

## Using the Variation Agreement

Requirements to stay at home and to maintain a distance from others have obviously had an impact on completions. The priority is public health and trying to achieve what your client reasonably wants if completion cannot take place when scheduled.

Read the government advice:

<https://www.gov.uk/guidance/government-advice-on-home-moving-during-the-coronavirus-covid-19-outbreak>

and general Law Society guidance:

<https://www.lawsociety.org.uk/support-services/advice/articles/coronavirus-covid-19-advice-and-updates/>

and CLC resources and information:

<https://www.clc-uk.org/lawyers/coronavirus/>

## Contracts exchanged but not completed

- The draft specimen clause that follows is only intended to be reviewed for use in the very limited circumstances where contracts have already been exchanged, but completion has not yet taken place.
- It is not suitable for use in other circumstances.
- This clause is not being recommended for use. It is intended as a starting point to enable you to identify some of the issues which could legitimately justify delaying completion of transactions where contracts have already been exchanged.

## Position under Standard Conditions of Sale (5 edition 2018 Revision) (SCS)

- Ordinarily, either buyers or sellers who do not complete on the contractual 'completion date' may be liable to pay compensation. (SCS 7.2)
- If the date has passed and completion has not taken place the party who is 'ready, able and willing' to complete can serve a notice to complete on the other, requiring completion to take place by a certain date (SCS 6.8) and failure to comply when served on a buyer can result in loss of their deposit. (SCS 7.4)

## **To avoid penalties arising under the Standard Conditions of Sale (5 edition 2018 Revision) (SCS)**

- To avoid the consequences arising under SCS the parties are encouraged to make alternate arrangements with each other on the basis that no-one is at fault but an external event beyond the control of the buyer and seller is preventing completion taking place on the date originally agreed.
- They should be encouraged to approach this process in a spirit of good faith.
- Buyers and sellers should be informed about all their options and the consequences.

## **Rescission**

- You should advise buyers and sellers to consider rescinding the agreement and explain the consequences of doing this.
- Ideally both parties would be put back largely in the position that they were in before contracts were exchanged. This means that the deposit monies would be returned in full and neither party would have any claim against the other.

## **Deferred Completion**

- If one or both parties still wish to proceed you will need to consider agreeing a variation to the contract so that the completion date is deferred to a time when it is possible and safe to proceed.
- The purpose of the Variation Agreement [below] is to propose a framework for this situation where completion cannot take place because of some aspect of the impact of coronavirus and the parties do not wish to rescind the agreement.

## **Explain the Risks**

- Consider whether your clients' best interests are served by varying the contract and the impact of that on your client. Advise them of the risks of varying the contract and of not doing so. Some clients could find themselves worse off if the contract is varied and some could benefit.

- It is essential that the effect of any clause which is to be added to a contract, where exchange has already taken place, is fully explained to clients, confirmed to them in writing/email and written/email authority obtained from both/all clients for whom you are acting to act accordingly.
- Clients should also be fully advised as to their position if the contract is not varied.
- The time that the deferral might last is unknown. There may be one or more extensions of the stay-at-home period and the requirements about physical distancing. The longer this period lasts the more likely it is that other issues will arise. For example:
  - market values may change.
  - mortgage lenders may withdraw mortgage offers.
  - buyers may lose employment.

## **The Variation Agreement**

- The provisions require good faith on the part of all parties.
- You will need to ensure that the provisions of the Variation Agreement accord with the Original contract in terms of definitions, etc.
- One or more of the possible 'delay provisions' may not be relevant.
- There may be other 'delay provisions' which are required.
- The 'no later date' needs to be agreed between the parties to reflect the circumstances of the transactions involved and the needs of the parties.
- The 'long stop date' should take into account the same considerations.
- In clause 3 there could be a dispute about whether a Delay Event has occurred. You may want to consider inserting a proviso that might say something along the lines of 'PROVIDED THAT if the parties, acting reasonably, do not agree that the Delay Event has ceased to apply, then the completion date shall be the date thirty (30) working days after the date on which the Regulations are withdrawn or otherwise cease to apply', depending on the requirements of the individual transaction.
- Some of the Delay Events are easier to evidence than others.
- Do not simply adopt this clause as a standard clause to be used in every transaction. It is not suitable for use in this way. It is not a 'one

size fits all clause’ – it is essential for you to discuss with your clients what they want to achieve in varying their contract.

- It is likely to be easier to achieve this in single sale and purchase transactions.
- Where there are chains it is essential that a common clause is used throughout. If different clauses are used in parts of the chain your clients need to understand the effect of the different provisions especially where this will allow different dates for completion or different reasons for rescinding.
- Consider how you will know what clauses the other parts of the chain are using and how you will know if these are varied before exchange of the Variation Agreement.

### **Email notices and authority**

- If you intend to use email to serve notices pursuant to any variation then consider reviewing your existing contract to assess whether this is permissible or not under the standard or special conditions and, if not, agree a variation limited to this.
- If you intend to use email to obtain authority to sign on your client’s behalf – there are legal constraints here and you will need to consider this carefully.

### **Wales and cross border**

- You will note that the draft Variation agreement refers to ‘*the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, or any subsequent statutory amendment, modification or replacement thereof*’.
- It is our understanding that these are intended to be very similar but if, either, there are chains that involve properties in Wales or transactions that involve properties with boundaries that cross England and Wales you may consider whether or not any of the defined or rescission events differ according to the regulations operating at the time the client is looking to enter into the Variation Agreement.

## **Written instructions**

It is obviously very important to take your clients instructions about how they want to proceed, to advise them as to the risks and benefits and to obtain confirmation from them in writing that they understand the risks and wish to proceed in writing.

**Disclaimer:** while care has been taken to try and make sure the agreement is accurate it has been prepared in haste for obvious reasons and the organisations who have contributed to drafting will not accept any legal liability in relation to them.

## Variation Agreement

### DATE OF THIS AGREEMENT:

In this agreement, the following expressions shall have the following meanings:

- **The Property:**
- **The Title Number(s):**
- **The Seller:**
- **The Buyer:**
- **Original Agreement:** the agreement for the sale and purchase of the Property dated [insert date] and made between (1) the Seller and (2) the Buyer.
- **The Regulations;** the Health Protection (Coronavirus, Restrictions) (England) Regulations 2020 and the Health Protection (Coronavirus Restrictions) (Wales) Regulations 2020, or any subsequent statutory amendment, modification or replacement thereof.
- **Coronavirus:** severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2).
- **Delay Event:** any of the events set out in clause 2 below.
- **Rescission Event:** any of the events set out in clause 7 below.

1. The Seller and the Buyer agree that all of the provisions in the Original Agreement (as varied by this agreement) are hereby deemed to be incorporated in this agreement:

(a) for the purpose of satisfying section 2 of the Law of Property (Miscellaneous Provisions) Act 1989; and

(b) with the intention that the terms of the Original Agreement (as varied by this agreement) shall remain effective and binding upon the parties.

2. If the Buyer or Seller are unable to complete on the Completion Date because one or more of the following conditions apply: -

a. the Buyer or Seller, or an occupier of The Property, is using their best endeavours to comply with the Regulations, or UK Government guidance, requirements or restrictions relating to Coronavirus, including but not limited to the Regulations;

b. essential services suppliers (e.g. removal services, HM Land Registry providing pre-completion searches, utility connections) are using their best endeavours to comply with the Regulations, or UK Government guidance, requirements or restrictions relating to Coronavirus (including but not limited to the Regulations) where their resulting actions or non-actions prevent the Buyer or Seller effecting legal completion;

c. the UK financial system (or a relevant part of it) fails to deliver the balance of purchase monies to the Seller on completion as required to effect legal completion of this sale and purchase as a result of issues relating to Coronavirus;

d. any failure to deliver funds to the Buyer's conveyancer, as a result of issues relating to Coronavirus, by any financial institution

(including Help to Buy) providing finance needed for the purposes of performing the contract;

**then** the Completion Date provided for in the Original Agreement shall be deferred to a date fixed by agreement between the Seller and the Buyer (both acting reasonably in all circumstances), subject to clause 3 below.

3. If a new Completion Date cannot be mutually agreed, the Completion Date provided for in the Original Agreement shall become the date thirty (30) working days after the date on which the Delay Event ceases to apply.
4. If the Completion Date is deferred pursuant to the terms of this Agreement, it is hereby agreed that neither the Buyer nor Seller shall be in breach of the Original Agreement nor liable for any delay in performing, or failure to perform, any of its obligations thereunder. In particular (but not limited to) neither the Buyer or the Seller shall be liable to pay any sums by way of interest or compensation to the other in respect of late completion and neither Buyer or Seller may serve notice to complete during the period in which completion is deferred.
5. The Seller and the Buyer will both use their reasonable endeavours to mitigate and minimise the extent of any delay arising from a Delay Event.
6. For the purposes of this Agreement, written confirmation (including email) from the conveyancer acting for the Seller and/or Buyer shall be deemed sufficient to establish an inability to complete because of a Delay Event.
7. In the event that at any time after the date hereof, as a direct or indirect result of issues relating to Coronavirus one of the following Rescission Events occurs, namely: -
  - a. any financial institution (including the HCA for Help to Buy) providing finance upon which the Buyer relies for the purposes of performing their obligations under this contract withdraws the offer of finance (or amends the terms of such offer of finance such that the Buyer is unable to perform their obligations); or



b. the Buyer is no longer able to perform their obligations because a buyer on any related sale of the Buyer's own property rescinding their contract to buy the Buyer's own property ['Buyer's Related Contract'] either in circumstances that would satisfy the preceding subclause (a) above if they arose between the parties to this agreement or otherwise in accordance with the terms of the Buyer Related Contract; or

c. the Seller is no longer able to perform their obligations under this contract due to the Seller rescinding their contract to purchase a property ['Seller's Related Contract'] either in circumstances that would satisfy the preceding subclause (a) above if they arose between the parties to this agreement or otherwise in accordance with the terms of the Seller's Related Contract; or

d. the Buyer or Seller can no longer afford to proceed with this transaction because the funding arrangements for their purchase and/or sale are no longer available;

**then** either the Buyer or Seller may rescind this contract (by giving written notice (including email) to the other), in which case any deposit paid shall immediately be repaid by the Seller to the Buyer without interest and without deduction and the parties shall have no further liability to one another.

8. If due to a Delay Event or Rescission Event, the Buyer or the Seller is unable to complete within three (3) calendar months of the first notified Delay Event or Rescission Event, then either the Buyer or the Seller may rescind this contract at any time after that date. In which case any deposit paid shall immediately be repaid by the Seller to the Buyer without interest and without deduction and the parties shall have no further liability to one another.

Signed by or on behalf of the Seller: .....

Signed by or on behalf of the Buyer: .....

**Warning:** this is a formal document which creates legal rights and legal obligations. You should take advice before using it.

**Disclaimer:** while care has been taken to try and make sure the agreement is accurate it has been prepared in haste for obvious reasons and the organisations who have contributed to drafting will not accept any legal liability in relation to them.