Commentary

This is another question that you could almost predict might appear in a Property Law and Practice examination when there is a question about one party to the contract failing to complete and what the other party can do about it. Failure to complete is a fairly common occurrence in practice and as such examiners will want to be sure that you know how to deal with these circumstances. You will need to know the relevant conditions in the fifth edition of the Standard Conditions and you should be able to draft a simple notice to complete if that is what the question requires. This should not present you with difficulty as the operative words in such a notice simply repeat the appropriate part of Standard Condition 6.8.

This is also an area where case law will come into consideration particularly concerning the question of damages. You will need to know the basic law about the measure of damages for breach of contract so far as it relates to contracts for the sale and purchase of land. You may also need to demonstrate when and if a party to the contract is entitled to seek an order for specific performance. Finally you should, by now, appreciate that if the question is set in the form of an office memorandum that your reply should be couched in the same terms.

Suggested answer

ABBEY & RICHARDS, SOLICITORS
EMAIL MEMO

From: Trainee Solicitor
To: Training Partner

Re our client Wessex Building Society and its sale of 6 Well Way Cardiff.

I refer to your memorandum received earlier today and write to respond as set out in the following points. However to assist I can confirm that, should your time be limited, the essence of my advice is contained in the final point.

1. The purchaser is in breach of contract because he has not completed on the contractual completion date. It should be noted that late completion is a breach on the part of the defaulting party that will enable the injured party to claim damages for any loss suffered as a consequence of that delay (see *Raineri v Miles; Wijeski (Third Party)* [1981] AC 1050).

2. You have not said whether or not time is of the essence of the contract, but I will assume, as is usually the case, that time is not of the essence so the client has no grounds for treating it as discharged by breach. In effect, when time is not of the essence the agreement on its own does not entitle the injured party to terminate the agreement.

3. To remedy this problem, we can make time of the essence by serving a notice to complete upon the purchaser's solicitors. (I can confirm that Standard Condition 1.3.2 states that giving a notice or delivering a document to a party's conveyancer has the same effect as giving or delivering it to that party.)

4. May I please refer you to Standard Condition 6.8. If we are 'ready, able, and willing to complete' we can serve notice to complete, making it a term of the contract that completion must take place within 10 working days of the giving of the notice, excluding the day of service. A party is ready, able, and willing if that party could be but for the default of the other party (Standard Condition 1.1.3). As the amount to be paid on completion would enable the property to be transferred freed of all mortgages it is clear that the seller must be deemed to be ready, able, and willing to complete, (see SC 1.1.3 (b)). Standard Condition 6.8.3 (b) provides that on receipt of a notice to complete if the buyer paid a deposit of less than 10 per cent, the buyer is forthwith to pay a further deposit equal to the balance of that 10 per cent. I have noted from your memorandum that the buyer was £200 short of a 10 per cent deposit and, in theory, we can demand of the other side the additional deposit. Of course if they have no funds this demand may be somewhat worthless. The amount will still form part of our claim for damages.

5. If the purchaser does not comply with the notice, that is to say by completing within the time limits prescribed by the completion notice, our client can treat the contract as discharged. If this happens then the building society can forfeit the buyer's deposit. Thereafter they can also seek to sell to the other interested party. Such sale must of course proceed on the basis that the price and other terms still satisfy our client's obligations on a sale as a mortgagee. (Please see *Cuckmere Brick Co Ltd v Mutual Finance Ltd* [1971] Ch 949 and *Palk v Mortgage Services Funding plc* [1993] 2 WLR 415, CA.)

6. I have noted that the sale price in the present contract is £1,000 more than that offered by the new buyers. It may help you to know that any loss incurred on the resale can be recovered as damages under established principles, that is to say, loss arising naturally from the breach *(Hadley v Baxendale* (1854) 9 Exch 341). However, any claim must be reduced by the amount of the forfeited deposit. Having said that, the effect of s. 49(2) of the Law of Property Act 1925 should be noted. This provision allows the Court a wide discretion to order repayment of the deposit and may do so dependant upon various factors like the conduct of the parties, the size of the deposit, or the significance of other matters in question.

7. Actual financial loss can also be claimed provided that the loss was as a result of the breach. Under this heading our client could claim our costs incurred in the abortive transaction up to the time of sale.

8. The client also has the option of seeking a decree of specific performance from the court against the defaulting purchaser. However, this is an equitable remedy that will only come into play if damages may prove to be insufficient compensation for the breach. Accordingly this remedy would normally only be used as a last resort, say, where the seller has no reasonable prospect of selling the property in the foreseeable future. It should be noted that as this is an equitable remedy the other maxims apply. This being the case a decision to go for specific performance should be made reasonably promptly otherwise 'delay will defeat equity'. Bearing in mind that there is already another interested party the option of specific performance would not seem appropriate. Indeed, it is the client's duty to mitigate their loss by trying to re-sell without any delay. This being the case, the society are probably under an obligation to accept such an offer bearing in mind it is so close to the original sale price. (You should bear in mind that if the client is not

seen to be attempting to mitigate the loss the award for damages could be reduced for failure to mitigate.)

9. In conclusion, my recommendation is for the immediate service of a notice to complete pursuant to Standard Condition 6.8 upon the buyer's solicitors, bearing in mind the buyer has become somewhat elusive. If the purchaser still fails to complete, we should rescind the contract, forfeit the deposit, proceed with the sale to the other purchaser, and seek additional compensation if appropriate. If I can assist you further, please let me know.

Trainee solicitor: time engaged 55 minutes