goes for practical completion of the property in question.

16. Sometimes the parties try in advance to make the occurrence less controversial, for example:

- (a) by allowing the party that will be implementing the planning permission to decree whether it is satisfactory, by fiat;
- (b) or to waive any onerous conditions;
- (c) or by providing that a third party's certificate will be conclusive, for example of practical completion.

However, while sometimes these attempts work, sometimes they just shift the parties' dispute from the occurrence of the event, to the operation of this other mechanism.

### **What if the completion date has arrived?**

17. But what if the completion date has arrived. Do you have to complete then? In a sense, the contract's answer to this is both yes, and no. The contractual obligation to complete arises, on both parties. But time is not of the essence, unless the contract expressly makes it so.

18. It is almost invariably the case that initially time is not of the essence, because it is a standard term which is incorporated into most property contracts that completion 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: see Standard Conditions of Sale (5<sup>th</sup> edition), condition. 6.1.1 (also 6.1.1 of the 4<sup>th</sup> edition); and Standard Commercial Property Conditions (3<sup>rd</sup> edition), condition 9.1.1 (it was clause 8.1.1 in the 2<sup>nd</sup> edition).

**Does that mean you don't have to complete?**

19. Does the fact that time is not of the essence (yet) mean you don't have to complete?

No, it doesn't, though in a sense it does mean in practice that you often don't have to complete *on that date*.

20. As we've noted, the contractual obligation to complete has already arisen, and a failure to complete when asked will be a breach of contract. However, there are two qualified senses in which the answer to this question is that you don't yet have to complete, at least, not simply because the completion date has arisen.

(a) The first is that if the other party is content to wait, or is not itself ready, and so is not pressing for completion, then neither of you is forcing the other to complete, and things can stay like that indefinitely. Further, in these circumstances there may be no default capable of giving rise to a claim for compensation, or damages. For example, to obtain damages the vendor must prove that he was ready able and willing to give a good title, and had offered to convey the land (*Noble v Edwardes* (1877) 5 Ch. D. 378 (CA)). Silent acquiescence by both parties in the passing of the completion date may (depending upon the terms of the contract) give neither party grounds for complaint.

(b) The other, qualified, sense in which the arrival of the completion date does not force completion is that, the other party will only be able to force you to complete either by proceedings for specific performance, or (depending upon your attitude to the deposit) serving on you a notice to complete. So, you can get away with not completing for a bit, on pain of liability to pay contractual compensation and/or damages, and perhaps also some costs.

### **Specific performance**

21. However, failure to complete entitles the other party to seek specific performance. And in the case of land contracts, this remedy is available almost as of course, subject to the relevant equitable defences. In fact, this remedy is potentially available even before breach. In *Hasham v Zenab* [1960] A.C. 316; [1960] 2 W.L.R. 374 the Claimant issued a claim for Specific Performance before the date for completion had arisen, and it succeeded.

### **No notice to complete required**

22. So clearly you don't need to have given notice to complete before seeking specific performance. That would be to confuse:

(a) a completion notice, being a contractual notice necessary to trigger, specify, or fix a contractual completion date, with

(b) a notice under one or other of the standard conditions making time of the essence.

You might not be able to get an order for specific performance very easily before the date for completion had even been set, but you can certainly get one without having made time of the essence. I'm sure that on occasion we've all experienced the other side getting confused about this too.

23. In fact, a notice to complete is often better seen as a prelude, not to completion, but to termination, and escape from the contract: keeping the deposit if you are the vendor, or getting it back if you are the purchaser who doesn't like the bargain any more.

### **A crowded space**

24. This confusion is of course easier to fall into because this is yet another use of the term "complete" in this already crowded space. The fact that one can have:

(a) a notice stating that practical completion has occurred;

(b) which operates as a contractual completion notice, and fixes the completion date for 10 working days hence;

(c) then, after the completion date has passed, a notice to complete, which is something totally different in effect;

illustrates the need for scrupulous conceptual hygiene when discussing these kinds of contractual issues, to avoid being confused by terminology.

### **Ready able and willing**

25. Under both the commercial and other standard conditions, a party cannot serve a valid notice to complete if it is not itself ready, willing and able to complete.

26. Also, to obtain specific performance, you have to be ready and willing to perform your side of the bargain (*Australian Hardwoods Pty. Ltd. v Commissioner for Railways* [1961] 1 W.L.R. 425).

27. So, this composite concept —RWA, or RAW -- is important in both contexts, though the details of its application differs, not least because in the context of specific performance, the Court is exercising an equitable discretion, with all that that entails. I will focus on the way it works in the context of notice to complete, as that is where it is most fraught.

### **Validity of a notice to quit**

28. What does it take to count as ready able and willing to complete, in this context? It is tolerably clear that this means that the party serving the notice must be ready, able and willing to complete in accordance with its own obligations under the contract. It has to be able fully to perform its part of the bargain. However, as emerges from the cases, working out precisely what this requirement amounts to is not straightforward.

29. The validity of a notice to complete is judged at the date when it is served. That is when you have to be ready able and willing, though later events can be evidence either way; see *Cantt Pak Ltd v Pak Southern China Property Investment Ltd* [2018] EWHC 2564 at [87].



30. So, if things are to be judged at that date, 10 working days before the crunch date, does that mean you don't actually have to be literally poised to complete, mortgage free (if you are the vendor), cash ready to send at the press of a button (if you are the purchaser), pen in hand?

31. In *Naz v. Raja* [1987] The Times, April 11, Dillon L.J., with whom Stocker L.J. agreed, said:

“The question for consideration is whether the vendor is at the time of serving a notice to complete, ready and willing to fulfil his own outstanding obligations under the contract. Plainly he does not need to have fulfilled all the obligations which would have to be fulfilled when completion takes place. He is not bound to have tendered a transfer of the property or to have evicted persons in occupation who have arranged to leave before completion takes place. He is not bound to have discharged outstanding mortgages which are intended to be discharged in the usual way out of the purchase money on completion.”

32. However, there is an interesting contrast in this regard between Standard Condition 6.8., and its predecessor, National Condition 22, which is what was being discussed in *Naz v Raja*. In *Lambeth LBC v Vincent* (CD, Lewison J, 17th February, 2000) Lewison J cited the above passage from *Naz v. Raja*, and then commented:

“[Counsel for the seller] naturally relies on the observation that the seller is not bound to have tendered a transfer at the time when he serves notice to complete. The terms of National Condition 22 and Standard Condition 6.8 are different. National Condition 22 expressly referred to the “outstanding obligations” of the person giving the notice. Plainly therefore under that form of words it could not have been envisaged that all obligations, whenever arising, had to have been performed at the date of the notice. Standard Condition 6.8 allows a notice to be given by a person who “is ready and willing to complete”. Taken literally a person is not ready to complete if there are matters to be done under the contract, which are his responsibility, which have not been done at the date of the notice to complete, unless they are matters to be done on (i.e. simultaneously with) completion.”

33. In this passage, the Learned Judge make an interesting observation about the difference in the wording of the relevant conditions. This may mean that care needs to be take when relying on some of the previous case law. The conclusion seems to be that a party may have to be “even more ready” under condition 6.8 than under the the National Conditions.

**Ready able and willing: other distinctions**

34. There are other, to some degree overlapping, conceptual distinctions which are marked in the caselaw about what it takes to be ready able and willing, such as between:

***Matters of substance vs administrative formalities***

- (a) In *Cole v Rose* [1978] 3 AER 1121, a notice to complete was served at a time when there was an outstanding charge over the property, and it was not known for sure whether it could be got rid of. That was viewed as a substantial rather than administrative matter, and so invalidated the notice.
- (b) In *Northstar v Brooks* [2006] EWCA Civ 756, §188, it was explained that the test is whether the party serving notice is “poised to complete”, and is ready to set in motion any necessary administrative arrangements to enable completion within the relevant time limit.
- (c) This distinction was deployed recently in *Oakley v Harper McKay Developments Limited* [2018] EWHC 3405 (Ch).

***Defects in title vs substantial misdescriptions***

35. A particularly clear case is the seller’s obligation to have and prove title to the land in question. A failure to comply with a contractual obligation to prove title prevents service of a valid notice to complete. Examples of this include an undisclosed tenancy: *Horton v Kurzke* [1971] 1 W.L.R. 769. And it is important to note that a high likelihood that title will be made good by the time of completion is not enough: *Pips (Leisure Productions) Ltd v. Walton* [1980] 2 E.G.L.R. 172

36. By contrast, a substantial misdescription of the property did not prevent the giving of a notice to complete in *Bechal and Another v Kitsford Holdings Ltd* [1989] 1 W.L.R. 105. In that case, the property was much smaller than stated in the particulars, but that didn't prevent the vendor enforcing the contract.

**Be cautious about serving notice to complete**

37. If you serve a notice to complete, it can easily backfire on you, in more than one way:

(a) If the notice to complete turns out to be invalid, for some substantive reason, but you don't realise that, then if you purport to terminate the contract when it matures, you may yourself be committing a repudiatory breach of contract. In *Eminence v Heaney* [2010] EWCA Civ. 1168, the server of the notice made an innocent mistake, and got away with it, but this is a risky, fact sensitive business.

(b) If it is valid, but when it matures, for unforeseen reasons you are not then ready willing and able to complete, but the other side is, then the notice can backfire, and the other side can terminate the contract for your breach pursuant to your own notice. The notice makes time of the essence for both parties.

38. For that reason, if what you want is to complete, rather than terminate then most likely you should be seeking specific performance, and not giving a notice to complete at all.

39. Of course, as is well illustrated by the leading case on the topic, *Johnson v Agnew* [1980] A.C. 367, there is nothing to stop either party seeking specific performance after time has been made of the essence by service of a notice to complete. The first of Lord Wilberforce's famous list of "uncontroversial propositions of law" is (at 392):

"First, in a contract for the sale of land, after time has been made, or has become, of the essence of the contract, if the purchaser fails to complete, the vendor can either treat the purchaser as having repudiated the contract, accept the repudiation, and proceed to claim damages for breach of the contract, both parties being discharged from further performance of the contract; or he may seek from the court an order for specific performance with damages for any loss arising from delay in performance. (Similar

remedies are of course available to purchasers against vendors.) This is simply the ordinary law of contract applied to contracts capable of specific performance.”

40. Nevertheless, given that one can seek specific performance without having taken the dangerous step of making time of the essence of the contract, if you just want to complete, there may be little to be gained by doing so.

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