

Conveyancing process: Where can delays occur?

INTRODUCTION

The typical conveyancing transaction starts with the handshake when basic terms are agreed between seller and buyer (usually through an estate agent) and ends with the closure of the file by the Solicitors concerned. There are two intermediate stages namely the formal exchange of contracts (this being the point at which the parties become legally committed to one another) and completion (which is when the transfer of ownership passes).

The annexed table below shows the steps which the Solicitors would expect to take in the case of a sale by A to B and a borrowing by B from a Building Society or other conventional lender. In reality life is not quite so simple. A is probably buying from somebody else and needs to pace the two transactions so that A retains a roof over their head at all times. B not only requires to obtain mortgage funds to proceed with the purchase but probably to sell B's own property to C. C in turn may be dependent upon a sale to D and so on. By this means a "chain" of transactions becomes established, the progress of each transaction being dictated by the progress of all the other transactions in the chain. At the bottom of the chain there is a buyer with no property to sell. This is usually (but not invariably) a first time buyer.

It is very seldom that all the transactions in a chain commence at the same time. It is frequent for a buyer to shake hands on a purchase on the basis that the buyer has to sell their own property. This means that at the top of the chain the parties can be ready to proceed but lower down the chain there exists a buyer who is still waiting to sell their property. As a consequence until this link in the chain can be closed the whole chain is held up.

BETWEEN HANDSHAKE AND EXCHANGE OF CONTRACTS

Seller

The table shows the relative duties of A's Solicitor in preparing the sale contracts and B's Solicitor in carrying out the pre-contract investigations. A's Solicitor must obtain the Title Deeds in order to prepare the contract for sale. It is true that if A's title is registered and if A's Solicitor knows the title number it is possible to obtain office copies of the register from the Land Registry - something which A's Solicitor will have to do in any event. In practice, however, it is impossible to dispense with the Deeds package because it usually contains other relevant documents (such as copy planning consents and NHBC insurance documents). If the Deeds are held by the seller's Solicitor or by the seller personally they will, of course, be immediately available. If the Deeds are held by the seller's Building Society they will usually be sent to the seller's Solicitor by return of post but this is not always the case. However if the Deeds are held by a seller's Bank then the situation becomes more complicated. The Bank will not release the documents without the seller's specific written authority. Consequently time is lost in correspondence whilst that authority is requested and given. Nor is that the end of the story. Building Societies centralise their Deeds storage. Banks used to keep Deeds at branch but have now regionalised their Deeds storage. The seller/bank borrower does not necessarily know at which regional centre their Deeds are held and the situation may have been complicated by movements of account from branch to branch. The end result is, even when all the appropriate authorities have been obtained, it can often take Banks as long as a fortnight to locate the Deeds and send them to A's Solicitors. As a consequence the first step in the whole transaction, the preparation of the contract, will have been delayed.



Having obtained the Deeds the seller's Solicitor prepares the contract and pre-contract information. If A's Solicitor has decided to conduct the sale according to the Law Society's TransAction Protocol the Solicitor will have arranged for A to supply a contents list (Fixtures, Fittings and Contents form) in a prescribed form and to have answered a standard set of enquiries relating to the property sold. If the Protocol is not used A's Solicitor will prepare a basic set of contract documents and wait for B's Solicitor to raise such enquiries as the Solicitor thinks fit. The Protocol is clearly a superior system since it anticipates the buyer's Solicitor's requirements and therefore saves time. However there are inevitably circumstances in which the questions raised by the Protocol forms are inadequate and have to be supplemented by additional enquiries from B's Solicitor. There are also, unfortunately, Solicitors who are not satisfied with the standard set of enquiries and insist upon raising further enquiries of their own devising.

The National Conveyancing Protocol was devised by the Law Society. The forms which the conveyancers use are the copyright of the Law Society but these forms may be produced by Solicitors and Licensed Conveyancers provided that they follow exactly the form and content of the prescribed forms. The TransAction scheme was also devised by the Law Society. The TransAction client forms are also the copyright of the Law Society. These forms are not currently available for use by Licensed Conveyancers.

In the case of freehold property the pre-contract information is relatively easy to prepare. With leasehold properties - particularly flats with service charges - the situation is much more difficult because further documents will be required. These include the Memorandum and Articles of Association of the management company, and the accounts of the management company over the preceding 3 years. It is seldom that a seller is able to provide all the required information from the seller's personal records. If anything is missing the seller's Solicitor has to apply to the managing agents for it. The time taken to obtain this information is dependent upon the efficiency of the managing agents and sellers' solicitors have no means of establishing in advance what this information is likely to cost. This situation could be improved if leaseholders were encouraged, for instance by a warning on the documents themselves, to retain management accounts and service charge demands.

Another difficulty encountered by a Solicitor acting for the seller of a leasehold property is that there is a standard requirement for production of a receipt for the last payment of rent. The technical reason for this is that if the receipt is "clean" i.e. is not endorsed with a note of a breach of covenant, a buyer may assume that there are no breaches of covenant which the landlord is presently enforcing. In practice rent is often paid by cheque against invoice and no receipt is asked for or given. A statutorily imposed obligation on the landlords to give a receipt, and a warning on the face of the receipt itself to leaseholders that they ought to keep it, might be helpful.

If the title is unregistered the seller's Solicitor will provide an Epitome or Abstract of Title demonstrating A's ownership of the property to be sold. If the title is registered the seller's Solicitor has to obtain office copies of the register from H.M. Land Registry. The office copies are usually available by return of post and it is possible to make the application to the Land Registry by computer link, Fax or telephone. A small difficulty with the present procedure is that the Land Registry only send out of the basic register entries and do not, unless specifically asked to do so, send copies of plans and documents held on the register and referred to in the office copies. This sometimes means that a double application has to be made with a consequent loss of a day or two whilst this is done. It would be helpful if the registry could, as standard practise, issue not only office copies but also copies of all documents and plans referred to in those office copies.

Having prepared the contract documents and supplied the pre-contract information the seller's Solicitor obtains the signature of the sale contract by A and waits for exchange of contracts to occur.

Buyer

The first action which a buyer's Solicitor should take is to make a so called "local search" and other relevant searches (e.g. a mining search) as the location of the property requires. A local search is a copy of the statutory registers held by the local authority and the answers given by the local authority to an agreed standard form questionnaire. The document is of the greatest importance not only to the buyer but to the buyer's mortgagee. In particular it shows whether roads or sewers are adopted, whether the property is affected by compulsory purchase or road widening proposals and whether there are any planning difficulties. Unfortunately not all local authorities are able to deal with sewer enquiries because of the structure of the water industry.

In these cases it is necessary to make a separate search with the water company at an additional cost. None of these searches can be made until B's Solicitor receives a plan of the property. In turn A's Solicitor cannot provide that plan until he has received the Deeds. Thus any delay in A's Solicitor getting the Deeds has an immediate effect in preventing B's Solicitor from carrying out the first step in the purchase transaction.

The time taken to respond to local searches varies widely. Some local authorities return the searches within 2 days. Others can take 6 to 8 weeks. The fact that some authorities are able to deal with a search quickly shows that there is nothing much wrong with the procedure itself and it is merely a question of what priority a particular authority accords to the fulfilment of its statutory duty to respond to local searches and whether funding has been made available for computerising the collation of the information. The effect is always cumulative - in other words in a chain of transactions one slow local authority will, effectively, dictate the pace of the whole chain even if all the other local authorities against whom searches were made have responded within 24 or 48 hours. One of the main difficulties with local searches, when received, is that the information relating to Town and Country Planning has become impossible to deal with.

The planning registers were opened on the introduction of Town and Country Planning in 1948. There has been a steady accumulation of information on the registers ever since and, as is inherent in the nature of planning law, nothing has been cleared off. It is has therefore become impossible for many authorities to do any more than to issue an index of the planning documents which exist relating to a particular property - it being then left to the buyer's Solicitor either directly or through the seller's Solicitor to obtain copies from the local authority of those planning documents which are relevant. This process causes unnecessary delay and could be avoided by some sort of simplification of the system or a mechanism whereby a property could be given a planning health certificate by the local authority to confirm that at the date of the certificate the property conforms with planning law. Most authorities will maintain that they lack the resources to provide this sort of a service.

Another difficulty is that a local search has no shelf life and ought not to be relied upon after three months. A buyer in a protracted transaction may, therefore, have to make a second search with further cost and delay. Whether the local search will provide information on sewers and drains will depend upon the locality. If not a Water Authority search has to be made which may well not be answered until the Water Authority has carried out a survey. The problem is likely to be compounded by the requirement to make environmental searches.

B's Solicitor will study the contract and pre-contract information supplied by A's Solicitor. If the Law Society Protocol has not been used B's Solicitor will have to raise routine preliminary enquiries. If the Protocol has been used B's Solicitor may still have some further enquiries to make.

B's Solicitor will obtain B's signature to the contract for sale only when all the following have been satisfied:

- (i) the terms of the contract have been agreed;
- (ii) the searches made by B's Solicitor have all been returned, answered in a satisfactory manner;
- (iii) A's Solicitor has answered all B's Solicitor enquiries;
- (iv) if B needs to borrow a suitable mortgage offer has been made and any special conditions (e.g. structural survey) have been complied with;
- (v) B's buyer, C, is ready to proceed (if there is such a buyer).

Borrowing

B will probably have made application for any mortgage required at the time of or shortly after the handshake. In a conventional case most lenders conduct their valuation and issue an offer within 10 working days. They are dependent, however, on the co-operation of others - in particular the provision of information by employers. In less straightforward cases (for instance if the borrower is self-employed or already has a mortgage of another property which the borrower wishes to retain) the process can take much longer. It is, however, rare for a transaction to be held up because a mortgage offer is awaited. It is usually one of the other factors that causes delay, the mortgage offer being received at a comparatively early stage. However, it has been known that financial checks on the borrower have led to delays and eventually to chains of related sales breaking down.

Generally

Each of the individual steps to be taken by the seller's Solicitor, the buyer's Solicitor and the lender require only a few days. The problem lies in the fact that there is a substantial dependency upon third parties (holders of Deeds, managing agents, local authorities) over whom neither the buyer nor the seller is able to exercise any influence. To this has to be added the cumulative effect of any chain of transactions where the whole chain moves only as fast as the slowest can go. The length of the period before exchange of contracts creates the conditions for gazumping and gazundering. It is fair to say that in some cases the period is so long that a change in market conditions justifying an increase or reduction in price may have occurred.

FROM EXCHANGE OF CONTRACTS TO COMPLETION

Mechanics of exchange of contracts

A person buying and selling needs to be certain that both transactions are, so far as practicable, contemporaneous. Unless this is achieved a seller may find that they have become contractually committed to a sale without having the benefit of a property to move into. Alternatively such persons may find themselves committed to a purchase without having secured a contracted sale - thus creating the situation whereby they are unable to complete the purchase through lack of funds. The Law Society has established a series of formulae which are used for the purpose of exchange of contracts by telephone. These are available for use by Licensed Conveyancers as well as Solicitors. The appropriate formula is brought into effect by a telephone conversation between the buyer's Solicitor (or Licensed Conveyancer and the seller's Solicitor (or Licensed Conveyancer). The formulae create a series of undertakings between the parties to the telephone conversation which are enforced by the Law Society (or in the case of Licensed Conveyancers by the Council for Licensed Conveyancers). These formulae, if properly applied, eliminate the risk of a person being left with two homes or no homes. However once again the dependence of the housing market upon chains of transactions creates difficulty. In a simple case, of course, A's Solicitor rings B's Solicitor to establish whether contracts can be exchanged and to settle the completion date. If B does not have a property to sell an immediate answer can probably be given. The likelihood, however, is that B's Solicitor will say that an answer cannot be given without reference to B's buyer, C. This process continues until the end of the chain is reached and an individual Solicitor in the chain will often have to make ten or more telephone calls to set up an exchange of contracts and to fix an agreed completion date.

The exchange of formal contracts is the crux of the transaction. Once it has been achieved all parties know where they are going and the completion date on which they are to move. For the first time there is a certainty as to what is to happen.

Buyer

Following exchange of contracts the buyer's Solicitor prepares a draft of the transfer document and raises "Requisitions on Title". These requisitions are no longer strictly confined to title matters and deal with practical aspects such as confirmation of the arrangements for the discharge of the seller's mortgage and a seeking of information as to how the purchase price is to be paid. When the transfer document has been approved the buyer's Solicitor obtains the buyer's signature to that document and the mortgage (if there is one). The buyer's Solicitor calls down the mortgage loan and, on the due date, sends the purchase price to the seller's Solicitor (usually by telegraphic Bank transfer). There are searches which the buyer's Solicitor has to make before completion from the Land Charges Registry and the Land Registry. These searches are invariably answered by return of post and again can be dealt with by telephone, Fax or computer link.

Seller

The seller's Solicitor checks the draft transfer and returns it to the buyer's Solicitor subject to any amendments which are found to be necessary. At the same time he deals with the "requisitions on title". If the seller has a mortgage he will also find out from the lender how much is required to pay the mortgage off. On receipt from the buyer's Solicitor of the transfer signed by the buyer the seller's Solicitor obtains the seller's signature and holds the document in his file in readiness for completion.



Borrowing

If (as is almost universally the case) the buyer's Solicitor also represents the lender the procedure is extremely simple. The buyer's Solicitor sends a report to the lender in a form prescribed by the lender which includes a request for the loan to be sent to the buyer's Solicitor in time for the agreed completion date. Most lenders ask for one week's prior notice. If the property is being newly built or has had works carried out to it the lender may require to re-inspect in which case most lenders ask for ten working days to carry out the re-inspection. Lenders are, however, generally co-operative in cases of emergency and will provide funds on lesser notice if the urgency is made clear to them.

Generally

The period between contract and completion does not generally cause difficulty. The period can be as little as one minute - many transactions go through today on the basis of contemporaneous exchange and completion. Solicitors often anticipate a requirement for early completion by preparing and settling the documents between themselves at the same time as the contract documents.

FROM COMPLETION TO CLOSURE OF FILE

Mechanics of completion

Completion takes place by the buyer's Solicitor sending to the seller's Solicitor the purchase money. This is almost invariably effected by telegraphic Bank transfer. Most domestic property completions take place on Fridays which means that the Clearing House system is placed under enormous pressure. Friday is usually a nightmare day in a busy conveyancing office. However it is very rare for a completion of a domestic dwelling not to take place on the contracted date. Having received the purchase money the seller's Solicitor becomes obliged to pay off the seller's mortgage and to forward the transfer in favour of the buyer and other relevant documents to the buyer's Solicitor. The obligations of the seller's Solicitor on completion are established by the Law Society's Code for Completion by Post. Whilst it is possible (and in the case of substantial commercial transactions not unusual) for completion to take place by a visit by the buyer's Solicitor to the seller's Solicitor, this procedure is rare in domestic conveyancing and would not be welcome because it would hold up the transfer of funds from one Solicitor to another through the transfer system.

Seller

On receipt of the purchase price the seller's Solicitor fulfils his obligations to pay off the seller's mortgage and send the transfer and documents to the buyer's Solicitor. The seller's Solicitor reports completion to the seller and accounts for the proceeds of sale.

Buyer

The buyer's Solicitor receives the Title Deeds, stamps the transfer, brings the mortgage into effect and registers the title at the Land Registry. Following this the Deeds are sent to the lender or, if the buyer has not had to borrow, are held to the buyer's instructions.

Borrowing

The lender is concerned to see that the transaction, and in particular the mortgage in favour of the lender, is properly registered at the Land Registry and that the Deeds are sent promptly to the lender. Lenders frequently complain (sometimes with justification) that this part of the buyer's Solicitor's duties is not given the priority which it deserves. However lenders have their own methods of enforcing discipline on Solicitors acting for them and it is extraordinarily rare for the house buyer personally to be in any way affected by delays on the part of the Solicitor in dealing with stamping or registration of title or sending of the Deeds to the lender.

CONCLUSION

If delays in the house buying process are to be reduced the period to address is between handshake and exchange of contracts. In an auction sale or a sale by legally binding tender this period is, of course, completely eliminated but the price paid is that several buyers will have to go to the trouble and expense of carrying out pre-contract investigations but only one of them will be the successful purchaser. The rest will have wasted their time and money. There are a number of ways in which the procedures which delay this vital period can be reduced, in particular, it would be a great help if those local authorities who are slow could be persuaded to deal with local searches in the same time scale as the best. The fundamental difficulty, however, remains that most sales of domestic houses form part of a chain of transactions and will, therefore, progress only at the same speed as the slowest link in the chain.