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UK REAL ESTATE CLIENT GUIDE

REMEDIES FOR BREACH OF A SALE
AND PURCHASE AGREEMENT



Executive summary

This guide summarises practical options available when a counterparty breaches a Sale and Purchase Agreement (SPA). It focuses on four core concepts: (i) time of the essence (ii) notices to complete, (iii) guarantors, and (iv) deposits. Deployed properly, these tools allow an innocent party to impose a hard deadline for completion, elevate any delay by the counterparty to a repudiatory breach, benefit from a guarantor of obligations under the SPA, and/or limit financial exposure where deposits are set at less than the standard 10% of the purchase price. The sections below set out how each mechanism works, what to check before using it, and the main advantages and disadvantages to using each mechanism.

Using this guide

Before taking any enforcement action, it is important to decide first what you are trying to achieve. Do you want to complete the deal as soon as possible on the existing terms, terminate the agreement and move on, preserve an ongoing relationship, or revise the deal and obtain better terms? The answer will drive the choice and sequencing of remedies deployed by the innocent party.

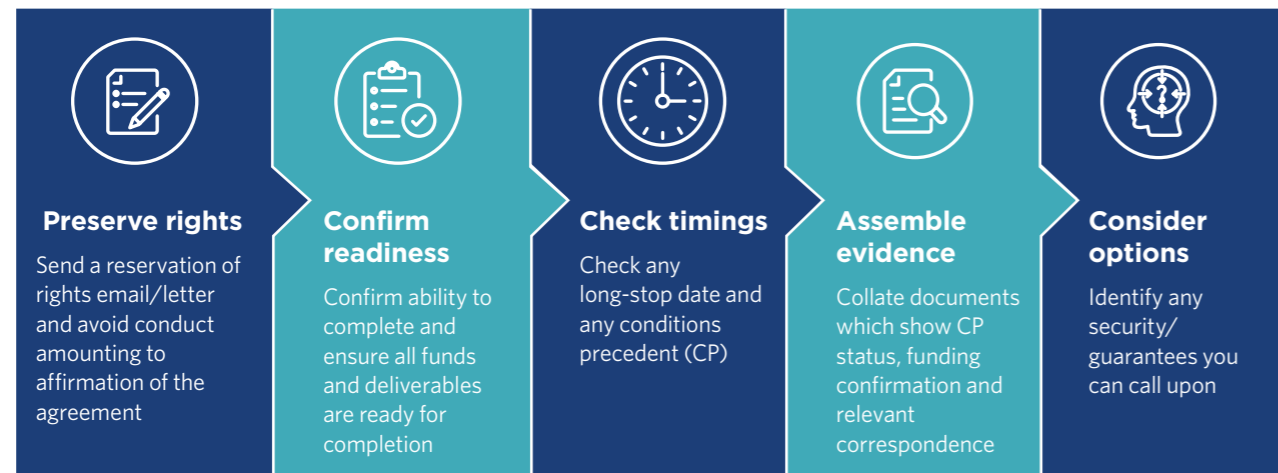
My buyer or seller is in breach: Where do I start?

Where there is a failure to comply with fundamental contractual terms under the SPA, the innocent party can terminate the contract and claim damages. But the practicalities and timings are often not straightforward.

The innocent party has two options:

- (a) it can terminate the contract for breach, if the circumstances entitle it to do so, and the innocent party may be able to forfeit the deposit, claim interest or costs and/or claim damages;
- (b) or, if it wants to keep the contract in place, it can waive the breach and affirm the contract; if the other party still fails to perform, it could bring a claim for specific performance to order the other party to complete the SPA and comply with its obligations.

Initial checklist:



Time of the essence


Ordinarily, time is not of the essence in commercial contracts unless: (i) the SPA says so; (ii) the circumstances make timely performance essential; or (iii) a valid notice to complete has been served.

If the Standard Commercial Property Conditions (SCPCs) are incorporated into the SPA, time can be made of the essence by serving a notice to complete (see below). If the contract does not incorporate the SCPCs, time can still be made of the essence by serving a notice requiring performance of the contract within a "reasonable time". What is reasonable depends on the circumstances, but the 10-working day period in the SCPCs is a starting point.

When time is of the essence, the counterparty failing to meet the deadline and comply with its obligations under the SPA is a repudiatory breach entitling the innocent party to terminate and claim damages (and exercise deposit rights, if relevant).

If time is not of the essence, persistent or serious delay can still amount to repudiatory breach, but the threshold to be met is higher.

In circumstances where time is not of the essence, the innocent party should use interest provisions within the contract, long stop dates and step in rights to preserve negotiating leverage with the counterparty.

 **Practical tip:** Say explicitly in the notice to complete that "time is of the essence" and make sure you are ready to complete - otherwise the notice risks being ineffective and you risk a counter-allegation of repudiatory breach.

Notice to complete

Purpose: a notice to complete fixes a final date for completion and, once validly served, makes time of the essence. It is commonly used where one party is ready, willing and able to complete but the other is not. You are ready, willing and able to complete when serving the notice (funds and deliverables are in place) if:

- All contractual preconditions to service are satisfied (eg, conditions precedent);
- Service of the notice to complete complies with the notice clause in the SPA (eg, method, timing, addressee); and
- The notice period matches the period in the SPA, or SCPCs (10 working days in the case of the latter).

Effect: if the counterparty fails to complete by the deadline set out in the notice to complete: (i) you can terminate; (ii) the seller may forfeit the buyer's deposit if applicable; and (iii) you may seek damages (including loss of bargain). Specific performance may be available where the asset is unique (ie damages would not enable a similar asset to be purchased in the market). Consider also contractual interest on late completion to maintain leverage while the clock runs.

If a party chooses to terminate the SPA following service of a notice to complete, it must communicate that election to the other party. The contract will remain in place until a clear and unequivocal acceptance of the breach is made.

Alternatively, the innocent party can affirm the contract, keeping it in place. After affirmation, the contract cannot be terminated for the breach. Affirmation can be express or implied by conduct.

Implied affirmation takes place where the innocent party acts consistently with the continuation for the contract. For example:

- Performing further obligations under the contract.
- Invoicing for sums due under the contract.
- Complying with conditions of the contract, such as seeking or implementing planning permission - if in doubt, pause any steps and seek advice before any act that could be read as affirmation.

ADVANTAGES	DISADVANTAGES
Creates a clear final deadline and negotiating leverage	Invalid service undermines the remedy
Converts the counterparty's delay in completing the SPA into a repudiatory breach if the deadline to complete is missed	The party serving the notice to complete must be ready, willing and able to complete at the date of service - otherwise, the counterparty could use this as an example of the serving party's own repudiatory breach of the SPA
Often a prerequisite for deposit forfeiture in property style deals	May escalate the dispute and harden the parties' negotiating positions

Guarantors and enforcement

When an SPA is supported by a guarantor, both buyers and sellers should understand how that guarantee operates if the SPA is breached.

For buyers, the primary question is whether the guarantee clearly covers the type of breach at issue: whether relating to payment obligations, warranties or indemnities. Buyers should check whether the guarantee is “on-demand” (allowing direct recourse to the guarantor) or a secondary guarantee (requiring the buyer to pursue the seller first before being able to pursue the guarantor for any remedy). Attention should also be paid to any caps, time limits and exclusions that may restrict recovery, as well as any notice requirements before a call on the guarantee can be made. Practical enforceability issues matter too: the guarantor’s financial strength, jurisdiction and dispute resolution provisions can all affect speed and certainty of recovery.

If the guarantor is located offshore, you need to check the governing law, jurisdiction and enforcement routes early, building in parallel steps so the guarantee call does not slow the notice to complete/termination timetable.

For sellers, the focus is on managing exposure. Sellers should ensure the guarantee is aligned with their agreed SPA liabilities, with clear caps, survival periods and limitations on recoverable losses. It is also important to control when and how a guarantee can be called upon, including requiring the buyer to attempt to resolve disputes first or follow specific procedures. Sellers should assess corporate approvals, internal indemnities and any insolvency risks if a parent company acts as guarantor. Where possible, require financial information or comfort on the guarantor at signing of the SPA and require prompt information from the guarantor after any breach.

Deposits below 10%

A deposit of 10% of the sale price is market standard, but parties can agree lower deposits in SPAs (eg where a buyer is SPV funded close to completion or regulatory timing is uncertain).

Issues for sellers:

- If the buyer fails to complete, the seller could be left out of pocket if the lower deposit does not cover its losses (eg remarketing, price reduction on resale, costs).
- A less than 10% deposit is a weaker deterrent against buyer default, eg if the value of the property has significantly decreased.
- Losses in excess of the deposit can only be recovered by a damages claim.

If a seller is considering accepting a lower than 10% deposit, it would be well-advised to consider additional forms of security, eg enhanced interest on late completion and/or a guarantee. There are also provisions in the SCPCs that require, following service of a notice to complete, the buyer immediately to top-up any deposit to 10% of the purchase price. A seller should use this top-up provision plus interest to keep pressure on while preserving the option to complete.

Deposits higher than 10% of the purchase price, that are out of all proportion to the innocent party’s loss, are at risk of being an unenforceable penalty.

Furthermore, in some extreme circumstances, a defaulting buyer can still ask the Court to order the seller to give back the deposit. There is an obscure Court jurisdiction for this under s.49(2) of the Law of Property Act 1925 but the facts would need to be very unusual, for example it might be considered if the seller had suffered no loss at all from the termination and in fact was able immediately to sell the property to another purchaser for (say) an increased amount.

Summary of remedies



Buyer in Breach

- Termination following a valid notice to complete
- SCPC top-up to 10% of deposit on service of notice to complete, where applicable
- Forfeiture of deposit
- Damages (including loss of bargain and costs)
- Enforcement against guarantor (payment, interest, costs)
- Seek an order from the Court for specific performance of the contract (where asset is unique)



Seller in Breach

- Refund of deposit plus interest
- Damages (reliance or expectation losses, as applicable)
- Specific performance (especially for unique assets)
- Enforcement of guarantees
- Consider seeking interim relief (such as an injunction) where there is a risk of asset disposal or dissipation undermining any order for specific performance

Choosing the right route

Sequence: Start with readiness to complete and service of a notice to complete where appropriate. Keep guarantees and security in play. Calibrate litigation steps to the commercial objective (completion versus termination and damages).



At a glance considerations for sellers:

- If you want completion quickly → serve a notice to complete; ensure funds/deliverables are ready; consider claim for specific performance.
- If you want an exit → serve a notice to complete then terminate on expiry; pursue damages and deposit rights (if you are the seller).
- If counterparty covenant strength is weak → enforce guarantees/indemnities.
- If deposit is less than 10% → require a top-up under the SCPCs and/or reinforce with higher interest or stronger guarantee; preserve damages claim.



At-a-glance considerations for buyers:

- If seller defaults, consider specific performance for unique assets and interest for delay.
- Keep your deliverables under the SPA updated so you remain “ready, willing and able” to complete.
- Preserve rights to a refund of deposit plus interest on termination.

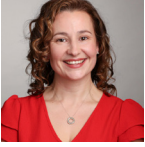
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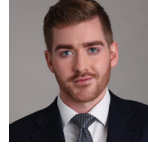
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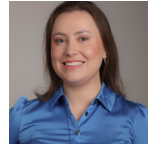
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