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22 April 2016

Dear Sirs,

Scrutiny Review Panel: Domestic Property Transactions

I write further to your letter of 8 April 2016 to the Jersey Law Society with regard to your review of Domestic Property transactions in Jersey.

I am the Partner in charge of the Property Department at Collas Crill, one of the larger property practices in the Island with a team of eight property practitioners and two secretaries. Our property practitioners have in the region of 160 years experience between them and so hopefully, the response below, which has been contributed to by all the people in my team, will be of assistance to you.

Dealing with your specific questions:

1 The average time that transactions take to progress from offer and acceptance to completion.

In our view, the minimum time frame required to complete a transaction is 3 to 4 weeks.

The passion and emotion that are so intrinsically connected to property ownership stems largely from the fact that every property is different. In a similar vein, no two property transactions are the same and there are a mass of factors which could influence the time frame from offer and acceptance to completion. Broadly speaking the process can be split into three stages.

Firstly: The preparatory stage which incorporates take on and instruction. Once a sale has been agreed, all firms have strict compliance procedures which must be followed and engagement letters need to be signed and returned before we commence any work. Often clients request a delay at this stage until their survey has been conducted, or some transactional issues have been addressed. Once these initial formalities have concluded the first requirement in any conveyance is the preparation of a draft contract by the seller's lawyer. This often requires a fair amount of research, so that clauses established in title and subsequent transactions can be merged into one document and finally the translation of these clauses and contractual information is required from French to English (in the majority of cases). A similar updating process occurs with title investigations needed for the neighbouring properties. We also send property enquiries to the various utility companies, Parish

and Island authorities at the outset. A week would be a fair time estimate for this first phase to complete.

Secondly: The investigative stage. Once a purchaser's lawyer has received a draft contract he/she will commence title researches. Title checks can be extensive and historic contracts must be reviewed back until a point in history when there was last an open conveyance of the property more than 40 years ago. When we are dealing with inherited properties, title checks can often extend back into the 1800's or beyond, before we reach a registered alienation of the property and depending on the number of transactions entered in to by the predecessors in title of the seller, the work load can vary dramatically. This process must be repeated for every conveyance. When we are happy that title is in order we attend each property to ensure there are no boundary defects, service or access issues which may need rectifying. A second week should be allowed for this part of the transaction.

Thirdly: Trouble shooting. After title researches have concluded and we have attended the property we begin trouble shooting any issues. We review the responses to our property enquiries and request a number of confirmations based on our researches from the seller's lawyers. Any issues or responses which cause concern are addressed and the time incurred by remedial action can set matters back. At this stage we also approach any neighbours or third parties if we require their participation to rectify contractual issues or anomalies. The involvement of third parties will almost inevitably cause a delay. In a vanilla sale where no issues arise this final stage can be concluded in about a week.

It is worthy of note that simultaneous to the legal progress of any transaction, surveyors and other specialist may be attending the property and in the majority of cases lenders are procuring facility arrangements and formalising loan agreements. The time frame required by lenders and surveyors is generally between 4 to 6 weeks depending on workloads.

In conclusion, a faultless transaction with no delays could take place in a minimum of three to four weeks. This assuming that neither the law firms involved, any lender or any surveyor is set back by either property issues or business workloads and all purchasers and sellers are proactive in the production of documents and information.

2 The average time to complete transactions

Our experience is that the industry norm is 4 – 6 weeks from offer to completion. The time frame is generally set by Estate Agents at the start of a transaction to allow a week or two's grace on top of the basic temporal requirements, to account for variations in workloads and possible issues. Inevitably some transactions are set back by weeks or even months depending on the specific circumstances. Significant factors which contribute to longer time frames being suggested at the outset are the burden of long transactional chains (an endemic problem for a property market restricted to a closed island) and seasonal market fluctuations, which add pressure and tend to increase the time taken for transactions to complete. We would suggest as a rough guide that circa 70% of transactions complete within the allocated window, 25% of transactions suffer some form of delay and 5% of transactions fall through.

3 Whether there is evidence of:

(a) widespread problem with late failures of transactions

Thankfully there is not.

You will be aware that in Jersey either the vendor or the purchaser can withdraw from a transaction with no recompense to the other party, all the way up to the contract passing before Court. As suggested only about 5% of transactions ever fall through, the majority of which result from mutual agreement between the parties involved. Rare circumstances of failure driven unilaterally tend to be;

- Vendor withdrawal. This is extremely rare. With the residential property market being hit by the recession in 2008, it has very much been a buyer's market and whilst the market has recovered, it is certainly not as buoyant as it was pre 2008 and, therefore, there has been very little evidence of vendors withdrawing from transactions late in the day. Where failure is led by the vendor it is normally owing to a failure further up the chain or where there has been a compelling change in personal circumstances. In respect to gazumping, we have only seen one example of gazumping in our combined experience during recent times. In the vast majority of cases transactions fall apart because prices are forced down rather than receipt of a higher offer from a third party.
- Purchaser withdrawal. Whilst there is more evidence of this than vendor withdrawal, thankfully it is unusual. A purchaser may pull out voluntarily by getting cold feet due to nervousness created by a survey which highlights concerns, contractual issues, or advice on the property given by his/her lawyer. Again, with it being a buyer's market we do occasionally witness last minute attempts by a purchaser to reduce the price or "price chip" and if the revised price is not agreed a purchaser may withdraw from the transaction. Attempts to reduce the price could potentially be without genuine reason, however without justification, are unlikely to be fruitful. Alternatively (and more usually) they may be due to concerns from a survey, typically where the valuation comes in at less than the agreed sale price, or where there is a structural issue with the property. Less commonly a price reduction is requested owing to a deficiency in title or boundary issues (however such issues are normally resolved through the participation of a third party to the contract). A fundamental requisite to price chip requests is the discovery of something detrimental to the value of the property and inevitably this will only occur later in the transaction. In our experience, most price drops are justified and although this can leave a bad taste in the mouth of a vendor, the adjustment reflects the true value of the property being sold. In most instances of Purchaser withdrawal the result is due to a lack of agreement as to a revised price.

The purchaser may also have to withdraw involuntarily as a result of the following: the lawyer being unhappy with title to the property, boundary defects, or insufficient service or access rights, title defects or due to a poor survey leading to a Bank refusing to lend. In terms of title defects and boundary issues there is no doubt that it is now harder to get transactions over the line. The property market is more cautious, lawyers are generally more nervous about taking a view on minor matters and lending banks can sometimes refuse to lend due to issues with the property that ten years ago would have been accepted.

- (b) **Transactions that are aborted at a late state tend to cause one or more parties to incur significant legal and other fees plus considerable inconvenience.**

In terms of inconvenience, I would repeat my comments in 3 (a) above.

In terms of legal fees, we as a practice look at each case on its merits. If a vendor client has been badly let down, we are likely to send a reduced invoice together with an agreed fee for when the vendor gets another purchaser, or where an alternative purchaser arrives quickly honour the original quote. When dealing with a purchaser, we would ordinarily look to halve the bill, again, offering a good deal on any subsequent purchase. Purchasers will also be liable to pay search letter costs to local authorities which currently stand at £311.50. Unfortunately, if purchasers incur surveyor's fees they will be unable to get those reduced as the work will have been fully concluded.

- (c) **Material negative impact on utility providers and other third parties arising from aborted transactions –**

We are not aware of any evidence of this. Our understanding is that most service providers will not book in to connect a property until contract has been passed.

- (d) **Material legal financial administrative and other complications remaining unidentified until the final days of a transaction process.**

As mentioned above, the time frame set at the start of any transaction leaves little margin for issues. Inevitably complications cannot be identified until late in the process by which time completion will be looming. The knock on effect of this is that purchasers may be required to make important decisions late in the day as to whether they wish to proceed and lending banks equally need to decide whether they are willing to lend. The expectation of the general public is for transactions to happen as quickly as is possible. The conveyancing process in Jersey is far more expedient than most jurisdictions and unlike jurisdictions which have a two tier completion process, when transactions run smoothly in Jersey we are able to turn matters round in an incredibly short time frame. I do not believe that any forced elongation of the process would be beneficial, for example, if the industry expectation changed so that completion was anticipated to take say 8 weeks, on the presumption that 4 weeks are allowed for standard procedures and a further 4 weeks to account for any issues that arise, then we would unnecessarily be penalising the vast majority of transactions, in an attempt to reach a standard transaction length. In practice this simply wouldn't be achievable, owing not only to the individualistic nature of transactions, but also the complicated nature of our local property law.

4 **Whether there are:**

- (a) Specific bottlenecks affecting the average rate of progress of transactions.

I would say that there are four main issues causing the bottlenecks:

- Market fluctuations in the number of transactions being registered. The number of practitioners remaining constant throughout;

- Ever increasing laws, regulations and red tape affecting property in Jersey leading to more time needed to be spent on carrying out checks and many more questions being asked of a vendor's lawyer;
- Cautiousness of legal firms, surveyors, lending banks and other professionals in dealing with Jersey property. A legal fraternity moving from common sense to caution as a response to a more commercialised island and lending practice.
- A lack of legislation which allows remedial action for common property deficiencies. Particularly in respect to boundaries and services/access rights.

(b) Specific options for alleviating such bottlenecks.

It is very difficult to know what to suggest in this respect. You cannot force law firms to carry out their title checks and researches more quickly, or in a set time frame for completion as no two transactions are ever the same. Even if some kind of presale agreement sign up became the norm, as is prevalent in other jurisdictions, the same issues would occur leading up to the initial sign up and in essence, this would just add an extra 2 or 3 weeks to the typical transaction length.

NB: Many clients instruct their lawyers to hold fire on carrying out title and boundary checks until they have had survey results and formal mortgage offer approval.

One thing that may help is for the profession to agree a uniform set of property questions that a purchaser's lawyer wishes to ask a vendor's lawyer, so that this can be sent out and addressed at an early date and also for a standardised approach to (and uniform understanding of) what constitute real property issues requiring rectification.

The greatest hurdle we suffer as a profession is that the substantial laws which govern property work are ancient, archaic and to some extents past their sell by date. Laws affecting title to properties could be addressed to make the process less complicated or less onerous. New laws could be drafted which determine the ownership of enclosures which are established, for example, between neighbouring properties with agreement. At present where there is any uncertainty, a contract of ratification is required before the Royal Court to resolve the same. In England the Party wall Act and other legislation, coupled with the presence of boundary surveyors goes some way to alleviate this burden.

Service providers have statutory powers to establish and maintain services, yet these powers fall short of ensuring that any house which is connected to mains services has a right to remain so connected and to maintain such services. Clearly a person should not be able to establish services across the land of a third party without permission, but if there were a simpler means of formally agreeing rights for access, services and boundaries with a neighbour, then it would remove some of the more substantial causes of transactional delay.

The limitation of completions to a Friday afternoon can cause frustration when transactions are delayed. Having to wait an additional week between completion

dates can cause serious complications. The availability of a single day to pass contract also places a huge burden on service providers, removals companies and industry professionals.

As an aside, I have personally and quite recently driven the re-formation of a Law Society Conveyancing Sub-Committee to address many of the issues highlighted and iron out common difficulties that are caused to certain conveyancing practices.

5 Any other matters relating to the existing system of domestic property transactions arising trough evidence gathered.

The system is not perfect and as we know. Whilst every firm has experienced deals falling through late in the day and the trauma it causes clients, thankfully examples of this are few and far between. The one good thing with a fixed Friday Court date is that it actually tends to focus people's minds to get the job done and drives a cyclical weekly pressure which forces many matters over the line. The nostalgia and historic significance of the Friday Court is also warmly received by the vast majority of home buyers and should not be overlooked.

Pre-sale agreements are available for complicated transactions, or where for instance transactions have completion dates set some months down the line or dependant upon some contingency. Such agreements of sale are entered to tie the parties into the later completion date, however these agreements would not suit most transactions, would cause an unnecessary delay and tend to contain loop holes which can cause great irritation to clients.

Collas Crill also has a UK property offering. The UK process has a system of exchange then completion, so the clients once they have exchanged know the date upon which they are you complete. Whilst this gives them certainty once exchange has taken place, reaching the exchange part of the deal can have many of the same problems as getting a Jersey conveyance straight to the Royal Court for completion within a matter of circa 4 weeks. It should also be noted that by comparison the current Jersey system of conveyancing is generally far quicker than the UK as well as many other, if not most other jurisdictions.

I hope the above is of assistance but please do not hesitate to contact me if you have any further queries.

Yours faithfully,

Paul Harben
Partner