

The legal aspects of property purchase

LEARNING OBJECTIVES

Your studies in Topic 6 should have given you a clear overview of the stages involved in the property-buying process. In this topic the focus is on the role of the solicitor and the conveyancing process.

By the end of this topic, you should have an understanding of:

- the role of the solicitor or licensed conveyancer;
- investigation of title;
- the information that has to be provided by the vendor;
- key documents including the mortgage deed and contract of sale;
- the work carried out by the solicitor in relation to exchange of contracts and completion;
- work that is carried out post-completion.



THINK ...

Before you start work on this topic, take a moment to think about what you already know about the legal side of property purchase. We have already looked at some of the work involved in investigation of title in Topic 5. Some of the processes in this topic will be familiar to you if you have been involved in purchasing a property.

For instance, do you know:

- what 'carrying out searches' means in the context of property purchase?
- what sort of information has to be provided on a seller's property information form?
- at which stage a buyer gets the keys to their new property?

7.1 What is the role of the solicitor?

It is not absolutely essential for a solicitor to act in a property purchase or sale but, in practice, no lender will consider a mortgage unless the legal formalities are carried out by a suitably qualified person. In the majority of cases a solicitor is appointed, although many buyers now use a licensed conveyancer to act for them.

WHAT IS A LICENSED CONVEYANCER?

A licensed conveyancer is a person who has met specific requirements relating to study, qualification and experience as required by a recognised conveyancing organisation.

Unlike a solicitor, who can deal in a number of legal matters, their qualifications limit them to property-related matters.



NOTE ON USAGE

For the purpose of consistency we will use the term 'solicitor' throughout this topic.

A vital role of the solicitor is to give advice throughout the process of house purchase and creation of the mortgage. Taking on a mortgage is a massive step, especially for a first-time buyer, so all sorts of questions may need to be addressed. Advice might relate to:

- the purchase/sale transaction;
- the mortgage itself and related matters, such as assignment of life assurances; or
- ensuring the property is covered by buildings and contents insurance.

Fees are incurred as the process progresses - we will look in detail at the costs involved in conveyancing in Unit 4. Apart from the solicitor's own fees, fees cannot be refunded once the service (title searches, for instance) has been provided. Some solicitors will reduce their fee if the purchase does not complete, depending on the stage that the process has reached. Aborting a purchase once the legal process has started is likely to be expensive.

7.1.1 Professional negligence

On rare occasions, a solicitor may make a mistake or overlook a significant fact during the process. If the solicitor is negligent, the implications can

be serious. Failure to identify a defect in the title, for example, can cause enormous problems for the owner of the property.

Solicitors, like other professionals, can be sued for negligence in the civil courts by those to whom they owe a duty of care. To establish negligence, the plaintiff must prove that a duty of care was both owed and breached, and that some loss, damage or inconvenience was caused.

In addition to legal redress, solicitors are bound by strict standards laid down by their professional body, The Law Society, which can take disciplinary action against those who fail to observe these standards.

All solicitors carry professional indemnity insurance against claims for negligence. This does not protect them entirely – if guilty of negligence, both their finances and future prospects of business can be severely damaged. Professional indemnity insurance does, however, ensure that the client will be paid in full if damages are awarded.



THE ROLE OF SOLICITORS IN SCOTLAND

In addition to carrying out the legal work associated with house purchase, some Scottish solicitors, particularly in eastern Scotland, act as selling agents for houses. This is attractive for vendors because combining the roles of selling agent and legal adviser in a single firm can result in cost savings and lower charges for the vendor.

Many solicitors have, collectively, established property centres that keep details of a large number of properties for sale, predominantly in their geographical areas. House buyers can visit these centres to look for potentially suitable homes. Several solicitors' property centres produce free newspapers or have websites containing details of properties for sale.

7.2 What is involved in investigation of title?

It is vital that the buyer becomes fully entitled to the property they buy. Investigation of title involves the solicitor making thorough enquiries to establish whether the property is what it is claimed to be and that it is free from restrictions that would inhibit the sale process. It also involves producing a certificate of title to confirm the findings. The certificate of title also confirms that the person who is selling is the legal owner, or their legal representative, and is entitled to sell the property.

Investigation of title requires the solicitor to make searches of various registers. Once these have been carried out satisfactorily, the solicitor can confirm good title.

These investigations are extremely important: any defect in title that is not uncovered at this stage could have very serious repercussions, at worst meaning that the buyer has not purchased what they thought they had.

The issue is equally important to the lender, since defects in the conveyance could mean it is unable to exercise some or all of its rights over the property, which would affect its security. For this reason the lender will insist on receiving a satisfactory certificate of title before it enters into a binding contract with a borrower.

The process of investigating title is becoming progressively more straightforward as land registration is now compulsory in England and Wales, as well as in many areas of Scotland. Registered details of the property, ownership and incumbrances affecting the property are guaranteed to be accurate.

If the title to the property is not free from defects, the solicitor must advise how these affect the security and/or how they may be overcome. For example, further legal work may be required to overcome the problem or, instead, insurance cover could be arranged to protect the lender.

The certificate of title will confirm the borrower's full name as it will be recorded in the legal documents, and show the outcome of the various searches on title that the solicitor has undertaken.

INSURANCE AGAINST DEFECTIVE TITLE

Insurance products have been developed to protect mortgage lenders against defective title. These policies can be specific, or they may be arranged on a block basis. They may be especially helpful where one lender is transferring a book of business to another, where a full investigation of each individual title would be very costly.

The extent of the cover can vary according to needs, but policies can provide cover against a solicitor's failure to identify a title defect, which could include covenants, different types of title, easements and so on. The policies can be arranged to protect only the lender, or the lender, the borrower and any subsequent purchasers.

FIGURE 7.1 WHAT SEARCHES ARE CARRIED OUT?**Land Registry search**

Carried out if the land is registered and involves a search of the property, proprietorship and charges registers.

Land Charges Registry search

Carried out if the land is unregistered to check for puisne mortgages or spousal interests.

Local Land Charges Registry Search and Enquiries of the Local Authority

The Local Land Charges Register identifies details of obligations and restrictions attaching to the property. These records are being transferred from local authorities to the Land Registry, with completion expected by 2025. Enquiries to the local authority identify road changes, town planning schemes and so on, which may affect the property and apply to the land (both registered and unregistered) rather than the individual.

Bankruptcy search

Carried out by the lender's solicitor to ensure that the applicant is not a bankrupt, and sometimes carried out on the vendor to confirm they have the right to receive the proceeds of the sale. A vendor who is an undischarged bankrupt would not be entitled to receive the proceeds of the sale, as their assets are controlled by an insolvency practitioner.

Commons registration search

Checks that the land being sold is not common land. Usually applies where the land is in the countryside and previously undeveloped; or belonged to the Lord of the Manor; or is designated a town or village green.

KEY TERMS**PUISNE MORTGAGE**

A puisne mortgage is one where the lender on an unregistered property does not have the title deeds as security for the mortgage. For unregistered land, the lender holding the title deeds is considered to be the first-charge holder. A puisne mortgage holder is in the same position as a second or subsequent charge holder on registered land.

SPOUSAL INTEREST

Exists where a non-owning spouse has lodged an interest in the property under the Family Law Act 1996.

CAN A REMORTGAGE BE COMPLETED WITHOUT THESE SEARCHES?

It is quite common in remortgage cases for the lender to allow the borrower's solicitor to arrange search indemnity insurance rather than carry out the standard property searches usually required.

The cover protects the homeowner and the lender against any financial consequences that might have arisen as a result of the searches required, and allows the remortgage process to be completed more quickly than normal.



CHECK YOUR UNDERSTANDING I

What can you remember about Land Registry searches and different types of title from your studies in Topic 5?

- a) In which register would you find:
 - i) a plan of the property?
 - ii) details of restrictive covenants?
 - iii) the class of title applying to the property?
- b) What is the most desirable class of title from an owner's and lender's perspective?

7.3 What other work is carried out prior to exchange of contracts?

7.3.1 Information from the vendor about the contents of the sale

The buyer's solicitor confirms with the vendor exactly what is and is not included in the sale (such as fittings and temporary outbuildings, such as garden sheds). The vendor will also be required to complete a 'Law Society property information form (TA6)'. The vendor must answer questions honestly, because if false information is given the buyer could seek redress through the courts if they suffer as a result.

FIGURE 7.2 WHAT INFORMATION IS PROVIDED ON THE PROPERTY INFORMATION FORM?**Property boundaries and responsibility for maintenance****Occupiers***Those over 17; tenants; sold with vacant possession?***Environmental***Eg flood risk, Radon gas, Japanese knotweed**Environmental performance certificate (EPC)***Disputes with neighbours****Notices affecting the property****Services and utilities to the property***Water, electricity, gas, etc***Guaranties and warranties****Insurance on the property****Parking arrangements, including rights for other vehicles****Arrangements and rights relating to the property, including informal agreements****Changes to the property****Planning and building control matters***Buildings insurance cover and relevant claims***Fittings included in the sale or fixtures that are to be removed****Other issues to do with the mechanics of the sale**

**IN
BRIEF**

WHAT ARE FIXTURES AND FITTINGS?

Fixtures are generally those items that are permanent additions to the fabric of the property – ie screwed in, nailed down, plumbed in and so on. Examples would be laminate flooring, fitted kitchen units and built-in appliances. It is normal, unless the agreement specifies otherwise, for fixtures to be included in the sale, whereas personal items (chattels) are not.

Fittings are items that it would be reasonable for a vendor to take with them, including curtains, carpets, freestanding furniture and so on.

Where fixtures are to be excluded from the sale or fittings included, this should be clearly specified in the contract to avoid problems at a later stage.

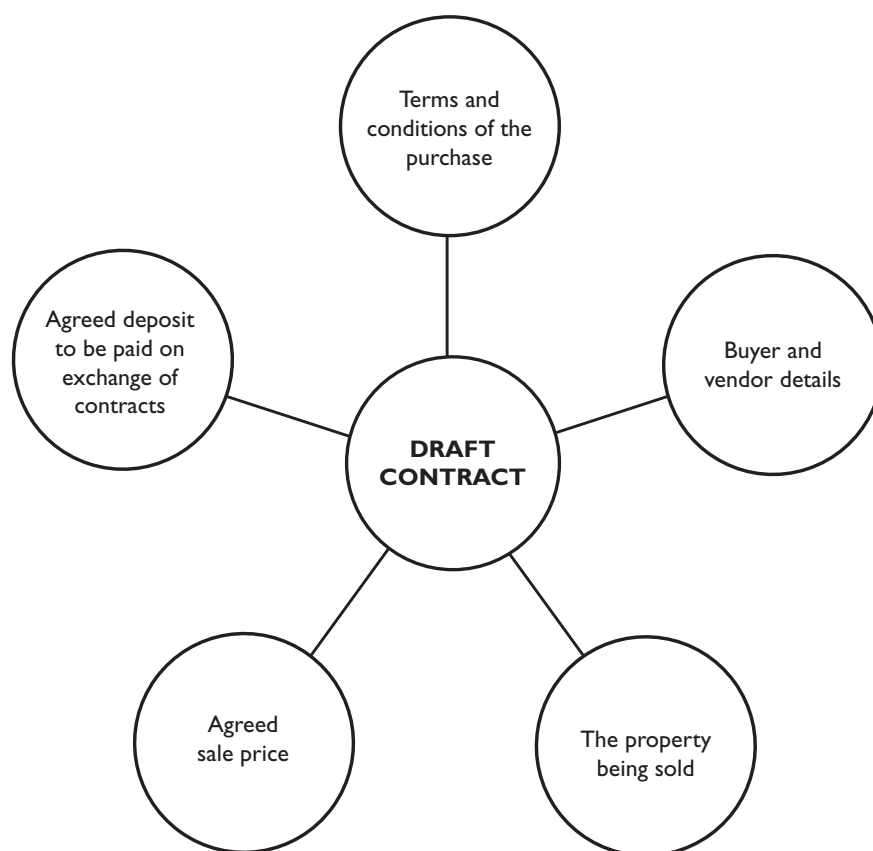
7.3.2 Preparation of mortgage deed

The mortgage deed forms the contract and the buyer's solicitor will carry out the work necessary on behalf of the lender to have the deed ready for completion. This involves liaison with the lender so that the mortgage funds can be transferred in time.

In addition to the mortgage, the solicitor may have to deal with deeds of assignment of life assurance policies, if this is the lender's policy, and other transactions related to the mortgage.

7.3.3 Preparation of draft sales contract

The vendor's solicitor prepares the draft sales contract. As with the seller's property information form, the vendor must be honest in the information they provide, because if false information is given the purchaser could seek redress through the courts if they suffer as a result.

FIGURE 7.3 WHAT DOES THE DRAFT CONTRACT SPECIFY?

7.4 What is involved in exchange of contracts?

Once all the searches have been completed, and the buyer's solicitor is satisfied with the results and has confirmation that a binding mortgage offer is in place (if required), the signed contracts can be exchanged. The amount of the deposit paid at this stage is negotiable: it is customary for a deposit of 10 per cent of the purchase price to be paid by the buyer to the vendor's solicitor, but a lower deposit may be accepted – or even no deposit, in some circumstances.

Regardless of the deposit amount, the vendor can sue the buyer for breach of contract if they do not go through with the purchase having exchanged contracts.



CHECK YOUR UNDERSTANDING 2

Think back to your studies in Topic 6. Contract exchange is the point of no return – the vendor is obliged to sell and the purchaser is obliged to buy. Technically, either party can still withdraw from the transaction, but what consequences might this entail?

A completion date is agreed (in Scotland this is known as ‘date of entry’). The vendor’s solicitor will obtain a settlement figure to repay any outstanding mortgage the vendor has on the property when the sale is completed. If the buyer is selling a property to fund the new purchase, their solicitor will obtain a settlement figure to repay any outstanding mortgage on that property.

The buyer’s solicitor will normally arrange for the buyer to sign the mortgage deed a day or two before the purchase is due to be completed, ready for execution on the day. The deed is a formal and binding contract between mortgagee (lender) and mortgagor (borrower). Its contents and those of any document ‘linked’ to it (such as the mortgage conditions) cannot be varied without the consent of both parties to the contract.

MCOB rules require lenders to make the conditions of a mortgage clear to borrowers. Usually, the solicitor will talk the borrowers through the transaction, telling them the significance of what they are signing.

The buyer’s solicitor sends a draft transfer deed to the vendor’s solicitor for the vendor to sign in readiness to be returned in time for completion. Soon after exchange, the buyer’s solicitor will apply for release of any mortgage money needed to complete the sale, in time for completion.



SCOTLAND

In Scotland, the final acceptance of an offer to purchase (together, ‘the missives’), which must be in writing, is legally binding – a solicitor also deals with this.

7.5 What happens at completion stage?

Completion day is when the property is finally transferred from vendor to buyer. The main event is the electronic transfer of the balance of the purchase price from the buyer’s solicitor to the vendor’s solicitor. The legal charge for the mortgage takes effect at completion because it is not until this point that ownership changes.

Once the money has cleared, the property belongs to the new owner, and they can move in.

7.6 What has to be done after completion?

Once the transaction has completed, the solicitor still has a few tasks to carry out:

- File a stamp duty land tax return within 14 days of the effective date of the transaction and pay the applicable tax. The effective date is usually completion.

- Apply for registration of the new owner at the Land Registry, and for any mortgage to be noted on the register.
- Send a bill to the buyer to cover conveyancing fees and disbursements. (In some cases the solicitor may ask the buyer to deposit a sum of money at the start of the process to cover some of the disbursements as they arise.)

DISBURSEMENTS

Expenses paid by the solicitor on the buyer's behalf, such as stamp duty land tax, registration fees, searches, etc.

**THINK AGAIN ...**

Now that you have completed this topic, how has your knowledge and understanding improved?

For instance, can you:

- explain what searches are carried out as part of the investigation of title?
- list the contents of the 'seller's property information form'?
- explain the difference between a fixture and a fitting?
- summarise the content of the draft sale contract?
- outline the procedures that take place between exchange of contracts and completion?

Go back over any points you don't understand and make notes to help you revise.

Test your knowledge before moving on to the next topic.



Test your knowledge

Use these questions to assess your learning for Topic 7. Review the text if necessary.

Answers can be found at the end of this book.

- 1) What type of insurance must a solicitor have in case of claims of negligence against them?
 - a) Public liability insurance.
 - b) Professional indemnity insurance.
 - c) Partnership insurance.
 - d) Law Society insurance.
- 2) Why is it important for the lender to be provided with certificate of title?
 - a) For insurance purposes.
 - b) To meet record-keeping requirements.
 - c) If the title is defective, the lender may not be able to exercise its rights over the property.
- 3) Town planning issues will be highlighted by a Local Land Charges Registry search. True or false?
- 4) A vendor who is an undischarged bankrupt would not be entitled to receive the proceeds of a sale. True or false?
- 5) Carmen and Joanna had a long-running dispute with their neighbour over his poor maintenance of the boundary wall dividing their properties. On what document were the couple required to declare this issue when they sold their property?
 - a) Key features illustration.
 - b) Disclosure form.
 - c) The seller's property information form.
- 6) Which of the following would usually be classified as a fitting?
 - a) A built-in oven.
 - b) A free-standing wardrobe.
 - c) Laminate flooring.
 - d) A bathroom vanity unit.

- 7) Which of the following would **not** be contained in a draft sale contract?
 - a) Details of the buyer and vendor.
 - b) The agreed deposit.
 - c) The amount of the mortgage loan.
 - d) Details of the property being sold.
- 8) Which of the following processes is **not** carried out between exchange of contracts and completion?
 - a) The vendor's solicitor obtains a settlement figure to repay any outstanding mortgage on their property.
 - b) The buyer signs the mortgage deed.
 - c) The vendor completes a seller's property information form.
 - d) The buyer's solicitor applies for release of mortgage funds.
- 9) The legal charge for the mortgage takes effect:
 - a) from the point where the solicitor registers the new owner at the Land Registry.
 - b) from completion.
 - c) when the lender issues its offer of advance.
 - d) from the point where contracts are exchanged.
- 10) When a borrower is remortgaging, it is possible to minimise the conveyancing work involved by arranging search indemnity insurance. True or false?

