

A Guide to the Law Society Conveyancing Protocol

1. INTRODUCTION

The Law Society Conveyancing Protocol (the Protocol) is the Law Society's preferred practice for residential conveyancing transactions. It is designed for transactions that involve the transfer of freehold and leasehold residential properties. Firms that are members of the Law Society's Conveyancing Quality Scheme (the CQS) will be expected to follow the procedures set out in the Protocol in so far as this is appropriate for the particular transaction.

The first version of the Law Society National Conveyancing Protocol was introduced in March 1990 and it was last updated in 2004. The introduction of Home Information Packs (HIPs) cut across the Protocol. The abolition of HIPs, in addition to the inception of the CQS, provides the rationale for introducing a new protocol. This, the latest version of the Protocol is set out in a tabular, rather than a linear, process list form and it is hoped that this will enable clients as well as other professionals involved in the process to understand the stages of the process and what the other party is expected to do at any stage as well as indicating those points at which contact with others is most likely.

2. THE PROTOCOL

2.1 Date

The Protocol takes effect on 1 April 2011. Some transactions will be part way through at this date and, whilst the steps in the Protocol that have not already been carried out could be used in these transactions, the use of the Protocol will only be mandatory for CQS members who are commencing a transaction after this date.

2.2 Purpose

This Protocol is designed to bring structure and clarity to communication in residential property transactions.

Some parts of the conveyancing process are not governed by law but are shaped by convention and codes of practice; these develop over time and adapt to meet market practice. The Protocol aims to set out arrangements for the conduct of business between buyers and sellers and their respective solicitors on the basis of a set of agreed principles.

Others involved in the process will be able to better understand the set of processes involved and thereby access information about the stage that a particular transaction has reached. The Protocol can assist in explaining the steps that need to be followed to achieve exchange of contracts and completion of the transaction.

The buying and selling of a home is a non-contentious matter where both parties are broadly looking to achieve the same outcome: that is, the transfer of the home from seller to buyer. Some of the 'general principles' set out at the beginning of the Protocol aim to encompass this fact and to improve communications and reduce unnecessary delays.

Previous iterations of the Protocol have focused on clarifying procedure and practice as between solicitors. This new version incorporates changes in practice and procedure but also faces outwards and aims to provide some transparency. The goal is to enhance the experience for solicitors as well as for the lender and lay clients.

Most sellers and buyers take part in conveyancing transactions rarely and are therefore not always familiar with all of the parts of the home buying and selling process. The Protocol is designed to assist solicitors to organise their work where it affects others and to better manage the expectations of sellers and buyers.

The Protocol follows the stages of a typical residential sale and purchase transaction. It does not prescribe the advice that solicitors offer but marshals work into agreed stages. It is hoped that its use will facilitate the interactivity on which the process relies. Where the terms of any transaction make the order of the Protocol inappropriate it is for the users of the Protocol to explicitly agree how they wish to vary the order of the Protocol or agree what alternative steps they wish to adopt.

Typically solicitors instructed by property sellers and buyers will be in contact with estate agents, brokers, lenders and surveyors. It is likely to assist the progress of a transaction if all those involved, including buyers and sellers, know the methodology that solicitors will be adopting in their conduct of the transaction.

2.3 Users

CQS members

The Protocol has been developed and revised as part of the CQS scheme and it is a requirement of the scheme that members follow its obligations.

Under the CQS those who can become members are solicitors, licensed conveyancers and duly certified notaries public who practise residential conveyancing provided that they are employed by a practice regulated by the SRA. This includes any SRA regulated partnership, company, sole practitioner, limited liability partnership (LLP) recognised under s.9 of the Administration of Justice Act 1985 and legal disciplinary partnership (LDP) recognised under s.9A of the Administration of Justice Act 1985.

Those who are not members of the CQS

Whilst it is possible for those who are not CQS members to use the Protocol, it is likely that CQS members will want to carry out checks of non-member firms in order to attempt to establish identity. The status of non-member firms will obviously be especially important in circumstances where professional obligations are involved (for example in relation to the giving of undertakings under the Law Society Code for Completion by Post). In dealing with non-CQS members it will be possible to use the Protocol but it will not be possible for CQS members to insist that it is used.

The Legal Services Act 2007 makes it an offence to carry on a 'reserved legal activity' through a person who is not entitled so to do. A solicitor should not deal with an unqualified person unless he has clear evidence that no offence under the Legal Services Act 2007 will be committed.

2.4 Scope of the Protocol

The Protocol is designed for use in residential transactions. The Protocol sets out the steps in the most basic of residential transactions. It is for use in freehold and leasehold sales and purchases of residential property.

It is designed to be used in matters that are wholly or primarily residential in nature. In most cases it should be relatively straightforward to establish whether the transaction is residential and one to which the Protocol should apply. However there will be a variety of matters where determination is not so simple. In order to establish whether or not the Protocol applies consider:

- the use of the property;
- the nature of the transaction;

- the nature of the parties;
- the nature of the contract;
- the nature of any mortgage.

Some of these categories may have areas of overlap or may conflict – it will be necessary to decide if the Protocol should apply to any transaction at its commencement. This should be discussed with the solicitor acting for the other party at the beginning. Even where it is not appropriate to use the Protocol CQS member firms should still act within the spirit of the Protocol.

2.5 Status of the Protocol

The Protocol has the status of preferred practice.

The Protocol sets out practice standards which are preferred practice and are not regulatory. However the Protocol does refer to other obligations including legislative, regulatory and other requirements, such as those of mortgage lenders. It is not exhaustive in this regard.

The Protocol contemplates only a very simple transaction and there may be many matters in a transaction that may make some deviation from the Protocol desirable or necessary. It does not include the alternative and additional requirements involved in many kinds of transactions.

This Protocol has been issued by the Law Society for the use and benefit primarily of CQS members. The Protocol sets out the Law Society's view of preferred practice in residential conveyancing. It is not intended to be the only standard of good practice that solicitors can follow.

Where the Protocol refers, for example, to the Code for Completion by Post and the formulae for exchange of contracts it should be remembered that use of these carries the force of professional obligations.

There are specific conduct rules that regulate conveyancing transactions (Solicitors' Code of Conduct 2007, rules 3.07–3.15).

The nature of the transaction, instructions from clients, changes in regulation, statute law or case law may be matters that will take precedence over the Protocol.

It is the responsibility of users of the Protocol to decide when it is appropriate and when it is not appropriate to follow the Protocol. CQS member firms should still act within the spirit of the Protocol if an individual case/circumstance dictates that they need to move away from it.

If the Protocol is not followed in a relevant transaction consideration should be given to how this would be justified to the CQS or to the Solicitors Regulation Authority (SRA) or other regulatory body. If not using the Protocol is appropriate in the context of a particular retainer consider making a note of the explanation for its non-use on file.

If solicitors adopt the Protocol then they agree to substantially comply with its terms and with the spirit of the process outlined. Any material breach or repeated breaches reported in one or more transactions may result, in the first instance, in the Law Society requiring an explanation from the Senior Responsible Officer (SRO) appointed under the CQS procedures. Repeated cases of serious default will be monitored and where necessary adjudicated under the membership rules of the CQS and may result in expulsion from membership of the CQS.

The Protocol is designed to drive up standards and the quality of work carried out. So, for example where the contract bundle documents are not checked or are incomplete the seller's solicitor will have failed to meet the standards required if this is not stated and the missing documents are not supplied as soon as reasonably possible.

3. THE GENERAL PRINCIPLES OF THE PROTOCOL

3.1 Overview

The Protocol begins with a list of governing principles that are 'general obligations'.

1. Disclose to the buyer/seller that there are professional obligations which apply to the sale and/or purchase. Obtain agreement and instructions to enable you to act in accordance with the terms and spirit of this Protocol.

Clients need to be advised of the basis on which the work will take place. It is important for the client to understand that, whilst acting for them, there are overriding professional obligations. This provision gives a specific and positive obligation to seek instructions and set out the limits of the retainer particularly in relation to obtaining the client's agreement to act as the Protocol provides.

2. Where acting for a lender as well as for a buyer/seller, the duties owed to the lender are no less important than they are for any buyer/seller, subject to the nature of the instructions.

Lenders are important clients and solicitors need to take their instructions very seriously. This is particularly critical in relation to matters that might cause the lender to reconsider its proposals to

lend on particular terms, for example in relation to the source of funds over and above the mortgage monies. When acting for lender and borrower the duties owed to both clients are equally important.

3. There is potential for a conflict of interest to arise when acting for more than one party: sellers, buyers and lenders. Careful consideration must be given to this.

Whilst solicitors will be aware of the current rules relating to conflicts the provisions under the new system of outcomes-focused regulation (OFR) proposed by the SRA may change what is permissible as from 6 October 2011.

4. Endeavour to maintain vigilance to protect and guard against fraudulent or other illegal behaviour encountered in the conveyancing process.

Solicitors are the gatekeepers of the process and must endeavour to establish the identities of those dealing – both clients and those acting on the other side. It is important to be vigilant to guard against fraudulent or any other illegal behaviour by any participant in the conveyancing process.

Paragraph 4 is no more than a restatement of obligations but it highlights the importance of these obligations.

5. Maintain high standards of courtesy and deal with others in a fair and honest manner.
6. Co-operate with others and treat them with respect.

The transaction is a non-contentious one. The obligation to act in the best interests of the client is paramount. Consider the main objective of the client in the transaction. The steps of the Protocol should always be followed with care and consideration to all participants.

7. Share information with others to assist in the efficient management of each transaction or chain of transactions. Requirements to provide and share information in each stage of the Protocol are subject to client confidentiality obligations. If the buyer/seller consents to the disclosure of information about the transaction, other transactions in the chain or any change in circumstances, this information should be disclosed. The buyer/seller should not be encouraged to withhold authority to disclose information unless there are exceptional circumstances.

One of the factors in achieving an uneventful and predictable conveyancing transaction is having good quality communication between all of those involved. This obligation requires that information is shared with others to assist in the efficient management of each transaction or chain of

transactions. This only applies in so far as this is permitted by the client. Rule 4 of the Solicitors' Code of Conduct 2007 requires that care must always be taken to avoid any breach of the duty of confidentiality owed to the client. The client is entitled to refuse to permit you to disclose any information and this will outweigh obligations under the Protocol. However, clients should be encouraged only to withhold the authority to disclose in exceptional circumstances.

Transactions are often complicated by the related purchase or sale of another property that must be conducted simultaneously. This position could be replicated a number of times over in a chain of related transactions. Chains will impact on the use of the Protocol particularly in relation to timing but will make the principles relating to disclosure even more important. Understanding and taking account of the fact that everyone in the chain is reliant on each other is an important factor in improving the quality of the process. The issue of the provision of information across chains is likely to be the most contentious in the context of confidentiality requirements. The interdependence of transactions arises not only in relation to purchases and sales that depend on one another but in relation to other transactions such as the sale of investments to finance a deposit, the conclusion of a divorce or the issuing of a grant of probate.

The personal circumstances of parties may change unexpectedly or by reason of unemployment, holidays, illness or family events. Problems may arise in the course of a transaction concerning funding, survey, or defects in title. In all of these situations parties will want to be aware of the position as soon as it is known and be clear as to the cause of any delay or breakdown in progress and how long it may take to resolve. The process therefore aims to commit the seller and buyer and their legal advisers to an agreed method of dealing. Those adopting the Protocol will be encouraged to ensure that, where the duty of client confidentiality allows, the timely sharing of information and co-operating with their counterparts leads to enhancement of the client experience and in the reduction of time and wasted expenditure.

This is a difficult area – the duty of confidentiality may come into conflict with the requirement for disclosure but the duty of confidentiality is the paramount obligation. If the client asks that the seller's agent and solicitor are not told that the client no longer has a buyer for their related sale or has had their mortgage application rejected then this must take precedence over the obligation to keep everyone informed.

Management of information is as important as the information itself. If the seller is told what the buyer is doing to resolve the problem, they may perhaps be more likely to wait for resolution, than they would if they discovered at a later date that the information had been withheld.

8. Respond to all communications promptly or in accordance with agreed timeframes. Where something is to be addressed in a different order or by different means, this should be notified to those who are affected as soon as reasonably possible. Steps required by the Protocol should be carried out as soon as reasonably possible.

With a view to avoiding or reducing any unnecessary delay, it is important to respond to all communications promptly. Where something is to be dealt with in a different order or by alternative means this is to be made clear to those who are affected as soon as it is possible to do so. The Protocol recommends that timeframes are agreed where possible.

9. Deal with transaction materials including correspondence, electronic or otherwise, efficiently and with care and consideration. Where parties agree to deal online, agree arrangements, for example, to acknowledge receipt. Where documents are submitted by post, submit draft documents in duplicate.

Increased use of electronic communications gives rise to the necessity to agree arrangements for submission of and response to documents. The obligation to submit in duplicate is to counter a growing trend for some firms to submit only one part of the contract and immediately ask their clients to sign the other part. This increases the risk of exchange not being effected in accordance with s.2 of the Law of Property (Miscellaneous Provisions) Act 1989 as the two parts are less likely to be identical.

10. Ensure all incoming data is loaded on to the system and made available to the person dealing within a day of receipt, where any automated data handling or scanning of documents is used.

This is an obligation to ensure that information is reliable and up to date. It primarily applies to those solicitors using case management systems or other automated data handling systems and scanning and distribution systems. It is not an obligation on all.

11. Use the most up-to-date versions of forms, formulae and codes provided by the Law Society. Follow the advice contained in SRA warning cards, guidance, Law Society practice notes and other practice information. Update forms to accord with changes in the law if these have not been updated by the Law Society.

How many firms simply stick to what they know but do not adjust their procedures to take account of changes in practice or in the law? This is a positive obligation to use the most up-to-date versions of forms and to take account of practice materials and to make appropriate changes to the forms in accordance with changes in the law.

The Law Society cannot always react instantly if there is a change in law or procedure perhaps following judicial decisions so again it is a positive obligation to make a change if it is properly required.

12. Ensure proper arrangements are made for file management (including cover for absent colleagues) during any period of planned or unplanned absence.

If the person dealing with the transaction is absent for any reason such absence should be covered by another. The Protocol requires that proper arrangements are put in place for file management.

3.2 Interpretation

There is a section in the Protocol about the interpretation of the general obligations. This also demonstrates what is not in the Protocol. The obligations are set out as follows:

1. Timetable

The timing of each transaction will vary. The needs and requirements of the buyer/seller take precedence. A flexible approach by all will assist in achieving exchange of contracts and completion. In some transactions it may be appropriate to set some time parameters but these should only be agreed when all parties understand the factors that may affect the timescale and can make informed decisions regarding time requirements. For example, if a fixed period is suggested between instruction and exchange of contracts, both the buyer and the seller need immediately to be made aware of the length of time it may take for a mortgage offer to be issued, and the necessity for the buyer to have sufficient time to obtain the information and advice reasonably required to exchange contracts.

Other participants in the process, for example, estate agents, brokers and lenders, have important roles to play. Estate agents may have an understanding of associated transactions and may be able to assist in settling a realistic timetable. A framework for communication with others who may be able to contribute to the process should be considered and addressed in each case at the outset.

This section seeks to encourage the setting of realistic and achievable timetables so that clients know what to expect in terms of timing. The timetable for the transaction is probably one of the most important aspects of the Protocol to the client.

The Protocol sets out a framework for some of the tasks undertaken by the solicitors for the parties. To reduce concerns about delay whilst the solicitors on each side carry out the work they need to do, consideration should be given to creating a timetable structure for the transaction. For example, allow 10 working days after submission of a contract bundle for each party to report their current position in relation to the timetable for exchange and completion date and to disclose any potential problem or likely delay.

The timing cannot be precise for each stage but generalised indications are modelled in the Protocol. Where expectations cannot be met it is the responsibility of the solicitor to inform his client and relevant connected parties of the position so that people are kept informed.

2. The order of transactions

For the purpose of this Protocol a straightforward residential sale and purchase transaction (freehold and leasehold) has been used as the model. The Protocol is only designed for use in residential transactions. It is recognised that the sequence for individual transactions will vary depending on the circumstances. The general obligations should nevertheless guide practitioners in these situations.

3. Transparency

Those participating in a transaction should recognise the value for all concerned in making the process transparent. This will assist clients and others to understand the process and this in turn should make the process more efficient.

4. Additional premiums and deposits

Local practice may vary as to the payment of premiums for indemnity insurances and the handling of deposit monies. This Protocol has deliberately not specified which party should pay the premiums nor how the deposit monies should be held. It cannot pre-judge the relative bargaining power of the seller and the buyer in any individual transaction.

In the initial consultation with local law societies, a number suggested that the Protocol should contain an obligation that sellers (or buyers) should always pay premiums particularly for chancel repair policies or indemnity insurance premiums.

The drafting committee decided that it was not proper to make specific rules or guidance on this. Different solicitors take different views as to whether policies are necessary or useful. An obligation that one (or other) party always pays would shift the balance against that party.

The economic bargain between seller and buyer on price may impact on their willingness to contribute. The Protocol may bind solicitors but it cannot bind the clients who would be paying the premium.

The consultation process revealed that practice regarding the payment and acceptability of deposits of varying amounts differed.

The Protocol does not preclude the adoption of standard provisions in relation to these matters to meet local convention.

3.3 Notes

(i) The obligation to act in the best interests of the client takes precedence over the Protocol.

(ii) The steps in the Protocol are not exhaustive and should not be regarded as a conveyancing 'checklist'.

(iii) In some cases the Protocol offers options for a party to adopt according to their preference and in others there is a default position to be followed.

(iv) The Protocol does not set out legal advice and is no substitute for necessary legal advice nor does it set out all the work that needs to be undertaken in order to carry out competently what is required to meet professional and legal obligations.

(v) The Protocol is a framework for the parties that can be adapted by prior agreement to suit the needs of the parties in any particular situation.

(vi) The Protocol does not constitute legal advice, nor does it necessarily provide a defence to complaints of misconduct or of inadequate professional service. While care has been taken in the drafting of the Protocol the Law Society will not accept any legal liability in relation to it.

3.4 Terms used in the Protocol

(i) The term 'solicitor' in the context of the Protocol includes solicitors and licensed conveyancers.

(ii) Terms such as 'seller' and 'buyer' include one person or more than one person.

(iii) 'He' includes 'she'.

(iv) Where reference is made to the CML Lenders' Handbook this only applies where the lender is a full member of the CML and instructs using the CML Lenders' Handbook. Where a lender has elected to instruct under the provisions of the BSA Mortgage Instructions the Protocol should be read as though referring to the corresponding

provisions in the BSA Mortgage Instructions. Where a lender instructs using its own instructions, again the Protocol should be read as though referring to the corresponding provisions in the CML Lenders' Handbook if appropriate.

4. OPERATIONAL INFORMATION

4.1 Stage A: Instructions

At this early stage in the process the main steps relate to preparation for later stages.

It is a regulatory requirement that:

- in appropriate cases the legal capacity of the client is checked in relation to the transaction;
- there is no conflict of interest that may preclude the solicitor or the firm from acting in the transaction.

Since the earlier versions of the Protocol there are now more obligations in relation to checking the identities of the parties and others in the process and completeness of funding arrangements.

The obligations in relation to checking or attempting to check a client's identity are a regulatory matter rather than a Protocol requirement. Lenders have their own requirements in relation to identity checks to be carried out against borrowers. It is important to keep appropriate records of the checks made in relation to a prospective client's identity. The regulations in this regard are designed to be a precaution against mortgage fraud and money laundering.

For these reasons it is also necessary to check the identity of the solicitor acting for the other side.

Recent changes have been made to the CML Lenders' Handbook for England and Wales to provide that lenders are entitled to ask for the details of the other side's solicitors at the beginning of the transaction.

Note also the requirements of the CML Lenders' Handbook for England and Wales Part 1, which provides:

A3.2 If you are not familiar with the seller's solicitors or licensed conveyancers, you must verify that they appear in a legal directory or they are currently on record with the Law Society or Council for Licensed Conveyancers as practising at the address shown on their note paper.

In addition to identity it is also important to consider the position of the parties as between themselves particularly when acting for buyers.

Buyers

If a property is being bought by more than one person the buyers' solicitor will need to take detailed instructions. Buyers should be advised as to the ways in which property can be held in joint names and whether an express declaration of trust should be drawn up. The buyers' solicitor should consider how the beneficial interests will be recorded in the transfer. Whether this is to be recorded by a trust deed or through the transfer itself, the buyers will need to sign the document as a deed. A copy of this should be retained at a later date before application to the Land Registry for registration. Buyers should be made aware that clarifying these matters at this stage may avoid misunderstandings, cost and expense at a future date or in the event of disagreement as to the nature of the trust.

If there are adults who intend to occupy the property but who will not be owners their consent will be necessary in order to ensure that the lender's rights are binding on them. In this respect it may be appropriate for them to be offered the opportunity to take independent advice.

When acting for a buyer establish whether there will be a sale or mortgage of any other property that will be related to the purchase. If the buyer is in rented accommodation establish the possible termination dates of the tenancy, the period of notice and what arrangements need to be made to give notice.

Sellers and buyers

If there is more than one client, for example where the property is in joint names, it is important to check the scope of the authority to act in this situation. You need to have instructions from both clients even if authority is given for one to act on behalf of them jointly for day-to-day communications.

At an early stage the seller's solicitor should obtain the written authority from the client to deal with the lender authorising the release of the deeds and providing a redemption statement.

Apparent title defects

The obligation on the seller's solicitor, at an early stage in the process, to 'consider and advise in relation to any apparent defect in title or missing items in title documents, e.g. missing lease or discrepancies in names or addresses' aims to assist in accelerating the removal of defects that can cause delays. Management company restrictions, missing evidence of rights of way, mismatching of names of registered proprietors and sellers, need to be investigated or rectified by the seller's solicitor. If the registered title shows entries that will necessitate the transfer being signed by at least two trustees or a trust corporation this needs to be considered at an early stage. Other matters that

can lead to delay include a requirement for the landlord's consent in a leasehold transaction or the use of powers of attorney. If an attorney is involved produce a certified copy of the power at an early stage; remember an attorney must act with at least one other person to overreach beneficial interests in land and that the Land Registry has detailed identity requirements in relation to attorneys.

Where a client is selling a house, even before a buyer is located, it assists if the seller's solicitor ensures that terms and conditions, identity documents and such like are dealt with. Downloading official copies may reveal that the register needs to be updated – if, for example, a grant of probate needs noting or if there has been a change of name by deed poll or marriage.

Notwithstanding the above the primary obligation for establishing title remains with the buyer's solicitor and it will remain the obligation of the buyer's solicitor to report on title to his lay client and any lender client.

If the property is leasehold, the seller should supply the information they can about service charges, insurance and ground rent, make enquiries about the landlord and/or managing agents. Sellers will not necessarily wish to put together the full package before the chain is complete, as a result of the cost of doing so and the need to update if finding a buyer takes a long time, but it will assist the process if sufficient information is obtained so that at the minimum it is known where to go and how much it will cost when the need for this information arises.

The seller's solicitor may also advise the seller about the desirability of obtaining searches in advance.

4.2 Stage B: Pre-exchange – submitting a contract

This stage primarily involves the collation of the material necessary to provide a bundle of documents for the buyer's solicitor. The obligations are not wholly prescribed and offer an element of choice. In relation to official copies, these could be obtained by the buyer and it is possible to agree that this will take place. However in circumstances where the seller may give instructions at an early stage, before there is a buyer, requiring the seller's solicitor to obtain the official copies, registered title plan and copies of other registered documents enables them to comply with the requirements to start to address title issues at an early stage.

There is no obligation on sellers to obtain search results for buyers but they may if they wish. If they do so there is no obligation on a buyer's solicitor to accept such searches.

Sellers are obliged to provide building regulation documents and planning consents where they themselves have had the work carried out to the property. Where the seller holds no further information and the buyer's solicitor requires additional copy consents they should establish whether these are available from the local planning authority and pursue the matter direct where such consents are older than 20 years.

4.3 Stage C: Prior to exchange of contracts

The seller's solicitor should provide as much documentation as is possible at the outset and should, without further prompting from the buyer, apply for and supply filed documents. Official copies should be less than six months old at the time of submission. This obligation is designed to lessen the possibility of alterations to the register having taken place between production of official copies, submission of papers and pre-completion priority searches.

The seller's solicitor has an obligation to rectify the register to deal with any updating including a change of name on the death of a proprietor.

The joint Law Society and Land Registry Practice Note: Property and Registration Fraud (11 October 2010) points out that transactions following the death of a registered proprietor are at greater risk from fraudsters posing as executors or the deceased where no note has been made on the register. Updating the register currently carries no application fee.

When the buyer's solicitor receives the contract bundle, the buyer's solicitor is required to notify the seller's solicitor if he is instructed by the buyer's lender or if not to give details of the firm so instructed.

The Protocol requires the seller's solicitor to inform the buyer's solicitor if they are not able to comply with the Land Registry's requirements for any lender for the purposes of the buyer's application for registration to the Land Registry (Land Registry Practice Guide 67: Evidence of identity – conveyancers). It is important that these issues are addressed prior to exchange. Even where it is expected that the discharge will be made electronically, if this is not possible it is likely that the discharge will be made by paper DS1 triggering the identification requirements and this will not usually be known until after exchange and sometimes after completion. See the new provisions in the Law Society Code for Completion by Post.

Planning permission/building regulations

Planning permissions and building regulation consents should be produced where work has been undertaken during the period of ownership of the seller.

Where the buyer's solicitor requires copies of other planning permissions or building regulation consents, he should first check the local authority or planning authority website to seek to download documents directly (for which there is usually no charge) before requesting these from the seller's solicitor.

If planning permissions or building regulation consents are more than 20 years old, the buyer's solicitor should expect to apply directly for (and pay for where necessary) any copies required.

Searches

Following submission of papers, the buyer's solicitor would be expected to request searches, as soon as reasonably possible. If they are to be delayed (for example if the chain of transactions is incomplete) then the seller's solicitor should be notified. It is worth noting that some solicitors routinely do not institute searches until the mortgage offer is made available.

This may save the buyer money but can lead to delay so it is important that the seller's solicitor is made aware of this practice as soon as possible.

It is preferred practice for the buyer's solicitor to ensure that the buyer is aware of the limitations of replies to search enquiries.

Enquiries

The buyer's solicitor should raise only those specific additional enquiries that are required to clarify issues arising out of the documents submitted or which are relevant to the particular nature or location of the property or which the buyer has expressly requested.

They should resist raising any additional enquiry including those about the state and condition of the building which is capable of being ascertained by the buyer's own enquiries or survey or personal inspection. The Protocol includes the longstanding advice of the Law Society as to the type of enquiries to be raised.

It is preferred practice for the buyer's solicitor to ensure that the buyer is aware of the limitations of replies to enquiries and the warranties that should properly be sought.

Purchase price, deposit and incentives

The buyer's and seller's solicitors should advise as to the likely impact on the mortgage offer and the stamp duty land tax liability where apportionment of the purchase price for fittings and contents is suggested. On the information given is the suggested apportionment plainly unreasonable? Might it affect the percentage being borrowed as lenders will generally only take into account the price

paid for the property and not any contents? See www.hmrc.gov.uk/manuals/sdlmanual/sdlm04010.htm.

At the present time when there are real constraints on borrowers, with particular problems for first time buyers obtaining mortgages, many parents, grandparents and others are providing contributions towards the purchase price of the property. Where it becomes apparent that not all of the deposit or purchase monies, other than the mortgage monies, are coming directly from the buyer there are several issues to be considered:

- Does the lender know?
- Is this a matter that should be reported to the lender?
- How is such a contribution to be recorded?
- Should those proposing to advance such monies be advised to first take their own independent advice?

If the property is a new build or new conversion the buyer's solicitor needs to check with the client to see whether any incentives have been provided by the developer and obtain a completed CML Disclosure of Incentives Form completed by or on behalf of the developer from the seller's solicitor. Similar payments may apply in relation to other sales and the client should be asked whether they have received or made any direct payment or intend to do so with the other party.

Such matters must be disclosed to the lender.

If the deposit is held by the buyer's solicitor 'to the order' of the seller's solicitor the Protocol requires the parties' solicitors to consider the terms on which it is held.

Usually if no other discussions or communications have taken place, the terms on which the deposit is held might effectively be that an undertaking has been given by the buyer's solicitor that he is holding the deposit in his client account and will send it to the seller's solicitor as soon as this is requested, notwithstanding any argument between the buyer and seller as to legal entitlement to it.

4.4 Stage D: Exchange of contracts

Points to consider

When the parties are almost ready to exchange it is necessary to check the suggested completion dates with the clients, other solicitors in the chain and, where appropriate, any estate agents.

If there is more than one transaction for a client in a chain consider the order of exchanging – advise the client of the risks of exchanging on a purchase in advance of exchanging on a sale. The aim is to exchange on both transactions simultaneously but this is not always possible.

There is the option for the buyer's and seller's solicitors to deal with the transfer prior to exchange. Many solicitors acting for the seller may draft the transfer and obtain the seller's signature to it along with the sale contract in order to reduce the time required between exchange of contracts and completion. If this is done, the seller's solicitor should submit a copy of the executed transfer to the buyer's solicitor in advance in order to ensure that any corrections that may be required are undertaken prior to completion.

Although the obligation is repeated in the Law Society Code for Completion by Post, the seller's solicitor should provide replies to the questions in the Completion Information and Undertakings standard Law Society form at exchange. At present, it is common for the buyer's solicitor to send a blank form to the seller's solicitor who rarely completes it but rather sends back a standard word processed version of the answers, usually adapted with only the identity of the lender and date of the charge to be discharged.

Some firms when acting for sellers submit the Completion Information and Undertakings form at the outset but that practice is not recommended by this Protocol. This is mainly because this is likely to result in the undertaking to discharge being given a long time in advance of actual completion when there is a greater possibility of the undertakings being given without full and current information as to the sums involved.

Buyer's and seller's solicitors must both consider the type of discharge that may be given by the lender. This is necessary because identification of the lender will be required in paper discharge cases and it may not be certain that a paper discharge will not be the eventual means of discharge regardless of the information provided before redemption takes place.

Insurance

The buyer's solicitor must advise the buyer of the necessity to commence insurance from the point of exchange as required by the Standard Conditions of Sale (SCS). The risks of this will need to be explained. The buyer will need to be advised of any requirements that their lender may have in relation to such insurance, including the perils indicated by the lender in its instructions and the minimum sum insured. It will be a useful exercise for the buyer to investigate the insurance terms available for the property they wish to buy well in advance of the likely exchange date. They may learn much about the property from the terms offered by a number of insurers. As flood risk cover becomes ever more important those insurers who have detailed information about flood risk and

charge premiums that take this into account may be able to provide useful information to the buyer about the likely risks.

The contract regulates the position concerning who bears the cost of damage to the property if this occurs after exchange. The Protocol requires both the buyer and the seller to be advised by their solicitors about the position relating to insurance. Under the latest SCS (fifth edition) the risk of damage passes to the buyer at exchange.

Where the risk in the property has passed to the buyer then the contractual responsibility for any damage becomes that of the buyer. If he or she has insured adequately an insurance claim should produce the amount of the loss allowing completion to take place. However, it is highly unlikely that such funds will be available on completion. This may mean that the contract cannot be completed on the contractual completion date. This may expose the buyer to liability under the contract for late completion.

Even if the buyer has not insured, the SCS provide that the buyer must complete the transaction at the contract price. No allowance is to be made for the value of the damage. However, if the payment under the buyer's insurance policy is reduced because the property is also insured by the seller, the SCS provide that the purchase price will be reduced by the amount of any reduction. In practice it is likely that some sellers will continue to insure particularly where they have obligations to lenders in this regard.

If the property is damaged before completion, a buyer who is obtaining a mortgage will need the lender's consent to receive the advance. The value of the security may well be reduced and there is a risk that the mortgage offer will be withdrawn. In practice it is suggested that some lenders will be prepared to proceed once an insurance claim has been accepted and arrangements have been put in place for the insurance proceeds to be applied to the rebuilding.

Preparation for completion

In applications to lenders for redemption statements it is suggested that it is made clear to the lender that the seller and the seller's solicitor will be relying on their statement in order to give an undertaking. Asking lenders for statements for all and any charges (and giving all account numbers where possible) that they may have over the property is essential.

The buyer's solicitor needs to consider whether the Land Registry early completion policy will apply. He will need to consider the optimum time for carrying out an official search of the register with priority at the Land Registry. It is suggested this should not be too early, so as to leave the

maximum priority period post-completion, and not so late that there is insufficient time for the seller's solicitor to provide any undertakings that will be required if the register has been changed.

The buyer's solicitor should supply the certificate on title and request the mortgage funds and other monies from the client required for completion in good time. Discuss with the buyer/borrower whether the mortgage monies should be requested to arrive the day before completion where the advance is sent by CHAPS, so that completion is not delayed whilst waiting for the mortgage advance to arrive. Advise the buyer/borrower that they may be charged an additional day's interest.

The day before completion endeavour to establish whether there is likely to be any delay and talk to clients if necessary.

4.5 Stage E: Completion

General

Particularly where clients are physically moving on the day of completion it is important to establish whether there is likely to be any delay in completion and if so to let them know.

In relation to undertakings see particularly the SRA warning card on undertakings.

See also 'Accepting undertakings on completion following the Court of Appeal decision in *Patel v. Daybells*' in the Appendices to the Law Society's *Conveyancing Handbook*.

There is no obligation to give or accept undertakings and it may be necessary in respect of certain loans and some lenders to consider making arrangements to have the charge discharged in advance of completion. This is particularly relevant in relation to second and third charges.

Undertakings to discharge the seller's mortgage(s)

The Protocol provides that the seller's solicitor should consider whether an undertaking to discharge the seller's mortgage is appropriate at all.

Having given an undertaking to discharge a mortgage the firm is obliged to pay all monies that might be required, even if these exceed the available sale proceeds.

There are risks involved in giving undertakings and steps should be taken to minimise these particularly in relation to situations where there may be 'negative equity' or where 'flexible' mortgage

products are involved. Many developers will have given 'all monies' charges and the release of an individual property will necessitate specific agreement between the parties and a signed discharge.

'Offset' or 'flexible' accounts where a current account is linked to a mortgage account are relatively established in the residential mortgage market. Solicitors have used various different methods of establishing a 'fixed' redemption figure in these circumstances.

These have included:

- arranging to retain the proceeds of sale or an amount of funds pending the lender issuing the release;
- requesting the lender to 'freeze' the current account at the point of production of a redemption statement (which is only possible in practical terms where the borrower has access to other current account facilities);
- in circumstances where the bank will not freeze the account, asking the client who then agrees not to use the current account once the redemption statement has been supplied;
- asking the client to provide an additional sum to cover spending on this account prior to completion – some ask the lender for the maximum sum that could be withdrawn from the account in order to establish the maximum liability level – this is then the amount requested from the client.

All of these depend on the relationship the solicitor has with the client and his assessment of the matter generally.

Obviously there will be matters where solicitors are not able or willing to supply an undertaking on completion and these types of account may feature in a number of such cases.

As solicitors should not underwrite the process if it is not reasonable for them to do so it may in some cases be necessary to advise clients to obtain bridging finance. As the process cannot assist consumers in these circumstances it is advisable to give notice of these issues as early as possible in the transaction.

Where an undertaking is to be given the form of the undertaking should be considered by both parties' solicitors.

The undertaking in respect of this discharge is often given under the provisions of the Law Society Code for Completion by Post (the Code). The Protocol requires the buyer's solicitor and the seller's

solicitor to adopt the Code without variation unless instructions are given by the client, which are specific to the needs of the individual transaction. Standard exclusions of liability for obligations arising under the Code are a breach of the Protocol.

Where the buyer's lender is separately represented and is not represented by the buyer's solicitor it will be necessary to check what form of undertaking for discharge will be required by the solicitor acting for the buyer's lender as well as by the solicitor acting for the buyer. The solicitor acting for the buyer's lender may require that the undertaking be provided directly to them rather than to the buyer's solicitor.

By adopting the Code the seller's solicitor is under an obligation to send the signed transfer and other agreed documents on the day of completion to the buyer's solicitor.

The seller's solicitor should check that the seller agrees the redemption statement, particularly in relation to penalty or early redemption payments, and advise the seller about mortgage payments that fall due to be paid prior to the completion date.

4.6 Stage F: Post-completion

After completion inform the clients and as necessary the other party's solicitor and the estate agent (for keys) that it has taken place. The seller's solicitor should send the completion documents to the buyer's solicitor under the Code if used. The buyer's solicitor should then file the SDLT return (the client having previously agreed and signed a hard copy). Remember it is the tax return of the client.

Following completion the buyer's solicitor must apply to register the transactions within the priority period of the official search.

The seller's solicitor should provide the buyer's solicitor with the discharge or confirmation that it has been remitted promptly. If the discharge is to take place by form DS1 this needs to be supplied to the buyer's solicitor as soon as it is received. If the lender has discharged any registered charge by electronic means the seller's solicitor should notify the buyer's solicitor when confirmation is received from the lender. If none is received, the Protocol requires the seller's solicitor to contact the lender to obtain such confirmation. When the discharge has been remitted or supplied and the buyer is confident that this has taken place he can confirm that the undertaking in that respect has been discharged.

There can, as solicitors will be only too well aware, be delays in obtaining evidence of the discharge of the existing charge from some lenders. This may mean the Land Registry will implement its 'early completion' policy. This allows registration of the purchase and new mortgage to take place even if

no notification or documentation relating to the discharged mortgage has been received by the Land Registry. It is important to apply for registration within the priority period of the search to retain the protection of the search rather than wait for evidence of discharge. Remember that it is not possible to maintain priority by 'renewing' searches. Priority searches cannot be 'renewed'. It is just fortuitous if no other application has been lodged in the meantime. This is the case each time an application is made to 'renew' a priority search. Were all lenders to provide evidence of discharge promptly these issues would largely disappear.

If there is a restriction in the seller's charge that prevents other dispositions being registered, the buyer's solicitor should request that the Land Registry grant an extension of the time for lodging the discharge to prevent rejection of the application at a later date. Such an extension can usually be requested when the Land Registry raises requisitions.

When the buyer's solicitor receives the title information document (TID) from the Land Registry showing the title of the buyer to the property and the lender's interest they should check its contents including the address(es) for service. A copy should be sent to the buyer, who should be reminded of the benefits of keeping the address(es) for service up to date. The lender should be advised of registration. Lenders have different requirements as to what documents they require following completion and these will normally be set out in Part 2 of the CML Lenders' Handbook.

After completion

Post-completion the obligation to provide a discharge continues. Even if the discharge is provided electronically the seller's solicitor should tell the buyer's solicitor when they are notified by the lender that the discharge has been given. The buyer's solicitor should not wait for evidence of the discharge before applying for registration in an attempt to avoid the application of the early completion procedure. This creates too much risk for the buyer's solicitor. It is not possible to be certain of preserving priority. If another application is made during the currency of the buyer's search by a third party the buyer's solicitor's subsequent search result will be subject to this intervening application. The fact that one might be lucky enough to obtain a further clear search with a new period of priority is not the basis of good practice.

Separate representation

There are sections in Protocol about separate representation. Many lenders have reduced numbers on their panels to such an extent that some degree of separate representation has been introduced by lenders. The buyer's solicitor should make arrangements as soon as possible to ascertain precisely what will be required by the lender's solicitor and if any change in procedure is required, for example, an undertaking for discharge directly from the seller's solicitor to the lender's solicitor,

this should be dealt with as soon as reasonably possible in order to expedite matters, post-exchange.

5. PROTOCOL MATERIALS

5.1 Standard Conditions of Sale (fifth edition)

When sending out the contract bundle, the seller's solicitor should use the latest edition of the Standard Conditions of Sale and should not add further additional special conditions unless they are necessary to accord with current law or specific and informed instructions have been given by the seller that inclusion of such clauses are necessary and are required for the purposes of a particular transaction.

This obligation is designed to stop the multitude of unnecessary special conditions which increase workloads and can militate against co-operation.

Because buyers are often also sellers and sellers are often also buyers the Standard Conditions are designed to provide a fair balance between the seller and the buyer.

See Explanatory Notes to the Standard Conditions of Sale (fifth edition) (Law Society and Solicitors Law Stationery Society, 2011).

Whilst the Protocol is a form of 'preferred practice' and recommends the use of the Standard Conditions of Sale without amendment where appropriate, the solicitor must use his knowledge and judgement and act in the best interests of the client. It is hoped, however, that the Standard Conditions of Sale (fifth edition) will be used with little or no amendment save where the law or clients' instructions require.

5.2 Enquiry forms

The forms that continue in use following the abolition of the HIPs legislation are set out below.

- Property Information Form (TA6)

This form was expanded from the previous preliminary enquiry form both to accommodate HIPs requirements and to raise enquiries commonly requested by buyers. Even though the questions requested to be asked by buyers are not strictly necessary for the production of the form of Certificate of Title set out in rule 3 of the Solicitors' Code of Conduct 2007 they can be useful to buyers generally. There are difficult areas here in the context of caveat emptor but because many sellers are also buyers the

Law Society aims to balance the respective rights of buyers and sellers in the framing of these enquiries.

- Leasehold Information Form (TA7)
- New Home Information Form (TA8)
- Fittings and Contents Form (TA10)

This form sets out those items that are or are not to be included in the sale. It is possible for further sums to be charged for items in addition to the purchase price. This form is to make the position regarding items to be included in the sale clear to buyers and sellers.

Another aspect of matters relating to these items is the reasonableness of the price for stamp duty land tax purposes. To agree a figure that is not just and reasonable for the purposes of saving stamp duty land tax is a criminal offence:

www.hmrc.gov.uk/manuals/sdlmmanual/sdlm04010.htm.

- Completion Arrangements and Undertakings (TA13)

This form has been changed to reflect practice.

5.3 Exchange formulae

The exchange formulae remain A, B and C and these have not changed.

It has always been necessary to record an agreed memorandum of the details of the exchange and any agreed variation of the formula used at the time of the exchange and to retain this in the file.

Agreed variations should also be confirmed in writing to the other side. The serious risks of exchanging contracts without a deposit or with a deposit being 'held to order' should be explained to and accepted by the seller client.

The new version of the Standard Conditions of Sale (fifth edition) makes provision for a record of the exchange on the front sheet of the contract itself although it does not form part of the contract. Such a record can be extremely important if any question about the exchange were raised subsequently.

As those who effect the exchange will bind their firms or other organisations to the undertakings in the formula used, solicitors should carefully consider who is authorised to effect exchange under the formulae and ensure that use of the procedure is restricted to them. They may also want to ascertain the identity and status of the person with whom they are effecting the exchange. Since professional undertakings form the basis of the formulae they are only recommended for use between solicitors and licensed conveyancers.

5.4 Code for Completion by Post

The Law Society Code for Completion by Post (the Code) provides a voluntary procedure for postal rather than physical completion for residential transactions. It outlines a clear structure for the completion process and clear obligations of sellers' and buyers' solicitors.

The objective of the Code is to provide solicitors with a convenient means for completion on an agency basis when a representative of the buyer's solicitor is not attending at the office of the seller's solicitor.

It may also be used by licensed conveyancers.

It contains important professional obligations and practices will need to ensure that it is dealt with at an appropriate level of seniority within the practice.

Solicitors adopting the Code must be satisfied that its adoption will not be contrary to the interests of their client. When adopted, the Code applies without variation unless otherwise agreed.

To adopt the Code both parties must agree in writing to use the Code to complete a specific transaction except if they have already made it clear that they will be using the Protocol in which case the Code is automatically implied.

The Code has been updated and revised and solicitors are advised to take note of the contents of the revised Code and the notes to the Code.

6. REVIEW OF CONTENT AND CONTACT INFORMATION

Users of the Protocol and supporting documentation are encouraged to provide information as to its operation and content. The Protocol and supporting documentation will be updated regularly.

How to contact us

For queries in relation to membership and other matters relating to CQS contact **CQS@lawsociety.org.uk** or 0207 316 5550.

For queries or comments on the Protocol, the Standard Conditions of Sale, the TA forms, the formulae, the Code or these notes contact protocolfeedback@lawsociety.org.uk.