

## DEFAULT NOTICES AND THE PURCHASE OF RESIDENTIAL PROPERTY

Settlements don't always go as planned. Sometimes, a buyer defaults because they have failed to pay the deposit or they are not ready, willing and able to settle on the settlement date. However, the seller is unable to terminate the contract without first sending a default notice to the buyer.

### What is a default notice?

A default notice gives the default party a 'final opportunity' to remedy its default. It is defined in clause 26.1 of the Joint Form of General Conditions for the Sale of Land (2011 Revision) ("General Conditions") as a notice that:

- specifies the default under the contract;
- requires the default party to remedy the default:
  - within 10 Business Days after the date the notice is duly given; or
  - within any longer period specified in the Notice; or
  - if the Contract is a Terms Contract, within the time specified in Section 6(2) of the Sale of Land Act, that is, the notice must give the default party:
    - 28 days to remedy the breach where the breach consists of a failure to pay a sum of money; or
    - Where the breach relates to any other matter, a reasonable time to remedy the breach.
- If the non-default party wishes to terminate the contract in the event that the default notice is not complied with, it is important to include a statement in the default notice to the effect that if the default is not remedied within the relevant time specified, the contract may be terminated.

If the default party does not remedy the default within the time specified, then:

- The non-default party may give a further default notice (clause 23.2 of the General Conditions); or
- The non-default party may terminate the contract.

### What happens when a Buyer defaults under the contract?

The seller has rights set out in clause 24.2 of the General Conditions, in addition to any other right or remedy of the seller.

Clause 24.2 allows the seller to:



- affirm the contract and sue the buyer for damages for default;
- affirm the contract and sue the buyer for:
  - specific performance of the contract; or
  - damages for default in addition to or instead of specific performance;
- Subject to clause 23.1 of the General Conditions, retake possession of the property;
- Subject to clause 23.1 of the General Conditions, terminate the contract by notice to the buyer, provided that the default notice contained a statement warning that if the default was not remedied with the specified time, the contract may be terminated; or
- where the buyer repudiates the contract, terminate the contract by notice to the buyer.

When deciding whether to affirm or terminate the contract, the seller should take the following factors into consideration:

- How much deposit was paid?
- Is the property market rising or falling?
- Why the buyer failed to comply with the contract e.g. financial reasons
- What are the seller's own circumstances e.g. can the seller afford the delay or expense of taking court action to enforce a contract?
- Whether the seller is ready, willing and able to complete settlement.

If the seller terminates the contract and follows all the steps required in giving the default notice, the seller can elect to exercise any one or more of the following options upon termination of the contract:

- Forfeit the deposit
- Sue the buyer for damages for default
- Resell the property

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