

## HOW SURE ARE YOU THAT YOU CAN FORFEIT THE 10% DEPOSIT?

1. It is a standard term in a sale contract for a residential plot that the 10% deposit will be forfeited if the purchaser wrongly fails to complete. More and more Developers are accepting 5% deposits on the basis that the balance of 5% will be due and payable if the deal goes sour.
2. In the majority of cases the reason for a purchasers default is that they cannot after all raise the mortgage monies. In a slow market many Developers will still try and do a deal to enable that purchase to complete. In a buoyant market however the Developer will often simply serve a Notice to Complete and when it expires forfeit the deposit and get on with re-marketing the plot. When only a 5% deposit has been paid, the Developer may want to pursue recovery of the other 5%.
3. **But is it simply a matter of taking the deposit paid and moving on to a new purchaser?**
  - In fact the answer is NO and not many people know that.
- 3.1. The reason is Section 49(2) Law of Property Act 1925, which gives the Court an unfettered discretion to order the return of a forfeited deposit if there is in fact no loss.
- 3.2. Very few defaulting purchasers make any effort to recover the forfeited deposit, possibly partly because not many residential conveyancing solicitors want to get involved in litigation advice and partly because of the cost of court action.
- 3.3. Where it does tend to be used is when a Developer decides to sue for the balance of the deposit. The purchaser is involved in litigation whether they want to be or not and the Defence (unless prepared by the purchaser in person) will often claim that no or little loss has been suffered by the Developer and therefore not only should the balance of the deposit not be paid, but that part of the 5% that has been forfeited should be returned.
- 3.4. If the plot has had to be re-marketed you can often argue some additional costs have been incurred there. If the plot is eventually sold at less than the original price, clearly there is a loss and the Developer should get back the loss suffered, but if the plot resells quickly and for the same or a greater sum, there is no loss at all worth talking about.

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4. A Developer who has an aggrieved Purchaser – e.g. they have failed to complete on issues of build complete or differences in design from that in brochures etc, may well find that they will sue to recover part or all of the deposit. Likewise a Developer who is overly aggressive and sues for the balance of the deposit may find that not only do they have to pay back some of the forfeited deposit, but to rub salt into the wound, costs as well.
5. The number of reported cases on this is small but with house prices getting higher, the 10% deposit figures are moving out of the Fast Track jurisdiction (£5k - £15k) and into the full Multi Track jurisdiction where an argument about a £20k deposit can cost almost as much again in legal fees to litigate to a fully defended final hearing.
6. The most up to date case in point is *Tennaro –v- Majorarch* [2004]EG 31 January 145. Neuberger J who is a highly respected Property Judge decided the case and he made it clear that you cannot simply automatically forfeit the deposit when a purchaser wrongly fails to complete. The amount of the forfeiture has to relate to actual loss.
7. It is acknowledged that this area of the law would benefit from clarification by a Court of Appeal decision. Until then the Developer really only has two primary courses of action
  - 7.1. Try and utilise your contract terms to persuade a purchaser that they cannot claim under S49(2) LPA. It is highly debatable as to whether that would stand up if tested before a Court as it is vulnerable to the dual argument firstly that the section cannot be overridden and secondly, if it can, to do so would be an unfair term which the Court can strike out.
  - 7.2. Don't seek to chase the remainder of the deposit unless it can be shown that there has been actual loss as a consequence of the failure to complete.