

LEASE CONFERENCES



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The law as stated during this webinar is up to date as of **15 October 2013**



Residential Leasehold Conveyancing Pitfalls to Avoid

Thomas Frith
15th October 2013

Content



- What the seller should do before marketing the property
- What the buyer needs to be aware of before making an offer
- Progress of a conveyance
- Completion and post completion

What should the seller do



Keep all documentation relating to the property in a secure location, especially the following

- Copy of the lease
 - The report on lease and title provided by the conveyancer on the purchase
 - All service charge demands and receipts
 - All ground rent demands and receipts
 - Any correspondence from the landlord/managing agent, especially any Section 20 consultation notices
 - Any electrical installation certificate for works undertaken
- Obtain an Energy Performance Certificate

The lease



Ensure you have a copy of the lease and any head lease. If unavailable get a certified copy from HM Land Registry

Examine the lease and look for:

- Any requirement for the buyer to enter into a direct deed of covenant with the landlord
- Any requirement for a licence to assign
- Are there any restrictions on sub letting
- How many years are left on the lease

The main steps in a conveyance



- A uniform and predictable process governed by established protocols
 - Eg, the Law Society's [Conveyancing Quality Scheme](#)
- The seller puts the property on the market typically through an estate agent
- Basic information is provided to potential buyers which should take into account the [Office of Fair Trading guidance on property sales](#)

Steps for the buyer



- Make an offer that is accepted
- Make a mortgage application
 - Directly to a lender
 - Through an independent broker
 - Through a broker attached to the estate agent
- Instruct a solicitor or licenced conveyancer

What the estate agent will do



- Obtain the details of the seller's and buyer's solicitors
- Send a memorandum of sale to both solicitors detailing:
 - Property address
 - Sale price
 - Name and address of the seller and buyer
 - Name and address of the seller's and buyer's solicitors

What the solicitors do



- Confirm each others' instructions
- NOTE: both solicitors will require funds on account to undertake searches and make enquiries where a cost is involved

What the solicitors do



- Seller's solicitor prepares a draft contract and supplies a copy to the buyer's solicitor for approval along with evidence that the seller is the legal owner and entitled to sell
- Seller's solicitor sends client the Law Society standard seller's property information forms (TA6 & TA7) and forwards the completed forms to the buyer's solicitor
- Based on the answers contained in these forms the buyer's solicitor will raise further enquiries

What the buyer's solicitor needs



- A copy of the lease and any head lease if applicable
- The replies to specific questions put to the landlord or managing agent by the buyer's solicitor via the seller's solicitor
- NOTE: These are fairly standard enquiries and the buyer's solicitor may accept the seller's standard enquiry form. Some larger landlords produce a sales pack containing the information typically requested

Typical additional enquiries (1)



The following are examples of enquiries made to the landlord/managing agent

- Who collects ground rent and are there any arrears
- The last 3 years of service charge accounts, current charges and any arrears or anticipated shortfalls from the current estimated service charge
- Is there a reserve fund and if so what is the balance
- Are there any anticipated major works
- Are there any regulations made by the landlord or manager

Typical additional enquiries (2)



- Supply a copy of the current building insurance certificate and risks covered
- If a deed of covenant by the buyer is required to be entered into supply a draft and the cost of registering the deed
- Confirm the cost of registering a notice to the landlord following the purchase and any mortgage registered against the property
- Are there any existing breaches of covenant by the seller

Potential problems for the buyer



- The answers from the seller contained in the Property Seller's Information Forms or in response to specific enquiries are vague or misleading
- The answers from the landlord/managing agent may be vague or take too long to be completed

Importance of answering enquiries (1)



- The seller's replies can be relied on and a remedy is available to the buyer for any misdescription. The buyer may lose confidence and withdraw from the purchase
- The buyer will rely on the landlord/managing agent's replies and although compensation for misleading or incomplete information is unlikely to lead to legal action there will be a loss of trust and sense of grievance by the new leaseholder

Importance of answering enquiries (2)



- Buyer's solicitor will also act for the buyer's lender and must comply with the lender's instructions in relation to leasehold purchases, which can be found in the Council of Mortgage Lenders (CML) [Lenders' Handbook](#), as well as any special instructions
- A solicitor cannot draw down the mortgage advance where he/she is in breach of their mortgage lender client's instructions

What prevents a solicitor from completing a purchase (1)



- No ground rent receipts or confirmation that ground rent has been paid
- No service charge statements provided
- There is an existing breach of covenant by the seller

What prevents a solicitor from completing a purchase (2)



- The lease is defective
- The lease fails to comply with CML requirements
- There is an original drafting error
- The buyer wants a lease extension
- The buyer's solicitor has been informed or suspects there will be a shortfall on the estimated annual service charge

Solutions (1)



- Seller should keep all ground rent receipts. If not available it may be acceptable to the buyer's solicitor to make an allowance reducing the sale price to pay for 6 years ground rent arrears
- Seller should retain all service charge accounts. If these are not provided the seller could exercise a legal right under Section 21 of the Landlord and Tenant Act 1985 to obtain a summary of the last year's service charge. Do this every year

Solutions (2)



If there is a current breach of covenant seek advice from the solicitor as to the best way to deal with the problem

Options include:

- Remedy the breach if possible
- Seek retrospective consent for the breach before marketing the property
- Take out an indemnity insurance policy acceptable to the buyer's mortgage lender

Solutions (3)



- If the lease is defective a variation to the lease can be obtained by the landlord usually for a fee
- If the buyer wants a lease extension the landlord will typically extend the lease for a premium. Best to obtain a lease extension if it is nearing 82 years unexpired before marketing the property
- If there is a possible service charge shortfall the seller's solicitor can retain an agreed sum from the sale proceeds. NOTE: suggest there is a time limit imposed on the holding of a retention

Unique properties of certain types of leases



- Right to Buy leases under the Housing Act 1985
 - These leases have implied covenants (obligations) imposed on the landlord and leaseholder. See Schedule 6 of the Act. Problems associated with rights of access and repairing obligations are implied
- Homes and Community Agency approved shared ownership leases contain restrictions on who can purchase the lease and the premium payable on a resale

Exchange of contracts, completion and post completion (1)



- Once all pre-contract enquiries have been satisfactorily completed the parties are ready to exchange contracts
- An exchange of contracts is an agreement to complete the purchase on a particular date to hand over the money and the keys to the property
- If there is a chain the estate agents will seek to coordinate all the parties in the chain to agree a date to exchange and complete the purchase

Exchange of contracts, completion and post completion (2)



Between exchange and completion the buyer's solicitor will seek from the seller's solicitor a completion statement

This will contain:

- The agreed purchase price
- An apportionment of any estimated service charge and ground rent paid in advance by the seller
- Any agreed allowance to be deducted from the purchase price

Exchange of contracts, completion and post completion (3)



- The buyer's solicitor provides the buyer with a completion statement detailing all financial transactions undertaken on the buyer's behalf and any funds required to complete the purchase
- NOTE: A solicitor will not complete a purchase unless he/she is in receipt of cleared funds

Exchange of contracts, completion and post completion (4)



- The buyer's solicitor will seek an undertaking from the seller's solicitor that any mortgage registered against the property will be discharged on completion
- The buyer's solicitor will put in place a priority search with HM Land Registry which prevents anyone making an entry on the register for a specified period during the gap between exchange of contracts and the buyer's solicitor's application to register his/her client's ownership of the property

Exchange of contracts, completion and post completion (5)



- The seller's solicitor will obtain a redemption statement for any mortgage registered against the property
- On the date of completion the buyer's solicitor will forward the funds required to complete the purchase. Once it has been confirmed that these have been received in the seller's solicitor's bank account completion has taken place and the keys will be released by the estate agent

Exchange of contracts, completion and post completion (6)



- The buyer's solicitor on completion will send a notice of assignment and charge (sale and mortgage) to the landlord or the landlord's agent along with any fee required
- The buyer's solicitor will pay any Stamp Duty Land Tax (SDLT) payable and obtain confirmation that this has been paid

Exchange of contracts, completion and post completion (7)



- The seller's solicitor will discharge any mortgage and request confirmation of the discharge from the lender
- Confirmation of the discharge is sent to the buyer's solicitor when received
- The buyer's solicitor makes an application to HM Land Registry to register his/her client's ownership of the property

Last things to bear in mind



- All deeds such as transfer deeds, mortgage deeds must be executed (signed and witnessed and undated) and returned to the solicitors before a completion takes place
- Buyers and sellers should not absent themselves between an exchange of contracts and completion of the purchase. Make sure your clients are aware of the need to be available during this period

Questions?



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Upcoming LEASE training



Webinar

Case Law Update
27 November 2013 at 13:00
 At the end of this webinar you should be aware of and understand the importance of recent Court of Appeal and Upper Tribunal decisions on:

- Service charges
- Right to manage
- Collective enfranchisement
- Lease extensions of flats
- Individual enfranchisement of houses

Upcoming training courses

Service charges and residential leases
Birmingham
 Thursday 17 October 2013
 9.30-16.30
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 Tuesday 22 October 2013
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