

The Legal Side of Buying and Selling Your Home.

A guide from
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The aim of these notes is to help you understand the various terms you will hear during the course of your transaction and to explain the procedures involved. We believe that a few minutes spent reading through these notes now will give you an overview of the conveyancing process and will help you to make strategic decisions to plan your move and keep the process as stress free as possible.

Please note that we will make certain assumptions on your behalf as part of the house buying process. These assumptions are explained in these notes and are highlighted in ***bold italic type***.

The two most important stages of the process are

- Exchange of contracts; and
- Completion.

Exchange of contracts.

When you first agree to buy or sell property there is no legally binding commitment to go ahead with the deal. After exchange of contracts there are potentially severe financial penalties if you withdraw from the deal.

Before we can advise a buyer to exchange contracts various key stages need to be completed. These are:

- Approval of the draft contract – to ensure that it correctly reflects the agreement made between the seller and buyer.
- Searches need to be carried out and the results checked.
- Property forms need to be checked
- Consideration ought to be given to carrying out a survey
- Finance needs to be organised and in place
- The chain needs to be checked to ensure that everyone is ready to proceed
- The deposit needs to be collected from the buyer.

Generally it takes between 4 and 6 weeks to get to exchange of contracts, but it is very difficult to predict the timescale precisely – factors such as the length of any chain, delays in receiving mortgage offers and searches can all influence the time needed to arrive at the point of exchange of contracts. This is why we recommend that a moving date should not be agreed at the outset of the transaction as it is impossible to know what might happen as the matter progresses. In our experience, agreeing a date too soon can place unnecessary stress on the buyer and seller as they frantically try to hit what might have been an unrealistic target date from the outset.

The key stages referred to above are set out in more detail below. Most of these stages apply to buyers, but it is useful for sellers to know what the buyer has to do before the buyer is ready to go ahead. Depending on the circumstances of the case, some of the stages described below may not apply.

The Contract

The contract is prepared by the seller's solicitor and should reflect the terms of the agreement between the buyer and seller. It contains the full names of the seller and buyer, a description of the property, the price and any other matters, such as restrictions on use of the property that the parties may have agreed between themselves.

When acting for the buyer, we check the contract in readiness for it being signed prior to exchange of contracts.

Searches

These are standard forms of enquiry sent to local authorities and other bodies to find out various bits of information about the property. In most cases searches cannot be applied for until we have received the contract and a plan of the property from the seller's solicitor. We will also need the buyer to pay us the search fees in advance. Results usually take between 1 and 2 weeks to come through.

There are various types of search, the most important being:

➤ **The local search.**

This consists of a long list of questions addressed to the local council and covers such matters as:

- Are the roads leading up to the property private, or are they public highways maintained at public expense by the local highways authority?
- Are there any financial charges affecting the property – e.g. a repayable improvement grant?
- Is there a breach of planning control?
- Are there proposals for new roads nearby?
- Is the property in a conservation area?

Buyers should note that the search does not cover other people's properties; so for example, a planning application for adjoining land would not show up on the search result. If this is a matter of concern it is possible to have a planning search carried out, but do remember that a search is essentially a "snapshot in time" and a planning application could be made the day after the search was carried out which would, of course, not be revealed by it.

➤ **The drainage search.**

This shows whether the property is connected to mains services for foul and surface water drainage and a useful plan incorporated in the search shows whether and public drains or sewers run under the land. This may be important to you if you wish to extend the property as special consideration needs to be given to building over drains and sewers.

➤ **The environmental search.**

This search deals with a number of issues, probably the most important being whether or not the property is affected by contamination issues. The property might, for example, have been built on or near the site of an old factory which may have caused toxins to enter the land. Not only might these be harmful to health, but in certain cases the owner of the land may be ordered to clean it up even though the owner did not cause the pollution in the first place. The cost of this clean up operation may be significant. Other issues revealed by the search relate to the risk of fluvial flooding or whether the property is in an area which may be affected by radon gas emissions.

➤ **Mining search**

It is always prudent to carry out a mining search for properties in the traditional mining areas of the country. The search reveals whether the property is at risk from past or present mining operations.

➤ **Chancel repairs search.**

Chancel repair liability is a liability on some property owners to fund repairs to the chancel of the church. The search identifies whether the parish in which the property is situated retains the right to make the charge – some do not, but many still do- and where this right still exists we recommend that insurance is taken out to cover this liability. Most mortgage lenders will require the insurance to be put in place at completion.

Property forms

These are supplied by the seller and comprise a list of standard questions concerning the property that most buyers would like to ask. Some typical questions are:

- Who maintains the boundaries?
- Are there any guarantees for work done at the property?
- Have there been any disputes with neighbouring owners?
- Is the property affected by rights of way?

If the property is leasehold there will also be information concerning the lease, service charges etc

The seller will also usually supply a list of fixtures and fittings indicating which are included in the price, which are excluded and which may be purchased by separate negotiation.

The survey

A seller should disclose all relevant information about the property to his buyer, but if he does not it will be very difficult for the buyer to prove that the seller deliberately withheld information from him. Furthermore the law operates a “buyer beware” principle which means that it is for the buyer to satisfy himself that the property is structurally sound. Indeed the law assumes that if the buyer has exchanged contracts he is happy with the state of the property; hence it is very difficult to persuade the courts to help the buyer who only discovers defects after completion, particularly where these could (and should) have been discovered prior to exchange of contracts.

Whilst most buyers find it tempting to rely on the mortgage lender’s valuation of the property this is rarely sufficient. Buyers should understand that a valuation is exactly that – a valuation – it is **NOT** a survey.

What is the distinction between the valuation and a survey- and why is it so important, anyway?

A valuation is prepared for the benefit of the mortgage lender to enable it to assess whether the property is good security for the amount of the mortgage loan. The valuer does not undertake a detailed inspection of the property and structural defects and faults may not be identified. Usually the valuation report will contain advice to the buyer that the buyer may not rely upon the contents of the report. In practical terms, this means that if the valuer fails to identify a significant problem with the property which only comes to

light after completion, the buyer will have no legal remedy against the valuer and will not be able to seek compensation. The buyer has bought a problem and it will be the buyer who will have to pay to put the problem right. Mistakes do happen. Pity the poor buyers who moved in to their dream home only to find that the valuer had failed to spot that the seller had relocated the staircase in the property and left it balanced on two six inch nails.

It is for this reason that we recommend that buyers should give serious thought to having a detailed survey carried out by their own surveyor. The buyer will have a direct contract with the surveyor – and if things sadly do go wrong the buyer may be able to seek compensation for breach of that contract. However, on the assumption that the surveyor has done a good job – as of course most of them do – the buyer will know what defects exist and may be able to renegotiate on the price to help pay to put the defects right. Even if the surveyor reports that the property is structurally sound and in good order, the buyer should regard the survey fee as money well spent in purchasing the peace of mind that goes with knowing that all is well.

The buyer should also consider whether specialist reports might be needed from tradesmen who can check out the electrical wiring and the central heating or look for evidence of rising damp or timber decay.

Remember – it is the buyer's job to satisfy himself that the property is sound and good value for the price being paid.

We will assume that once a buyer authorises us to exchange contracts on your behalf that you are satisfied with the state and condition of the property and that you have carried out all inspections and surveys that you deem necessary.

Finance

Most buyers will require a mortgage to help with the cost of the property. It is not safe to exchange contracts until the buyer has a firm offer in writing from the mortgage lender. Sometimes a mortgage offer may contain conditions that need to be fulfilled before the money can be drawn down. Some lenders require a period of notice to release funds – up to five working days in some cases – and this has to be taken into account when setting completion dates.

The Chain.

A first time buyer of an empty house is lucky – there is no chain.

More often than not there will be a chain of interdependent sales and purchases and exchange of contracts can only take place when everyone in the chain is ready to go ahead. It may be impossible to influence others involved in your chain and buyers and sellers should understand that the various members of the chain may be working to different agendas. One person may wish to complete very quickly, but the first time buyer at the bottom of the chain may not want to complete until his tenancy on his rented flat has expired as he cannot afford to pay both rent and mortgage payments in the same month. One person may receive their mortgage offer very quickly, but some one else in the chain may be having problems obtaining their offer because the wages clerk who was supposed to send off the buyer's salary information has gone away on holiday and nobody else can deal with it. Such things do really happen!

The Deposit

On exchange of contracts a deposit is paid by the buyer to the seller. Payment is made through solicitors and is usually 10% of the purchase price, but a smaller deposit may be agreed, particularly if the buyer is obtaining a 95% mortgage. In the chain everyone should in theory find 10% of the price of the property they are buying, but in practice most people's money is tied up in the house they are selling and there's no spare cash. As a result, the deposit paid by the buyer at the start of the chain is simply passed along the chain to the end of the line.

Once the above key stages have been reached everything is in place and we can proceed to exchange contracts. Before that can happen, though, we need to agree the completion date.

Completion

This is the day when the buyer pays the balance of the price for the house and gets the keys. The seller gets his money and has to move out of the property if he has not done so already.

We **strongly recommend** that there should be a gap between the date of exchange of contracts and the completion date. We believe that there are compelling reasons for having this gap:

- It enables the seller and the buyer to make their removal arrangements and arrange for final meter readings confident in the knowledge that the completion date is fixed; and
- It enables us to request your mortgage funds and carry out our pre-completion searches.

Increasingly clients are asking us to reduce the gap between exchange and completion. Sometimes we are asked to exchange and complete on the same day. Whilst we will of course follow our client's instructions we must point out that in our experience there will be far less stress and far less chance of things going wrong at the last minute if there is a reasonable gap. As property lawyers one of the worst things that we sometimes have to do is tell clients that their completion will not be taking place due to a last minute hitch down the chain, resulting in some cases in clients having to unload their removal van and carry their furniture back into their "old" house until a new date can be fixed. To add insult to injury they still have to pay their removal men for their time. Such things do happen, though thankfully infrequently, but the chances of things going wrong can be considerably diminished by leaving a gap between exchange and completion. We appreciate that moving in to a new house is an exciting thing and people don't always want to wait; but consider that most people move only once every 11-14 years – an extra week's wait is an insignificant amount of time but it can really help remove the stress from the removals process.

If you do instruct us to exchange and complete with little or no gap between the two dates we will assume that you are aware of the risk that your arrangements may have to be cancelled at the last minute and other arrangements postponed. There may also be financial consequences – for example your removal company may charge a cancellation fee and we may have to return your mortgage funds to the lender, which will incur additional bank charges.

The completion process

We are not usually involved in handing over keys – this is normally dealt with through estate agents. Please note that the keys will not be handed over until the seller's solicitor has received the purchase money. If there is a chain the keys may not be available until late in the day because the money needs to filter up to the top of the chain via bank transfers. We have no control over how long these transfers will take – if it is a particularly busy day for the banks there may be a time lag. As a rule of thumb, the higher up the chain you are the later you will receive your keys. We do not recommend arriving at your new house before lunch time as this will allow time for the money to be transferred and will cut down any delay in the keys being released to you.

Frequently Asked Questions

➤ **How long will it take?**

This is the most common question of all and one that is almost impossible to answer. Many years of experience has told us that you can never predict what is likely to happen. There are so many things that are outside our control – too many to list – that the most helpful tip that we can offer is to wait and see how things pan out. You should avoid the natural temptation to set a completion date and arrange removals before you know that everyone in the chain is ready to exchange contracts.

➤ **I am selling – when do I get my money?**

On the completion day. We will send you a cheque, or if you prefer we can credit your bank account direct, though this involves a small bank charge. The money you receive is the sale proceeds, less any outstanding mortgages, and less selling costs.

➤ **I am buying – when do I pay my money?**

You need to pay us the deposit before exchange of contracts. The deposit is 10% of the purchase price. If you are borrowing money from a mortgage lender we will arrange to draw down the advance prior to completion. Any remaining balance due from you must be paid prior to completion. We prefer to receive funds electronically by bank transfer as cheques and bank drafts must be cleared and this process can take up to 7 working days.

➤ **I am selling and buying – what happens then?**

If you have arranged your finances so that there will be a surplus left over on completion of the sale and purchase then we will account to you for the balance on completion.

If you intend to put some extra money into the new property then we will need the balance from you prior to completion.

➤ **What is the interest rate mentioned in the contract?**

When contracts have been exchanged there is a legally binding agreement to complete the sale and purchase on the agreed date. There has to be a penalty that would discourage either of the parties from defaulting and the penalty is a financial one involving the payment of interest. So, for example, a buyer who fails

to hand over the money on time to complete his purchase will have to pay interest at the rate mentioned in the contract – usually 4% over base rate on the unpaid price.

➤ **What is a restrictive covenant?**

A restrictive covenant is a condition imposed on the use of land. Examples could be that the land should not be used for business purposes; or that buildings cannot be erected or altered without the consent of the former land owner.

➤ **What is indemnity insurance?**

This is a phrase that is often heard during the course of a conveyancing transaction. Put simply it is insurance that will pay out if the event that you are covering yourself against should happen. Popular policies cover such things as:

- breach of restrictive covenant;
- absence of evidence of a formal right of way;
- lack of planning permission; and
- lack of Building Regulations Approval.

➤ **What are title deeds?**

Title deeds were effectively abolished by the Land Registration Act 2002 in respect of registered land. Evidence of your ownership of land is contained on the Land Registry's computer and an office copy of that entry is sufficient to establish your ownership of the land. About 90% of residential property has been registered at the Land Registry, but for those properties that have not been registered yet – known, unsurprisingly as unregistered property – title deeds are still important for it is the deeds that prove your ownership of your land. If you have a mortgage, your mortgage lender will hold these deeds. If you do not have a mortgage you may hold the deeds personally, or they may be held in safekeeping with your bank or solicitor. We need the deeds to enable us to prepare the contract for the sale of unregistered land.

➤ **What is Stamp Duty Land Tax?**

This is a tax payable by the buyer on completion. The rates are currently:

- Price over £125,000 – 1% of the whole of the price paid;
- Price over £250,000 – 3% of the whole of the price paid; and
- Price over £500,000 – 4% of the whole price paid.

There are some reliefs available – notably the disadvantaged areas relief where Stamp Duty Land Tax is not paid on prices up to £150,000; and first time buyer relief where genuine first time buyers will pay no Stamp Duty Land Tax on prices up to £250,000.

We will assume that you are not first time buyers entitled to relief unless you specifically inform us of your status.

➤ **Can I do a deal with my seller so that I pay him some cash for fixtures and fittings thereby avoiding Stamp Duty Land Tax?**

It is often tempting for a buyer to try to save Stamp Duty Land Tax by paying for fixtures and fittings separately as money paid for these items does not attract

Stamp Duty Land Tax. Thus we sometimes see deals agreed for a sale at £249,950 with £10,000 for fixtures and fittings. This will potentially save the buyer a great deal of Stamp Duty Land Tax - £5,301 in the example given. This is rarely legal and can carry severe penalties including imprisonment for tax evasion. For this reason we insist that clients provide us with an independent valuation of the fixtures and fittings carried out by a reputable valuer and in this absence of this we cannot agree to this type of deal and the full amount of Stamp Duty Land Tax will have to be paid.

➤ **I've changed my mind – can I pull out?**

Anyone in the chain can pull out before contracts have been exchanged without even having to give a reason. Usually however people will pull out because they have had a bad survey result or there has been a change in their financial circumstances. If this happens no compensation is payable to anyone else in the chain.

After exchange of contracts there are potentially very serious financial penalties for withdrawing. At the very least the buyer will lose his deposit if he seeks to pull out; the seller will face an action for damages for breach of contract.

➤ **What happens to the deposit?**

The deposit is paid by the buyer's solicitor to the seller's solicitor on exchange of contracts. It is a part payment of the price and credit for the deposit is given on completion when the remaining balance is paid over. The contract calls for a deposit of 10% of the price. If the buyer fails to complete, then subject to following certain procedures, the seller can keep the deposit.

Often, a buyer will not be able to pay a 10% deposit. It might be argued that a seller who accepts less than 10% deposit will be prejudiced if the buyer fails to complete. The seller might require the buyer to come up with a higher deposit. However, buyers fail to complete on time only very rarely – and we take the view that from a seller's point of view it is better to exchange contracts as soon as possible with a low deposit to secure the sale rather than wait for a higher deposit to become available. The greater the delay in exchange of contracts the more chance there is that someone in the chain may back out – and this happens far more frequently than buyers failing to complete once contracts have been exchanged. ***For this reason, on your behalf we will accept whatever deposit is available at the time of exchange of contracts unless you instruct us to the contrary.***

➤ **What happens if I am buying a house with someone else?**

You will of course be joint owners and you will need to choose the most appropriate method of joint ownership to suit your circumstances. There are two methods of joint ownership.

- Joint tenancy – the most common method. If one of the joint owners dies the property will automatically pass to the survivor.
- Tenancy in common – each joint owner has separate shares in the property (usually 50-50 but any permutation is possible). On the death of one joint owner the deceased's share passes to his next of kin (if there is no will) or his beneficiaries under his will.

Please note that we will assume that you will own the property as joint tenants unless you instruct us to the contrary. We will of course be glad to give further advice about this issue.

We hope that these notes prove helpful in understanding what is involved in buying and selling a home. Please feel free to ask us if there is anything that you don't understand during the process – we're here to help.