Scrutiny Review Panel: Domestic Property Transactions

I am a solicitor of the Royal Court of Jersey of over 20 years calling and I have specialised in residential and commercial property law and conveyancing for more than 30 years. My submission is based on my experience in property law and my perception of the roles played by various parties.

In connection with the following enquiries:

1. ***"The average length of time that transactions take to progress from offer and acceptance to completion"***

   There is no off easy or pat answer to this question, as the time taken depends on many factors including, but not limited to, the time taken for a seller or buyer to instruct a lawyer, whether the buyer has a property to sell or has agreed a sale with a prospective buyer creating a chain, whether the seller needs to find a property to purchase or will sell and make other arrangements, whether the buyer requires a mortgage, the time taken for a buyer to make a mortgage application, the time taken by a bank to process a mortgage application, the time taken for the banks legal adviser to draft loan documentation, whether and when the buyer instructs a surveyor to survey a property, whether the sale is part of a chain of transactions one dependant on the other, the time taken for the lawyer to check title and attend at the property to check the boundaries and present his or her findings to the buyer, the time taken for the submission of property search enquiries to Parish and Public bodies and service companies and the time taken by them to respond, whether there are title or boundary problems associated with the property being purchased or in the "chain", whether neighbours need to be approached to be a party to a contract to rectify or clarify some issue with a property, whether Title Indemnity Insurance is necessary for a title problem and needs to be obtained, whether there are planning issues, whether there are relationship breakdowns or matrimonial issues of a seller etc.

   In my experience from the date that the buyer gives instructions to the lawyer and assuming no major legal or structural issues the average time taken to convey a property is between 4 to 6 weeks (although in individual cases it can be achieved in both a shorter and longer period). Where the buyer is a true "cash" available buyer and does not need to obtain a loan and there is no chain (no property to sell), the time taken can be as little as a few days or weeks depending on the extent of the legal and physical checks that the client wishes to have undertaken.

   Where there are legal or title problems or issues with the condition of the property arising out of a survey or problems and delays with a bank loan the time taken to convey a property can be extended to 8 to 12 weeks. If a transaction goes beyond 12 weeks then often the issues are so fundamental that one or the other of the parties withdraws from the transaction.

2. ***"The average time to complete a transaction"***

   I refer you to my response to 1 above.

3. Whether there is evidence of:

   As to a ***widespread problem with the late failure of transactions***, I would say that when a transaction fails there will probably be a perception on the part of the seller that the "problem" has been identified at a late date and everything has been done at the last minute and that the problem or issue could and should have been identified earlier. This is, in my view, a naive view of the sale and purchase procedure and can arise because of the buyer or seller's expectations in or anticipation of the sale process or the inherent stresses and strains that can occur during the buying and selling procedure and the understandable disappointment in a transaction falling through.

   It can be and I believe increasingly is, the case that the buyer has, at an early stage, instructed his or her lawyer not to carry out potentially expensive legal work until some predetermined issue of the buyer is resolved. This can often be the case with a buyer not wanting to incur costs until the bank or lender has confirmed whether it will make a loan or the amount of the loan or a valuation/survey has been undertaken on behalf of the bank or lender. This sometimes means a delay until the issue of an offer or facility letter by the bank. The buyer will probably NOT inform either the seller or the estate agent (if there is one) of this intention.

   A bank, once it has received a loan application, will require proof of earnings, proof as to the source of the balance of funds and receipt of a valuation/survey of the property. It can take some time (possibly a couple of weeks) for the buyer to gather, submit and the bank process this information. Buyers are increasingly using the services of a mortgage adviser and this can speed up the process if the adviser is approached in anticipation of buying a property who can, in advance, advise the buyer of the documentation needed by a bank.

   When acting for a seller I am always conscious of the issue that the buyer may have instructed his or her lawyer "to do nothing". I advise my clients that a good early indicator that the buyer is committed to the transaction is if the buyer has approached a surveyor and the surveyor has requested access to the property. If a buyer has an issue, the buyer is less likely to engage a surveyor and incur the costs of a survey and therefore will delay arranging a survey which can be an indicator of an undisclosed problem. Another good indicator is where the buyer's lawyer requests access to the property to view the boundaries, as this shows that buyer and lawyer are committed to the transaction.

   Since 2008 and the marked drop in the value of property, there may be some anecdotally evidence that surveyors have been more cautious when giving valuations for loan purposes than previously. There have been cases where the valuation for mortgage purposes has come out at less than the buyers offer price. Some sellers are both surprised and angered in

cases where the surveyor has valued the property at less than the buyer's offer price, which can cause problems in the transaction.

When it comes to a bank loan, the banks criteria for a loan will depend on a number of things but include affordability by the borrower and a maximum percentage of the value of the property upon which the bank will lend, known as the "Loan to Value". A Bank will look to affordability to establish the amount that it will lend a particular borrower and will rely on the surveyor's valuation in determining the LTV amount that it will loan on a particular property, which may not be the same figure. In consequence where the surveyor values a property for loan purposes at a figure lower than the buyer's offer price this may affect the amount that the buyer can borrow and either the buyer will have to fund the difference from another source or reduce his or her offer price or withdraw.

In certain cases a survey brings to light structural issues, damp, rot, ingress of water issues or other issues, which require further more detailed surveys or investigations and this may delay the purchase process, especially if the buyer's lawyer is "on hold" or may give rise to a buyer's reassessment of the transaction, re-offer (at a reduced price) or withdrawal.

Where the survey is acceptable to a bank or other lender and there has been an instruction to the buyer's lawyer to put matters "on hold" and the buyer has now confirmed "to go ahead" with legal and other searches, a couple of weeks could have passed since initial instructions and in reality the process is, contrary to perceptions, at an early stage and there is a considerable amount of work to be carried out.

I have separately given an appraisal of the legal procedures in conveyancing, but least to say it is a time consuming and laborious process. Where search enquiries are made of Parochial or Public bodies and the various service companies, a response can in some instances be returned in a matter of days and some take a week or more.

All in all, I would say that obtaining search responses on average takes 7 to 10 days (if the letters are sent on a Monday, possibly 4 or 5 days). Depending on the complexity of the individual title, I would say that the average time taken to check a title properly varies between 3 and 5 working days. A site visit is then arranged through the seller's lawyer or the estate agent and it is only when the property is visited that all the information collated by the lawyer from different sources becomes relevant and any title or boundary problems discovered. If at this stage a problem is discovered such as a boundary issue requiring the participation of a neighbour to clarify the boundary or title indemnity insurance being obtained, this can delay the transaction.

If there are issues and matters cannot be resolved, then the transaction may fail at which time the seller may feel that the problem should have been discovered earlier as, in the seller's perception, 4 or more weeks may have passed since the lawyers were instructed and possible 5 or more weeks since the seller accepted the buyer's offer. In the alternative if the transaction does not fail it may take more time, possibly weeks, to resolve issues.

I do not see that there is a "**material negative impact on utility providers from an aborted transaction**", the utility provider has a contract for supply with the seller and that does not change. The utility provider may have more than one search enquiry submitted to it, however and as it charges for responding, it suffers no loss or inconvenience.

If "**Material legal, financial, administrative and other complications remain unidentified until the final days of the transaction process**" then this may arise because of a lack of communication. As regards the repayment of a seller's loan registered against a property this may by necessity be obtained in the week preceding the completion date as the figure is date specific.

Where an additional fee is charged for a separate item of work, due to the transaction becoming more complicated than originally expected (for example arranging the co-operation of a neighbour a party to the transaction), this will only become apparent or be calculated towards the end of the process.

In my experience law firms usually give a quote on legal fees and all disbursements are in addition, these will include stamp duty, bank transfer charges, costs of cancelling existing registered loans, in connection with some share transfers and flying freehold sales the administrative fees of the company or association secretary, search fees charged by states departments, parochial authorities and service companies, surveyors fees etc. Buyers often forget the impact of disbursements and may consider that fees have gone up, when in reality they have not.

It is, in my view, both incontrovertible and unavoidable that where a transaction fails there will be costs and fees incurred by both parties and the later the time or point in the process that this occurs, the greater the costs, expenses and fees will be.

4. "Whether there are :
Specific bottlenecks affecting the average rate of progress of transactions
If so, specific options for alleviating such bottlenecks"

The major bottlenecks for most transactions are as follow:

A seller is sometimes told that a buyer is a "cash buyer" when in fact this is not true or what is meant is that the buyer needs to obtain a loan. Equally a seller may be told that the buyer has a property to sell but it is sold, but actually the buyer lower down the chain needs to sell a property which may not be sold;
a seller or buyer failing to give proper instructions in a timely fashion;
a seller or buyer failing to provide compliance (ID, address and source of funds) documentation in a timely fashion;
the buyer's availability of funds for the transaction, principally the availability of a bank loan, but can include a buyer not wishing to break a deposit on an account or having to sell other investments or having to obtain funds from a settlement (such as a divorce);
a transaction forming part of a chain of transactions one dependent on another;

a buyer not instructing his or her legal adviser to carry out legal searches and enquiries early in the procedure;

a buyer not wishing to commit to expenditure until he or she is sure that he or she can complete the transaction or until some precondition, often only known to the buyer, is satisfied;

lawyers acting for buyer's in a chain are sometimes reluctant or are slow in providing information about the processing of associated transactions or if there are likely to be problems or delays;

a buyer or the bank from which he or she borrows not instructing a surveyor at an early stage;

a bank lending against a property not processing a buyer's loan application in a timely fashion;

a buyer not supplying financial details to his or her lending bank in a timely fashion;

a seller or a buyer withdrawing from a transaction for no apparent reason (not a common occurrence but does occur);

problems in the title or with the boundaries of a property;

in relation to share transfer sales, problems with the company records (frequently the case);

that contracts can only be passed before the Royal Court on a Friday and if that date is missed the transaction is delayed for a week at a time.

Options to alleviate bottlenecks

The law should be changed so that (as in the UK) the sale of a property can be executed by a signed document registered with the Registrar of contracts (exchange of contract) rather than the present system of passing a contract on a Friday on oath before the Royal Court. This should also enable transactions to be effected on any week day. This would undoubtedly speed up the process and reduce delays. This would require a change in the manner in which the contract is passed so that the contract contains a legally enforceable affirmation or undertaking to abide by the terms of the contract (currently a seller and buyer take an oath before the Royal Court).

A further benefit that could arise from such a change would be that the law could be changed (by a statute) to provide the Royal Court with power to enforce a contract (specific performance) where a buyer or seller (mostly seller) acts in breach of an agreement for the sale of the property. An addition benefit is that such a change might stop the practice of gazumping and gazundering.

Buyers, especially first time buyers, often and in my view naively, wish to reduce or avoid costs involved in the purchase of a property and this is especially the case as regards the physical condition of the property and a survey. There are a number of different surveys, including a valuation/survey, general survey (sometimes a called a "Homebuyers" survey) and a full structural survey. In addition surveys or inspections of the drains or electricity supply or the quality of water (especially where there is a borehole) can also be undertaken as indeed can specialist surveys for damp, rot or insect or fungus infection. As I have already stated it is for the buyer to decide which and how far he or she wishes to go with surveys

and inspections. In effect the buyer takes the "risk" if he or she does not carry out appropriate searches, inspections and enquiries.

It is extremely important that a buyer undertakes the fullest survey of the property, having regard to the age and general condition of the property. Not always is a full structural survey necessary, however and where issues arise there can be delays where additional surveys and inspections are identified, usually with the identification of remedial works and consequently costs, which a buyer may not wish to carry out or where the buyer will wish to re-negotiate the deal. Identifying physical problems early will avoid delays and chains falling through at a late stage

A seller could be required to provide to an interested party, when placing the property on the market, a survey of "general condition" (not a valuation of the property) upon which the buyer can rely. This would identify the general condition of the property and the surveyor would also identify issues, including whether a buyer should have a full structural survey or carry out a survey or inspection of the drains and other services or the like. In this way problems and delays arising in transaction where a surveyor for a buyer identifies an issue which goes to either the value or the necessity or cost of additional works would be apparent before the buyer makes his or her offer and more than likely avoid subsequent re-negotiation of the sale price mid process.

I believe there should be a pre sale disclosure by a seller of facts known to the seller in connection with the property. These should NOT be considered as warranties or guaranties but solely reasonable answers within the knowledge of the seller. In giving an answer a seller should not be attributed with the knowledge and experience of an expert or specialist (such as a lawyer, architect, surveyor, builder, electrician, plumber etc.) and the seller should not have to surmise any potential problems or issues eg whether planning permission might be given as regards a neighbouring property or whether works to stop damp (which may have been treated and has gone away) might come back.

I attach the UK Law Society approved form for residential sales disclosure (which is sent out during the sale process) together with a Florida State version which is completed by the seller when the property is marketed and given with the agent's details. Both clearly state that disclosure does not obviate the need for a buyer to carry out a survey or other searches, interestingly the Florida version clearly states "**It is not a substitute for your own personal judgement and common sense**", a sentiment which I wholeheartedly affirm.

I also attach an example of a Florida State offer form. Put simply in Florida an offer is made by a buyer in a written form and the seller then has a number of days to accept the offer or reject it. If the seller rejects the offer then there is no binding agreement, but if he accepts it he counter-signs the offer document which becomes conditionally binding. The seller can make a counter offer and if the buyer accepts the counter-offer (again within a fixed period of time) then there is a conditionally binding agreement and if he rejects it the parties go their own way.

I would note that the Florida conditional agreement sets out whether a buyer has "Cash" or whether a loan is required and can be made subject to the buyer's own sale of a property. I am aware that buyers often submit with their offer proof from a lender that they can obtain a given loan (which may require the co-operation in Jersey of banking institutions). There is more than one type of form and the buyer can elect to take the property as is (see addendum) or there is a mechanism for the seller to fix problems arising from a survey. There are fixed timescales by which a buyer needs to apply for a bank loan, carry out a survey, inspect boundaries and for matters of title to be dealt with (title is dealt with through a title insurance scheme not relevant to or available in Jersey).

All property is bought in the condition in which it exists on the day of passing contract and the legal obligation is on the buyer to establish the condition of the property. A defects clause is included in all contracts to the effect that the property is bought with all defects as may be apparent and which may be hidden and this relates both to legal issues but also physical ones. A lawyer will be engaged to check the title to the property and the position of the boundaries, but is not qualified to carry out a survey of a property. The purchaser may engage a surveyor, engineer or even builder to carry out an inspection or survey of the buildings, drains and services, however a surveyor can only give an opinion on the physical state of a property and is not going to advise on the title of the property. It is for the buyer to decide the checks he or she wishes to undertake and by whom (some rely on their own opinion), but the responsibility of establishing the true state of a property, ultimately lies with the buyer not the buyer's advisers.

In general terms and upon receipt of instructions the conveyancing procedure is:

1. Receipt of instructions from client;
2. Provision of compliance documentation by client (identity and address and if applicable source of funds);
3. Seller's lawyer prepares a draft contract. In doing this the lawyer will obtain from the public registry the contract of purchase of the seller and where in French will translate it into English. It must be understood that French terms cannot necessarily be translated literally from French to English and in the case of a dispute the Royal Court will interpret a clause in the language in which it is created. The seller's lawyer will access the Public Registry online and will check for any additional contracts passed by the seller and where relevant to the property and effects a change in the boundaries or servitudes and restrictions (easements as in the UK) alters the wording appropriately. The lawyer will also check neighbouring properties to establish whether neighbours have sold so that the contract correctly reflects the property and neighbouring boundary claims as at that date;
4. The seller's lawyer will send the draft contract to the buyer's lawyer together with a location map;

5. On receipt of the draft contract and assuming the buyer's lawyer has (upon instructions from the buyer) also completed compliance formalities, the buyer's lawyer will write to service companies the Parish and States Departments and Ministers to enquire of any facts which a buyer should be aware of eg planning permissions, service cable or pipe runs. The buyer's lawyer will access the Public Registry and check all contracts relevant to the property and the seller's title to the property for a period of at least 40 years (property can be acquired by unchallenged possession for 40 years and some lawyers will carry out further checks of each contract back to when the property was land as often there are restrictive clauses established on first sales which in the past were not brought forward in subsequent contracts). The buyer's lawyer will also check the contracts of neighbouring properties to ensure that there are no conflicts between the relevant contract and the neighbours title claims. The buyer's lawyer will write with a number of questions as regards the property. The buyer's lawyer will collate the information and will attend at the property to examine the boundaries;
6. The seller's lawyer will provide the buyer's questionnaire to the seller and formulate a response and return that to the buyer's lawyer;
7. The seller's lawyer will obtain a settlement figure for the seller's loan (if any);
8. At an early stage the buyer should have made an approach to a bank for a loan and submitted compliance and finance records for the consideration of the bank's lending team;
9. At an early stage the buyer should arrange a survey or other inspections as the buyer considers appropriate;
10. Once an offer letter has been received by a buyer from his or her bank the buyer must sign and return it to the bank and at that point the bank will then instruct it's lawyer to prepare loan documentation and submit it to the buyer's lawyer. This usually happens in the later stages of the transaction process;
11. The buyer's lawyer should arrange to meet with the buyer, read through and explain in detail the draft contract and title implications, read through and explain in detail the loan documentation to the buyer, sign the loan documentation and return the same to the bank's lawyer (this usually has to be no later than Thursday lunchtime or a bank may not lend) for that Friday. The buyer's lawyer will provide a settlement statement and obtain from the buyer the relevant funds sufficient to complete the transaction;
12. The seller's lawyer will arrange to meet with the seller explain the sale documentation to him or her, arrange for the exchange of keys and for the seller to be in court for that Friday or the seller may appear by his or her attorney. The buyer's lawyer will arrange for the buyer to be in court for that Friday or the buyer may appear by his or her attorney;
13. The bank's lawyer will arrange to register a charge against the property;
14. Where there is a title problem a borrower's bank may not lend to the borrower without the problem being rectified. This may be resolved by a neighbour being approached to be a party to a contract or for title indemnity insurance to be obtained to compensate the buyer in the event where a neighbour contests the title issue. In variably resolving title issues takes time, the co-operation of neighbours (who may not be prepared to act swiftly but who may wish to consider a request carefully) and additional legal and other costs.