

## **Do I have to Complete?**

### **Issues which arise when contracting parties change their minds about the sale/purchase of land.**

#### **(1) Introduction**

1.1 In a rising property market vendors are eager to rid themselves of contracts for sale so that they can remarket and sell at a higher price. In a falling market, it will be the purchaser who is trying to avoid the contract for sale and who is lamenting the day he ever signed on the dotted line. The current meltdown in the economy and the corresponding crash in the property market has led to an increasing number of instructions from purchasers who have either found themselves unable to secure funding to complete their transaction or who are simply reluctant to complete a contract under which they acquire property which is now worth substantially less than the contractual purchase price.

1.2 When a party to a contract for sale asks ‘do I have to complete?’ the answer is more often than not ‘yes’. This seminar explores some of the issues that arise when a party wants to withdraw from a contract for sale and when it may be possible to tell the client ‘no’ and in particular, the following issues are addressed:

#### **(1) The requirements for a valid contract for sale**

(2) Problems which arise under conditional contracts:

- Agreements to agree
- Agreements to secure a third party's agreement
- Contracts conditional on obtaining planning permission
- Leasehold sales: contracts conditional on landlord's consent

(3) How contracts for sale may be terminated:

- Terminology
- Termination for breach
- The effect of delay in completion

(4) How contracts for sale may be avoided:

- Misdescription / misrepresentation / non-disclosure
- Mistake

(5) How contracts for sale are enforced: specific performance

## **(2) The Contract for Sale**

### **(a) Formalities**

2.1 The obvious starting point in any vendor/purchaser dispute is the contract itself. It is well known that a contract for the sale or other disposition of land made after 27<sup>th</sup> September 1989 (the date when the Law of Property (Miscellaneous Provisions) Act 1989 came into force) can only be made in writing and only by incorporating all the terms which the parties have expressly agreed in one document, or where contracts are exchanged, in each. It is also necessary for that

document, or if contracts are exchanged one of them, to be signed by or on behalf of each party to the contract (section 2 of the 1989 Act).

2.2 An agreement which does not comply with section 2 is void. Thus a client who wants to avoid an oral or a ‘back of the envelope’ agreement will usually be given positive advice. But even in this situation, if the parties have acted in reliance on the void contract, the circumstances may be such as to give rise to an estoppel or even a constructive trust. If a party has incurred expenditure in reliance upon a void contract it may also be relevant to consider whether that party has a restitutionary remedy. For some of the complex issues (which are beyond the scope of this paper) which arise where a potential purchaser has acted in reliance on the hope of securing an agreement to buy certain land, see the decision of the House of Lords in *Cobbe v Yeoman’s Row Limited* [2008] 1 WLR 1752.

2.3 Even where there is a formal contract which complies with section 2 it is not uncommon to find that the parties have re-negotiated one or more of the terms to the contract. Such variations are often conducted informally and may result in an oral agreement or may simply be referred to in correspondence.

2.4 Where there is a valid written contract, any subsequent agreement to vary a material term which does not itself comply with

section 2 will be invalid: *McCausland v Duncan Laurie Ltd* [1997] 1 WLR 38; *Dolphin Quays Developments Ltd v Mills* (2007) 1 P&CR 201. The question as to what constitutes a “material” term of the contract appears to be fertile ground for litigation, although in most cases, the answer will be obvious. So, for example, provisions as to the price, the completion date etc. (which may be the most common contenders for a variation) will almost always be “material” for this purpose. Therefore, a variation agreed orally, or by exchange of correspondence, may not bind the parties.

2.5 Where the failure to comply with section 2 means that a purported variation is a nullity, one of the parties may wish to rely on this to seek to avoid the original contract. In an exceptional case, it may be possible to argue that the change which was agreed between the parties was so fundamental as to amount to rescission of the contract. (See e.g. *British Benningtons Ltd v N.W. Cachar Tea Co Ltd* [1923] AC 48 (at p. 68) and *Ginns v Tabor* [1995] EGCS 182). However, more often than not, a void variation will not mean that the original contract does not have to be completed: the original contract will remain enforceable because there will have been no binding agreement which has superseded it.

2.6 One exception to section 2 is a contract for sale made at auction. Such contracts are excluded from the application of section 2

by section 2(5)(b) and a binding contract is made on the fall of the hammer, even in the absence of writing. It is not uncommon, however, to find that a property which did not sell at auction is purchased by private treaty immediately after the auction. These contracts for sale are often made in haste and it is easy to forget that for sale made in this way will not be excluded by section 2(5)(b) and accordingly will have to comply with the section 2 formalities.

(b) Open Contracts

2.7 An informal agreement is often struck down by section 2 but an agreement which provides no more than 'X agrees to buy Blackacre from Y for £x' may give rise to a binding contract for sale (provided that such a contract is made in writing and is signed). A contract which leaves many of its terms to be implied is known as an open contract. Open contracts are rare given the strict requirements of section 2, but may arise where parties have not taken legal advice.

2.8 Providing the agreement complies with the formalities of section 2, the law will strive to uphold the parties' bargain by implying suitable terms, e.g. that the vendor must show good title within a reasonable time and thereafter complete the contract by an appropriate conveyance/transfer.

### (c) Formal Contracts

2.9 Written contracts for sale normally contain ‘special conditions’ (dealing with matters such as the identity of the parties, the property, the incumbrances to which the sale might be subject, the completion date, etc.) and ‘general conditions’ (standard form conditions regulating a wide range of matters which may arise in the course of a conveyancing transaction).

2.10 The Standard Conditions of Sale (4<sup>th</sup> edition) or, if the transaction involves commercial property) the Standard Commercial Property Conditions (second edition) are often expressly incorporated into a contract for sale. However, not all of these standard conditions will be appropriate for every transaction and there will usually be various exclusions or amendments to the standard conditions incorporated into the special conditions.

### **(3) Conditional Contracts**

3.1 A contract that is subject to some form of condition may be used where, for example, the buyer has not had an opportunity before exchange to make searches and enquiries, where mortgage

arrangements have not been finalised or where development land is being sold and planning permission is required.

3.2 A conditional contract must be distinguished from an agreement where there is a condition precedent to the making of a binding agreement (e.g. an agreement 'subject to contract'). In such a case there is no contract at all until the condition has been satisfied.

3.3 A true conditional contract will arise where X enters into a bilateral contract to sell property to Y subject to a condition precedent (which either party may be obliged to bring about). In such a case there will be a binding contract but until the relevant condition is satisfied there is no contract for the sale of land. Thus one way in which a party may avoid or at least defer a call to complete a transaction is by demonstrating that a condition precedent has not been satisfied.

3.4 Another form of conditional contract is where there is a condition subsequent. In such a contract there is an immediate binding contract for sale which may be terminated if a condition to which it is subject is not performed. An example of this is a contract for the sale of land which may be terminated if planning permission is not granted by a certain date as to which, see below. It is often the case that such contracts also contain an obligation on one party to perform the

condition or use best endeavours to satisfy the condition within a certain time.

#### **(4) Agreements to agree**

4.1 It is trite law that an “agreement to agree” will be struck down by the courts as being void for uncertainty. Likewise, agreements to use best endeavours to reach agreement: *Little v Courage* (1995) 70 P & CR 469. See also *London & Regional Investments v T.B.I.* [2002] EWCA Civ 355, in which a clause in a preliminary agreement under which the parties undertook to use reasonable endeavours to agree the terms of a joint venture was held to be too uncertain to be capable of enforcement.

4.2 Nevertheless, the fact that an agreement leaves certain elements to be the subject of further agreement will not always render the agreement void. For example, in a different context, in *Petromec Inv. v Petroleo Brasileiro* [2006] 1 Lloyd's Rep 121, a specific clause in a detailed and wide-ranging agreement provided that the parties were to negotiate in good faith the cost of one element of their transaction. The Court of Appeal held that this did not render the whole of the agreement void for uncertainty. There was already an agreement in place and the obligation which was uncertain comprised one particular



aspect of that agreement. In these circumstances, the courts will strive to fill the gap by implying suitable terms. So, if, in a detailed development agreement, the parties agreed to negotiate the terms of a satisfactory planning application, the Court may strive to uphold the agreement by having regard to the overriding criterion of reasonableness, which would be governed by the context of the agreement as a whole.

## **(5) Agreements to secure a third party's agreement**

5.1 Agreements for sale which contain a term requiring one of the parties to secure the agreement of a third party are common. An example is an agreement by the vendor to secure the release of restrictive covenants which impede development. Moreover, where a contract is conditional upon the purchaser securing planning permission, the purchaser might be required to enter into an agreement under s.106 of the Town & Country Planning Act 1990 in order to obtain planning permission.

5.2 In *Yewbelle Ltd v London Green Developments Ltd* [2007] 2 EGLR 152, the Court of Appeal upheld the validity of a contract which contained such a provision. However, in that case, the vendor had used all reasonable endeavours (as required by the contract) to obtain a s.106 agreement with the Council in the form of the draft

agreement appended to the contract of sale, but was unable to do so and therefore within a reasonable time (there being no long stop date), the contract was treated as discharged and for that reason, specific performance was refused.

## **(6) Development Obligations: Contract Conditional on Planning Permission**

6.1 Frequently, it is potential developers who have entered into speculative purchase agreements in the hope of obtaining planning permission who seek to extricate themselves from their bargain when the economics of the proposed development start to fall apart in a falling market.

6.2 A typical development agreement might provide for a purchaser to purchase land which is ripe for development, conditional upon the purchaser obtaining planning permission. It is often a term of the agreement that the vendor will co-operate in certain defined ways in the planning process (e.g. by affording access for specified purposes). However, the most common form of dispute in relation to agreements of this sort is as to the steps which the purchaser is obliged to take to secure planning permission and the nature of the planning permission which the purchaser is obliged to obtain. A well-drafted development agreement of this sort will spell out some or all of the following:

- (1) The type of development for which a planning application is required to be made;
- (2) The timescale for each stage of the planning process: e.g. initial investigations, consultation with planning offices, submission of planning application, time for submitting any appeal against refusal.
- (3) The type of planning permission which will trigger the obligation to buy, e.g. outline permission or final permission.
- (4) Requirements for the purchaser to keep the vendor informed of the various steps that are being taken (e.g. provide copies of applications / correspondence with the local planning authority).

6.3 It is in the purchaser's interest to ensure that the obligation to obtain planning permission is limited to a permission which permits the purchaser to develop in accordance with his plans. If the planning authority is not prepared to permit the development which the purchaser intends to carry out, but will sanction some lesser or different development which will not produce the returns which the purchaser hopes to make, the purchaser will wish to avoid completing the purchase. Frequently, agreements make completion conditional upon obtaining a "satisfactory" planning permission (see *Millers*

*Wharf Partnership Ltd v Corinthian Column Ltd* (1990) 61 P & CR 461). Well-drawn agreements will go further and define what is meant by “satisfactory”. Nevertheless, however detailed the definition might be, there will often be scope for argument about whether or not a particular planning permission which has been obtained satisfies the requirements of the contract and therefore obliges the purchaser to complete.

6.4 Timing is also important in development agreements where a contract for sale is made conditional upon obtaining planning permission. The planning process can be slow. Depending upon the circumstances (which are likely to include the state of the market), both vendor and purchaser will require some degree of certainty as to when the contract must be completed on the one hand and when, on the other, they will be entitled to walk away. If the contract does not stipulate any time limits for making a planning application, it is likely that a reasonable time will be implied. However, where the purchaser is subject to an obligation to use reasonable endeavours to obtain planning application, for so long as the purchaser continues to use reasonable endeavours, the fact that planning permission has not been obtained would not entitle the vendor to terminate the contract: *Jolley v Carmel Ltd* [2000] 3 EGLR 68.

6.5 Frequently, however, there is a “long stop date” by which either party is entitled to terminate the contract if planning permission has not been obtained. Where that is the case, if no planning permission has been obtained by that date, it will be open to either party to terminate the contract. If a permission has been obtained, but the purchaser argues that it does not satisfy the requirements of the agreement which govern the nature of the planning permission required, there may be a dispute as to whether or not the purchaser is entitled to terminate on or after the long stop date. Some agreements provide that such disputes are referred to expert determination rather than the court.

6.6 There is also often an obligation on the purchaser to use reasonable endeavours to obtain a satisfactory planning permission. This is an important counter-balance for the vendor because otherwise the purchaser has sole control as to (a) if and (b) when the contract will be completed. Frequently, a claim by a purchaser to terminate a contract for sale for failure to secure satisfactory planning permission will be met by a counterclaim by the vendor for damages for failure to use reasonable endeavours to secure such a planning permission. It is also important to distinguish between the different levels of obligation which might be imposed on a purchaser. An obligation to use “all reasonable endeavours” will impose a higher burden on a purchaser than just “reasonable endeavours” and a yet more onerous obligation

is imposed by the requirement to use “best endeavours”: see *Jolley v Carmel Ltd* (above) and *Rhodia International Holdings Ltd v Huntsman International LLC* [2007] 2 Lloyd’s 325.

## **(7) Landlord & Tenant Context: Conditional purchase agreements**

7.1 As noted above, it is common, in an agreement for sale of leasehold property where the lease contains a covenant prohibiting an assignment without the landlord’s consent, for the contract for sale to be made conditional upon the landlord’s consent being obtained. Condition 8.3 of the Standard Conditions (4<sup>th</sup> Edition) is in the following terms:

8.3.1 (a) The following provisions apply if a consent to let, assign or sub-let is required to complete the contract;

(b) In this condition ‘consent’ means consent in the form which satisfies the requirement to obtain it.

8.3.2 (a) The Seller is to apply for the consent at his expense, and use all reasonable efforts to obtain it.

(b) the buyer is to provide all information and references reasonably required.

8.3.3 Unless he is in breach of his obligation under condition 8.3.2, either party may rescind the contract by notice to the other party if three working days before the completion date (or before a later day on which the parties have agreed to complete the contract):

(a) the consent has not been given, or

(b) the consent has been given subject to a condition to which a party reasonably objects. In that case neither party is to be treated as in breach of contract and condition 7.2 applies.

7.2 Standard condition 7.2 provides that if either party rescinds the contract, unless the rescission is a result of the buyer's breach of contract the deposit is to be repaid to the buyer with accrued interest.

7.3 The application of standard condition 8.3 was considered by the Sales J. in the recent case of *Alchemy Estates Ltd v Astor* [2008] EWHC Civ 2675 (Ch). The defendants were the sellers and the claimants the purchasers of leasehold property, subject to the Standard Conditions of Sale (4<sup>th</sup> Edition), including condition 8.3. Due to confusion between the parties as to whose responsibility it was to obtain the landlords' consent, no approach was made until shortly before the completion date. The completion date came and went without consent having been obtained. A little over two months after the completion date, the purchasers purported to rescind the contract

under standard condition 8.3, consent not having been obtained by that date. The purchasers brought a claim for the return of the deposit and the vendors counterclaimed for specific performance. The vendors relied on two arguments. First, the vendors argued that the purchaser was in breach of the obligation in clause 8.3.2(b), to comply with the requirements for providing references and accounts, but this argument failed.

7.4 However, the Judge accepted the Vendor's alternative argument, that by 19 May 2008, when the purchaser purported to rescind the contract, it had effectively lost the right to do so through lapse of time. He considered standard condition 8.3 and concluded as follows:

“I consider that it is clear that neither the drafters of the Standard Conditions nor the parties intended that the effect of a right to rescind arising under standard condition 8.3.3 shortly before the contractual completion date should continue indefinitely thereafter, so as to afford each party the potential ability to bring the agreement to an end without any warning at all (no matter how much time, effort and expense the other may have put into working for the proper completion of the agreement after the contractual completion date has passed, and no matter how close they may be to being able to achieve completion). If the right of rescission under standard condition 8.3.3 is not exercised promptly - by which I mean by the contractual completion date (which was found to be acceptable in *Aubergine Enterprises*) or perhaps a matter of a day or two thereafter - both parties must be taken to have decided that they wish to proceed with the original allocation of risk set out in their agreement.”



He went on to say:

“I do not consider that the parties intended, by the incorporation of standard condition 8.3.3 into the Contract, to create a right arising in the immediate period before the contractual completion date but not used then, which either of them could simply keep in their pocket and then use later at any time after the contractual completion date without any prior warning to the other, if the contract was no longer thought to be commercially attractive (as Alchemy sought to do here). In my view, the contractual right of rescission under the standard condition must be exercised promptly, which means by the contractual completion date or, possibly, within a day or two thereafter.”

7.5 As an alternative basis for his decision, at paragraphs 67 and 68, Sales J held that the purchaser had given a clear and unequivocal indication, after the completion date, that it regarded the contract as on foot. In other words, the purchaser affirmed the contract, thereby waiving the right to rescind.

7.6 The proposition that a right of rescission under condition 8.3.3 must be exercised promptly and within a reasonable time cannot be disputed. However, on the facts of the case before the court, there was more than two months’ delay, and therefore the comment that the right must be exercised within a day or two of completion was *obiter*. Moreover, it would appear that the decision on affirmation was a far

more straightforward and obvious route to the same decision. However, that does not affect the binding force of the decision that (a) the right to rescind must be exercised promptly and (b) by the time it was exercised in that case (more than two months after the completion date), the right to rescind had been lost.

## **(8) Bringing a contract to an end: terminology**

8.1 Use of the term ‘rescission’ can be misleading as it is often used in two different contexts. Where X indicates that he does not intend to complete his side of a contract (expressly or by implication) or where X is in breach of an obligation which is of fundamental importance to a contract, Y, the innocent party, is entitled to regard the contract as at an end as regards his further performance. Termination of a contract in this way, following a breach, is often referred to as “rescission”. Because of the alternative use of the term “rescind” (described below), it is preferable to use the simpler terminology of “terminating” the contract for breach rather than rescinding it.

8.2 Where Y is the purchaser, he may recover any deposit which he has been paid and sue for damages. Where Y is the vendor, he may forfeit any deposit and sue for damages suffered.

8.3 The label “rescission” is also applied where a contract is voidable, for example because of fraud, misrepresentation or mistake, in which case the innocent party may rescind the contract and treat it as if it never existed. This is known as rescission *ab initio*. In this case, damages may be claimed to put the innocent party back into the position he would have been in had the contract never been made.

## **(9) Termination for breach**

9.1 A right to terminate a contract may be given by a specific contractual condition which sets out the circumstances in which the right arises. There is, of course, no such right under an open contract (see above). Under the Standard Conditions of Sale (4<sup>th</sup> edition), the right to terminate is available in the following situations:

- (1) where risk in the property remains with the seller and at any time before completion the physical state of the property makes it unusable for its purpose at the date of the contract (Standard Condition 5.1.2);

(2) where any plan or statement in the contract, or in negotiations leading to the contract is or was misleading or inaccurate due to an error or omission (Condition 7.1.3);

(3) where a licence to assign or sub-let is not forthcoming (Condition 8.3.3) (see below);

(4) where either the buyer or the seller has failed to comply with a notice to complete (Condition 7.5 and 7.6).

(The Standard Commercial Conditions (2<sup>nd</sup> edition) contain similar provisions, save for (a)).

9.2 Where there is no express right to terminate, the question of whether a party will be entitled to treat a contract as terminated for breach will depend on the nature of the breach. Breach of a trivial term will not entitle the innocent party to rescind. Whether in any given case a breach constitutes a fundamental breach justifying rescission will depends on the facts and circumstances of the case.

9.3 A common breach of contract which has given rise to difficulties with regard to the rights of the innocent party to terminate is delay, which is addressed in the following section.

## **(10) The Effect of Delay**

10.1 The date of completion is usually specifically agreed but in the absence of an express agreement it will be assumed that completion is to take place within a reasonable time. If the Standard Conditions apply, Standard Condition 6.1.1 and Standard Commercial Property Condition 8.1.1 provide that completion shall take place 20 working days after exchange.

10.2 Standard Condition 6.1.1 and Standard Commercial Condition 8.6.1 also expressly provide that time is not of the essence of the completion date unless a notice to complete has been served. This is consistent with the general rule that time is not of the essence of a contract unless (1) the contract expressly stipulates so, (2) the nature and subject matter of the contract is such that time should be considered to be of the essence, or (3) the parties make it so by giving notice, although this is frequently modified by the special conditions.

10.3 The contract may, of course, expressly make time to complete of the essence. If it does, failure to complete on the contractual completion day will constitute a fundamental breach of the contract entitling to the innocent party to rescind. In the absence of a provision making time of the essence delay in completion gives rise to an action

in damages for breach of contract (and may bring into play the compensation provisions of Standard Condition 7.3 and Standard Commercial Condition 9.3) but it does not entitle the innocent party to withdraw from the contract.

10.4 In order to make time of the essence, it is thus usually necessary to serve a notice to complete. Condition 7.5 of the Standard Conditions of Sale (4<sup>th</sup> Edition) provides that if a buyer fails to complete in accordance with a notice to complete:

- (1) The seller may rescind the contract;
- (2) If the seller does so, he may forfeit and keep the deposit and accrued interest;
- (3) He may resell the property and any chattels included in the contract; and
- (4) He may claim damages.

10.5 Where a seller fails to comply with a notice to complete, condition 7.5 provides that the buyer may rescind and is entitled to the return of the deposit with accrued interest. The buyer's rights and remedies are preserved, so that he may, in addition, sue for damages for any loss suffered.

10.6 It has often been said that care should be taken when serving a notice to complete. This is good advice. In a rising or falling market, the careless service of a notice to complete has often proved to be a fertile source of litigation.

10.7 The giver of a notice to complete must be ready willing and able to complete at the date of service and thereafter. The Standard Conditions provide that following the service of a notice to complete the parties are to complete within ten working days (excluding the day of service). Time, of course, is now of the essence but this is the case for both vendor and purchaser. Once a notice has been given it cannot unilaterally be withdrawn by the server. Thus, if the server of the notice is not careful he may find that he has fallen into his own trap.

10.8 It is also extremely important to check before seeking to terminate a contract that a notice is valid. A question which sometimes arises is whether the wrongful service of a notice terminating the contract amounts to a repudiatory breach, in itself, entitling the other party to terminate. The question of whether this entitles the “innocent” party to terminate will often be relevant to the issues of whether the deposit should be repaid to the purchaser and / or who is entitled to claim damages.

10.9 In *Woodar Investment Developments Ltd v Wimpey Construction UK Ltd* [1980] 1 WLR 277, a contract for sale contained a termination clause in the event of the land being subject to a compulsory purchase order, which was exercised by the purchaser. However, the purchaser's termination was subsequently held to be invalid. In the meantime, the vendor sought to rely on the purchaser's wrongful repudiation of the contract. The House of Lords was split as to whether the service of the termination notice amounted to a repudiation of the contract and the majority held that it did not. Lord Wilberforce referred to the fact that the party who wrongfully terminated, honestly believing that he was entitled to do so, was not manifesting an "ulterior intention to abandon the contract", since he "bona fide relied upon an express stipulation in the contract".

10.10 This decision has been more or less limited to its own facts by subsequent authorities: see *Dalkia Utilities v Celtech* [2006] 1 Lloyd's Rep and *Golf Agri Trade v Aston Agro Industrial* [2008] EWHC 1252 (Comm). In practice, this argument can be avoided, where there is uncertainty surrounding the entitlement to give a notice, by giving it "without prejudice" to the future performance of the contract.

## **(11) How is the contract terminated?**



11.1 Where one party to the contract has failed to complete, after time has been made of the essence, the “innocent” party must make an election. The choice which confronts the innocent party (whether vendor or purchaser) was explained in the leading case of *Johnson v Agnew* [1980] AC 367:

- (1) if the purchaser fails to complete, the vendor has the option to either treat the purchaser as having repudiated, accept the repudiation and claim damages, or in the alternative, he may press for performance by seeking specific performance with damages payable in addition to specific performance for any loss arising from the delay;
- (2) it is open to the vendor to keep open his right to elect between the above remedies until trial;
- (3) once the vendor has elected (at whatever stage that might be), the election will be final; if the vendor elects to repudiate, he cannot subsequently seek specific performance.

## **(12) Rescission ab initio**

12.1 This is not the place for a detailed explanation of the various factors which might be relied upon to avoid a contract. However, there follows an outline of some of the points which might be relied upon.

### Misdescription

12.2 A misdescription refers to an error in the particulars of sale for example an error relating to the physical extent of the property to be sold. If the error is substantial so that it can be said to substantially deprive the buyer of his bargain (see e.g. *Watson v Burton* [1957] 1 WLR 19) it may entitle the buyer to rescind. However, more often than not, a misdescription will amount to a misrepresentation and it is more common to rely on the Misrepresentation Act 1967 (see below).

### Misrepresentation

12.3 If a purchaser has been induced to enter a contract by a false representation he may be entitled to rescind the contract. In summary, what is required for a misrepresentation is a statement of fact (by words or conduct) which is untrue and which is relied on and which induces the aggrieved party to enter into the contract. A misrepresentation may be fraudulent (deliberately dishonest), negligent (made carelessly), or innocent (a genuine and innocent mistake).

12.4 A representation which was made negligently or fraudulently may give rise to a remedy under the Misrepresentation Act 1967. If a misrepresentation has been made fraudulently the aggrieved party may also have a remedy in the tort of deceit. The remedies for negligent/fraudulent misrepresentation under the 1967 Act are rescission of the contract and damages. In the case of an innocent misrepresentation rescission is available but not damages. Damages are awarded on a tortious basis (s. 2(2)). Rescission is likely to be granted if the misrepresentation induced the innocent party to enter into the contract and the effect of the misrepresentation is to deprive the innocent party substantially of his bargain. (See e.g. *Museprime Properties Ltd v Adhill Properties Ltd* (1990) 61 P&CR 111.)

### Non-Disclosure

12.5 It is an implied term of a contract for sale that the vendor is selling free of incumbrances, save for those to which the contract is expressly made subject. The vendor is accordingly under a duty to disclose latent defects and incumbrances to his title. Failure to comply with this duty, if substantial, may entitle the buyer to rescind.

### Mistake

12.6 A contract which has been entered into under a fundamental mistake of fact is void at common law and will be set aside. (For example, if the vendor contracts to purchase property which he already owns! (*Cooper v Phibbs* (1865) 17 1 Ch R 37)).

### **(13) Specific Performance**

13.1 This remedy is commonly sought by both vendors and purchasers. The Standard Conditions and Standard Commercial Conditions provide that if a notice to complete has not been complied with, the innocent party's right to apply for specific performance is not excluded.

13.2 To a party seeking to avoid a contract for sale, a claim for specific performance is bad news as this remedy is usually available to a purchaser or vendor as a matter of course. However, when faced with a claim for specific performance, the person seeking to get out of a contract may be able to defeat a claim if he can establish an equitable defence. For example specific performance may not be awarded if:

- (1) damages will be an adequate remedy (although this will rarely, if ever, apply in relation to a contract for the sale of land: see *AMEC Properties Ltd v Planning Research & Systems Plc* [1992] 1 EGLR 70);

- (2) a contracting party lacks contractual capacity;
- (3) the vendor cannot establish a good title;
- (4) mistake, fraud, illegality can be established;
- (5) enforcement of the contract would require the court's supervision (although this rarely the case in relation to a contract for the sale of land);
- (6) specific performance will cause great hardship, although again, this is not something which will readily be relied on in the context of a contract to sell land. In particular, it is very unlikely that changes in the market which make a deal unprofitable for one party would affect the exercise of the court's discretion to order specific performance: see *Mountford v Scott* [1975] Ch. 258;
- (7) a third party has acquired an interest for value in the property;
- (8) where there has been delay causing injustice to the other party. (See e.g. *Lazard Brothers Co Ltd v Fairfield Properties*

*CO (Mayfair) Ltd* (1977) 121 S 793; *Easton v Brown* [1981] 3 All ER 278).

13.3 If one party elects (at whatever stage) to press for performance (rather than to accept a repudiatory breach by the other) and an order for specific performance is made but not complied with by the date stipulated by the court, the innocent party may apply for further enforcement action by the court or alternatively, he may apply for an order declaring that the contract has been determined. Once the party in breach becomes subject to the court's order to perform the contract, the court retains its equitable jurisdiction to "police" the enforcement of the contract and this would also entitle the court to declare that the contract has come to an end by virtue of the non-compliance with its earlier order. It may be appropriate for an order in the nature of an "unless" order to be made before that step is taken: see, by way of example, *Ahmed v Wingrove* [2007] EWHC 1777 (Ch).