

# THE MECHANICS OF COMPLETION UNDER THE STANDARD CONDITIONS AND NOTICES TO COMPLETE

## NORTHSTAR BROOKS

### **Two Areas of Land**

In 1983 3M owned:

1. A large sports field largely surrounded by housing.
2. A large run down house at 78A Coleshill Road backing onto the sports field.

3M hoped to get planning for the sports field but knew it was long term.

The most likely access for development was over 78A Coleshill Road.

### **The Brooks want 78A**

The Brooks mercilessly hounded 3M to sell.

### **The Option**

3m agreed to sell 78A to the Brooks but:

1. They had a 15 year option to re-purchase.
2. The buy back price was to be ascertained disregarding any improvements (save some specified) and planning.

The contract incorporated the 3<sup>rd</sup> Edition (being the one current at exercise as below).

### **3M Leave the Scene**

In 1997 3M sell the sports field and the benefit of the option to Northstar Land Ltd.

Northstar Land is a subsidiary of Panther PLC whose managing Director is Mr Perloff.

Mr Perloff is a charming man who deals directly with the Brooks family.

### **The Option Exercised**

In 2000 the option was about to expire.

Brooks refused an extension.

Northstar exercises the option.

### **Disputed Figures & The Northstar Offer**

In 2001 – under the option terms – 78A valued at £257,500 which Brooks think is far too low.

Their solicitors write and raise objections to the option – all bad points.

Northstar offer alternative deal – it will try to get planning on 78A and then sell it and give Brooks the £257,500 plus one third of the excess.

### **Delays and Planning**

It suited Northstar not to complete according to the option until it had planning.

Matters thus dragged on but by summer 2003 planning for 5 houses on 78A was about to be granted.

Northstar started to press for completion of either:

1. The Option; or
2. The “Alternative Deal”

### **Notice to Complete:**

**16<sup>th</sup> December 2003** Notice to Complete served.

**2<sup>nd</sup> January 2004** Expiry of Notice.

Northstar had got fed up. They were happy still to do a deal on the “alternative deal” which was still on the table for completion on 2<sup>nd</sup> January but if not they were insistent the option completed on that date.

The file moves from Northstar’s solicitors (“FB”) property section to “litigation”.

### **Holiday Arrangements and Proposed delay to 9th January**

Miss A at FB realises that she is on holiday on 2<sup>nd</sup> January 2004.

Late on 22<sup>nd</sup> December 2003 she sends a fax to Brooks sols (Mr Drew) suggesting postponing completion to 9<sup>th</sup> January.

Mr Drew does not see it.

Miss A leaves assuming completion adjourned.

Mr Drew leaves having arranged for Brooks to come in for completion on 2<sup>nd</sup>.

### **Arriveth the 2<sup>nd</sup> January**

Mr Drew opens office specially.

Very unwilling Brooks attend.

Mr Drew thinks very odd not been asked for bank details or had requisitions etc.

Hears nothing – starts to contact FB.

Eventually Miss A rings him from home at 3.40pm.

### **The Conversation**

Everyone agrees it starts with something like:

Miss A: “Haven’t you seen my fax.

Mr Drew: What fax?”

Miss A then outlined what it said which came as a surprise to Mr Drew.

There was then a conversation which the Judge found amounted to Miss A asking if an extension was agreeable and Mr Drew saying he would “take his client’s instructions.”

### **The Brooks Instructions – Not Completing**

Having rung off Mr Drew – who had thought Northstar were unable to complete that day before Miss A rang him - consulted the Brooks telling them that he thought that Northstar were in breach of contract.

The Brooks followed their inclination and said they were not completing and left.

Mr Drew decided not to call Miss A back.

### **The Balloon Goes Up**

Mr Drew consults Counsel – told Northstar in breach and can rely on it.

8<sup>th</sup> January Mr Drew writes and rescinds contract.

Northstar sue.

**Arguments for Northstar:**

1. **The conversation amounted to an agreement to extend completion to 9<sup>th</sup> January – eventually abandoned** since there was no compliance with Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989 on which there has to be compliance on material terms such as completion – *McCausland v Duncan Lawrie Ltd* [1997] 1 WLR 38.
2. **The conversation amounted to a representation by the Brooks that unless they got back to Miss A that day time was extended – failed at trial and Court of Appeal.** In essence whilst Mr Drew had duties not to deceive Miss A his primary duty was to protect the interests of the Brooks family. His reply was deliberately neutral. No competent solicitor could take it as making any representation one way or another i.e. there could be no reliance by the promisee.
3. **If Mr Drew had said “complete today or else” Northstar could have done so – the Judge held they could not have done (the Court of Appeal did not need to decide this but indicated in argument they were unsympathetic to Northstar).**

There was some amusing argument on this. However the default position under the 3<sup>rd</sup> & 4<sup>th</sup> Edition of the Standard Conditions is at the seller’s offices – here Coventry with FB in London.

There were arguments over:

1. TT transfers – given the system closes at about 4pm.
2. Banker’s draft.
3. Cash.
4. Money laundering.

Eventually the Judge found that at best FB could have arranged to complete in Coventry at 8pm on 2<sup>nd</sup> January if Mr Drew had rung back Miss A at once.

4. **Completion can take place anytime up until midnight – repudiated by the Judge (again the Court of Appeal did not need to decide but very unsympathetic in argument).**

This was a necessary argument for Northstar because otherwise they suffered no detriment by Mr Drew not ringing Miss A back at, say, 4pm to say “complete or else.”

The decision of the Judge that completion has to be in usual working hours conforms with the House of Lords in Reardon Smith Line v MAFF [1963] AC 691.

### WHEN TO SERVE

1. Are your clients “ready willing and able” to complete?

It is critically important that the giver of a notice is ready willing and able to complete (defined in Condition 1.1.3):

1. When giving the notice (reinforced by Condition 6.8.1).
2. Throughout the notice period.
3. Especially when everyone is “up against the wire” just before it expires.

The sensible solicitor makes sure that:

- (a) **All outstanding enquiries and requisitions have been satisfactorily dealt with.**
- (b) **All searches have been returned and are satisfactory.**
- (c) **Completion monies are in their client account.**

## **2. Has the contractual date for completion passed?**

Condition 6.1.1 has the default of 20 *working days* after the date of the contract.

Serving it too early is ineffective (*Hooker v Wyle* [1974] 1 WLR 235, 237B) and might amount to a breach or anticipatory breach of contract (as intimating that after 10 days the giver will treat themselves as discharged).

No longer (if using the Standard Conditions<sup>1</sup>) do you have to wait for any further delay, or an unreasonable delay, after completion before serving.

## HOW AND WHAT TO SERVE

### **The Notice Itself – best use a standard form.**

For instance EFP Vol 36 Form 81.

Need not be specific form – *Babacomp Ltd v Rightside Props. Ltd* [1974] 1 All ER 142.

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<sup>1</sup> This does not necessarily apply if it is, for instance, an open contract

### **Minimum Requirements<sup>2</sup>:**

- 1. Identify the Contract.**
- 2. Identify failure to comply with the contractual term for completion.**
- 3. State that the giver is ready willing and able to complete.**
- 4. Refer specifically to condition 6.8 and obligations thereunder.**
- 5. Spell out the consequences of non compliance.**

It is vital that the notice is unambiguous and does not step outside the four walls of the strict contractual obligations then existing between the parties.

### **Service**

Time only starts to run from the end of the day service is effected (condition 6.8.2).

Sensible courses are:

- (a) Recorded delivery - making sure the record is obtained promptly.**
- (b) Postal but asking for signed acknowledgement.**
- (c) Personal.**

Reliance on deemed service in Condition 1.3 is only as good as proving your office in fact *sent* the document and is precarious to the intended recipient proving it did not in fact arrive (on time or at all) under Condition 1.3.6.

### **If Giver is Buyer – consider the Deposit.**

Condition 6.8.3 specifically deals with the buyer being on the receiving end of the Notice (see below).

There is an argument that it should also apply if the buyer is the giver of the Notice. Consideration ought to be given to paying any outstanding deposit or proffering it (but there are usually practical considerations against this course).

*EFFECT OF SERVICE*

1. **Buyer (if recipient) must pay balance of deposit (up to 10%) immediately** (Condition 6.8.3).
2. **Time is now of the essence.**

In other words the parties are in the position at common law with equity intervening. So if completion is now to be at 12.00 you either complete by then or you are in breach. Seeking to complete at 12.01 is too late.

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<sup>2</sup> It must be in writing – Condition 1.3.1

**3. Completion must take place within 10 working days.**

Not at the end of 10 working days – policy of madness.

Best to liaise to fix convenient time & place (especially because of giving vacant possession).

**4. Giver must remain “ready willing & able” throughout – “poised.”**

Being “poised” is a movable feast because it does not mean, for instance, the seller of a house who has given a notice must remain with the removals lorry waiting outside to load up in case the purchaser turns up with the money on day 5.

There is a parallel probably with an “on demand” guarantee – the recipient has just enough time to get the necessary cash from under his bed i.e. the minimum time in practical terms to fulfil the obligations he says he is “ready willing and able” to perform to complete.

Administrative matters that are outstanding (e.g. discharging the mortgage) are not treated as breach by the giver (Cole v Rose [1978] 3 All ER 1121).

If the recipient turns up to complete and the giver is not – then the recipient can elect to treat the contract as at an end.

**5. Recipient must proceed to complete.**

Leaving it until the last moment is simply asking for trouble (e.g. a glitch obtaining a bankers draft) will cause a breach which equity will not help with - and leave a potential negligence action.

Any requisitions or pre-completion arrangements should be put in train immediately – if only to avoid the default situation, as below.

HOW TO COMPLETE

**1. Condition 6.2.1 – solicitors to co-operate in agreeing arrangements.**

There is nothing worth discussing here – save to repeat that material terms of the contract should not be changed except in a manner that complies with Section 2 of the 1989 Act (esp. date of completion).

**2. In default of arrangements otherwise agreed it is to be:**

**(a) At the offices of the seller (or where he reasonably specifies).**

(b) **In normal working hours (Northstar v Brooks *ibid*)**

3. **Completion monies paid by:**

(a) **Direct credit** (Condition 6.7).

(b) **Release of deposits held as stakeholder.**

Condition 1.1.1(g) defines direct credits as the transfer of cleared funds to the seller's account with a clearing bank.

Cheques, cash and banker's drafts have all died a death (so the goings on discussed in Oakdown Ltd v Bernstein & Co. (1985) 49 P&CR 282 have ceased to be relevant).

Transfer from anyone other than the buyer's solicitors account will probably be refused because of the money laundering risks.

Note that the payee bank has to be a clearing bank (defined in Condition 1.1.1(c)).

Timing of arrangements is important because the TT system does close down about 4pm and instructions must be put into the system well before that time.

4. **Contractual variations.**

If the contract varies the Conditions as regards completion (e.g. that bankers drafts are acceptable) or earlier versions of the Conditions apply, then great care needs to be taken over the method of payment.

5. **Condition 6.1.2 (interest)**

There is school of thought that the provision that interest runs for payments received after 2pm means that completion must be before 2pm.

That argument was examined in Northstar v Brooks but found to be unsustainable. The provision says no such thing (because it relates to apportionments and suchlike).

DEFAULT

1. **Giver can repudiate the Contract, sue for damages and, if seller, forfeit the deposit.**

Respective remedies set out in Conditions 7.5 & 7.6

If defaulting party is the seller he must repay the deposit with accrued interest.

A forfeited deposit may still be recoverable under Section 49(2) of the Law of Property Act 1925.

**2. If the giver in default the recipient can turn the tables and repudiate the contracts.**

This is default both at expiry or at any earlier attempt by the recipient to complete.

Classic case is *Finkelkraut v Monohan* [1949] 2 All ER 234.

In effect what happened in *Northstar v Brooks* – with the result that:

- (a) Brooks left with house free of option.
- (b) House now has planning permission for 5 houses (Northstar paid costs of obtaining planning permission).
- (c) Northstar picked up costs bill for Court of Appeal and most of costs below.
- (d) A question may have arisen between Northstar and FB.

CONCLUSION:

**Professor Barnsley:**

*Service of a completion notice can be a tricky affair, fraught with potential hazards for the unwary. It should not be undertaken lightly. The cases indicate that practitioners tend to resort to the procedure in a rather cavalier fashion, without due regard to the provisions of the relevant condition, or to the consequences of giving notice or acting on it. This area of the law has proved to be a fruitful source of litigation, especially in times of spiralling house prices...”*

**Have a care!**

Malcolm D Warner

E&OE