

### Question 1 - Commentary

This question will appeal to those students who have had some practical experience of conveyancing. To score high marks it is important to answer the question according to how exchange ought **properly** to be carried out. Bear in mind that the prescribed methods of exchange (in particular the telephone formulae) do not always correspond with general practice!

Those students who rush into their answer may fail to appreciate that the question does not ask you to appraise the different formulae for telephonic exchange. It asks you to discuss the various **methods** of exchange that is personal, postal, or telephone. Notwithstanding that you can show your expertise on the Law Society formulae for telephonic exchange, you will regrettably fail the question if you discuss only the telephone method.

As well as covering the relevant ground, you must give your opinion as to the suitability or otherwise of each method as they apply to the facts, and indicate the time at which the contract under each method will become binding. The fact that the Standard Conditions of Sale and Protocol are being used is relevant.

Part (b) also raises practical issues concerning the considerations a solicitor should have before agreeing a completion date on exchange of contracts. Those students who have had practical experience of conveyancing should find this straightforward, but others may experience difficulty. Do try to keep focused on the facts of the case, which inevitably will offer clues. For example, here note the existence of a long chain and the fact that the client needs a mortgage.

Finally, as always, note the allocation of marks and apportion your time accordingly.

### Question 1 - Suggested answer

ABBHEY & RICHARDS, SOLICITORS  
INTERNAL MEMORANDUM

**To: Training Partner**  
**From: Trainee Solicitor**

- a) There are three methods of exchanging contracts:
- (i) in person;
  - (ii) by post (or document exchange); or
  - (iii) by telephone.

#### (i) In person

Both parties' solicitors meet at the office of the seller's solicitors. Each has their own clients' signed contracts and the buyer's solicitor holds a cheque for the deposit. The solicitors check that the two contracts are identical and that the seller's contract has been signed by the seller and the buyer's contract signed by the buyer. When both solicitors are ready to proceed, the contracts are physically exchanged - the buyer's solicitor receives the seller's signed part and

*vice versa*. The buyer's solicitor also hands over the deposit cheque. It is at this moment of physical exchange that the contract becomes legally binding.

A personal exchange is recognised as being the safest method because it is an instant exchange and both parties can check there and then that the contracts are identical. However, in Tom's case there is a chain and he must synchronise his sale and purchase. An exchange in person will therefore not be suitable. We must also bear in mind that Tom's seller's solicitor's office is 40 miles away, making a personal exchange on Peartree Cottage impracticable.

(ii) By post or document exchange

The buyer's solicitor sends to the seller's solicitor, by post or document exchange, the buyer's signed part of the contract and cheque for the deposit. Upon receipt, the seller's solicitor inserts the agreed completion date on both signed contracts and dates them. To effect the exchange, the seller's signed part is posted or sent in the document exchange to the buyer's solicitor.

As the contract incorporates the Standard Conditions of Sale, Condition 2.1.1 provides that the contract will come into existence when the seller's part is actually posted or deposited at the document exchange. An exchange by this method will not be suitable in Tom's situation (where there is a chain), because there is a danger that Tom's buyer may withdraw between the time when Tom's seller's contract is posted and the time we receive it. This would leave Tom with two houses.

(iii) By telephone

This is the most popular method of exchange and was given judicial acknowledgment by the Court of Appeal in *Domb v Isoz* [1980] Ch 548. It will nearly always be appropriate where there is a chain of transactions and will be the most suitable method for us to use in Tom's sale and purchase. The contract will become binding as soon as the parties' solicitors agree over the telephone that exchange has taken place.

The Protocol is being used so if we decide to exchange by telephone, we must adopt one of the three telephonic exchange formulae introduced by the Law Society to avoid uncertainty. They are as follows:

*(1) Formula A*

The seller's solicitor holds both signed parts of the contract and the buyer's deposit. In the telephone conversation the seller's solicitor confirms to the buyer's solicitor that both parts of the contract are identical. The solicitors agree a completion date, which the seller's solicitor inserts in the contracts. The solicitors then effect the exchange and, by doing so, the seller's solicitor undertakes from that moment to hold the seller's signed part to the buyer's order, and to send to the buyer's solicitor that day by first class post, document exchange, or hand delivery, the seller's signed contract. Formula A can also work in reverse where the buyer's solicitor holds both parts, but this is less common.

*(2) Formula B*

This is where each solicitor holds his or her own client's signed contract. In the telephone conversation they confirm that the respective parts are identical and insert the agreed completion date. They then effect the exchange and by doing so undertake to hold the contract in their possession to the other's order and to send it to the other that day by first class post, document exchange, or hand delivery. The buyer's solicitor must also send the deposit cheque. Formula B is the most commonly used formula.

Following exchange under Formula A or B the solicitors must record on file the following: names of the persons who agreed the exchange; date and time of exchange; completion date; the formula used and any agreed variations; amount of deposit.

### *(3) Formula C*

This is designed for use where there is a long chain of transactions and would be suitable in our case. As with Formula B, both solicitors hold their own client's signed contracts but, to aid synchronisation along the chain, the formula is in two parts. First, the buyer's solicitor undertakes to exchange by an agreed time later in the day, if the seller's solicitor so requests in a call back (the client's authority should be obtained before the undertaking is given). Each solicitor makes a detailed written note of the conversation. The seller's solicitor then activates the same procedure in the next link up the chain, and so on, to the top.

The second part of formula C occurs when, starting at the top and working down, the respective seller's solicitors ring back their respective buyer's solicitors by the appointed time to effect the exchange. The contracts are then sent out that day as with the other formulae. The parties may agree (on specified terms) that the buyer's deposit is sent directly to a solicitor further up the chain. Following exchange, the solicitors should make a second note, recording the actual exchange.

In conclusion I recommend that we exchange by using one or more of the telephone formulae.

**b)** The traditional period between exchange of contracts and completion is 28 days but these days the parties normally agree a much shorter period. As the contract incorporates the Standard Conditions of Sale, condition 6.1.1 stipulates that the completion date shall be twenty working days after the date of the contract. It is more usual however for the parties to agree a specific date, which is then written into the contract and overrides Standard Condition 6.1.1. If Tom requires a quick completion this is the procedure we must adopt.

Tom is asking for completion within a matter of days. Although it is possible to agree such a short period (in some cases exchange and completion can take place on the same day), it is unlikely to be feasible in Tom's situation. The reasons for this are as follows:

(i) The long chain of dependent transactions. Unless Tom is prepared to incur the expense of bridging finance (which we would not recommend in the present case), every person in the chain would have to agree the short completion. As the chain is very long, I doubt whether unanimity could be achieved (bearing in mind also that the other conveyancers would be considering points (ii) and (iii) below), but to help Tom we could at least ask the rest of the chain to consider it.

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- (ii) We must allow ourselves sufficient time to carry out the post-contract conveyancing work, for example, the preparation, approval, and execution of the purchase deed and mortgage deed. We will also have to carry out pre-completion searches, the results of which must be received before completion and, although there are telephone, fax, and computer terminal search facilities available, it is possible that we may not achieve this by the end of the week.
- (iii) Finally, and most crucially, Tom needs a mortgage to assist in his purchase. I note that we are ready to exchange today, so Tom will have received and we will have approved his mortgage offer, but we have to report on title to the mortgagee and request drawdown of the mortgage advance. Most mortgagees require three or four days or longer notice to release funds. This would have to be checked immediately with the mortgagee.

We should inform Tom of our reservations about the short completion and perhaps, in the circumstances, ask him to consider a slightly later date, which is mutually convenient to everyone in the chain.

Trainee Solicitor: time engaged 45 minutes

## Question 2 - Commentary

This question concerns the preparations for exchange, a stage of critical importance for both solicitor and client. Part (a) asks you to consider the client's arrangements for the deposit in which you will need to discuss the 'pros and cons' of bridging finance and the ways of circumventing it. One method commonly adopted to avoid bridging is to utilise the deposit on the related sale (note that the Standard Conditions are being used), but do not overlook the deposit guarantee scheme as well.

There are a few more marks for part (a) so you can afford to spend a little longer on it. Part (b) can be dealt with competently by simply listing the points that need checking. As well as the obvious things like the contract being signed and the results of searches being acceptable, do not forget practical points like making sure other people in the chain are ready.

## Question 2 - Suggested answer

- a) Emma has three main options:
- (i) to agree a reduced deposit on the purchase and utilise her sale deposit,
  - (ii) to borrow the deposit (or part of it) by way of bridging loan; or
  - (iii) to offer her seller a deposit guarantee instead of cash.

Each option will be considered in turn.

### (i) Utilising her sale deposit

The first thing Emma should try (with our assistance) is to use the deposit she receives on her sale as the deposit on her purchase. Whether she can do this will depend on the capacity in which we as her solicitors hold the sale deposit. If we hold it as agent for the

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seller it can be done, but if we hold it as stakeholder, we are obliged to retain the sale deposit in our client account until completion. The simplest way of achieving the 'agent' capacity is to agree a special condition in the sale contract stating that we hold the deposit as agent for the seller. In this way, Emma will be free to use the deposit after exchange in any way she chooses. However this may not be acceptable to Emma's buyer who is likely to prefer the security of paying a stakeholder deposit. In this event the Standard Conditions (which we are told are being used) will assist Emma. Assuming Emma's purchase is in England or Wales and she is buying it as her residence, Standard Condition 2.2.5 will permit her to utilise her sale deposit towards the deposit on her purchase, provided ultimately the deposit is held by a solicitor as stakeholder.

The amount of the deposit is normally 10% of the purchase price. Although Emma will have £50,000 available from the sale deposit, the deposit payable on her purchase is £70,000, and so she still has the problem of finding a further £20,000. The practical answer to this is to negotiate the payment of a reduced deposit on her purchase which is equivalent to the deposit she will receive on her sale. Provided Emma can persuade her seller to accept this and provided Emma insists that her buyer pays a full 10% deposit, the problem of finding the further £20,000 will be overcome.

What should Emma do if her seller insists on a full 10% deposit? Where will she find the additional £20,000? She has two clear options: bridging finance or the deposit guarantee scheme.

#### (ii) Bridging finance

After taking into account the money she has available, Emma could borrow the shortfall from her bank (or another lender) on a short term bridging loan. Most banks will be happy to help their customers in this way, especially where the loan is for only a short period. However before releasing any funds, the bank will normally require, from their borrower's solicitor, an undertaking to repay the bridging loan from the net proceeds of the related sale.

We should advise Emma that her bank will probably charge an arrangement fee for the bridging loan. We should also advise her that the interest charges on the loan will be high and, in the unlikely event of a delay on completion of the sale, the bridging loan could prove ultimately to be expensive.

#### (iii) Deposit guarantee scheme

Instead of offering her seller a cash deposit, Emma could offer a deposit guarantee from an insurance company. If this is agreed then an appropriate provision would be needed in the contract. The scheme operates in the following way. Emma would pay a single premium to the insurance company, which in turn would provide a guarantee to Emma's seller for the amount of the deposit. If Emma were to default under the purchase contract entitling her seller to forfeit the 'deposit', the insurance company would pay the seller the amount of the deposit. The insurance company would then exercise its right of recovery against Emma. The scheme is intended for use where a buyer enters into a simultaneous exchange of contracts on a sale, and so would be appropriate in this case. However, Emma's seller has of course to agree! Many sellers would prefer to have the security of 'cash' rather than a claim against an insurance company, and it should also be borne in mind that Emma's seller may have a dependent purchase, the deposit for which is to be financed from Emma's cash deposit.

In conclusion, we would advise Emma to pursue the first option of negotiating a reduction in the deposit on her purchase to £50,000 and utilising the sale deposit. If this is not successful, she would have to consider the other alternatives and weigh up the respective costs of each, for example by comparing the cost of bridging against the amount of the deposit guarantee premium. Ultimately the decision could lie in her seller's hands, for if the seller insists on a full 10% cash deposit, Emma will be forced to borrow funds.

**b)** An exchange of contracts will commit Emma to binding and irrevocable legal obligations to buy and sell and so, before exchange, it is vital that we check the following matters:

- (i) Both sale and purchase contracts should contain all the agreed terms and be signed by the relevant parties. Emma should have signed her two parts in readiness for exchange, and these should be on file. Note that we should not sign on Emma's behalf without her express authority (*Suleman v Shahisavari* [1989] 2 All ER 460). We would check that any non-owning occupiers who are required to sign the contracts have also done so.
- (ii) The deposit arrangements (including, if necessary, bridging finance and any requirement to give a solicitor's undertaking) would have to be finalised. If we are to draw a cheque for the deposit monies to her seller's solicitor, we would need to be put in cleared funds by the client.
- (iii) If Emma requires a mortgage to finance her purchase, she and we must see and approve the written mortgage offer. We should check in particular that the conditions of the intended mortgage are satisfactory. We would check generally that Emma's financial arrangements are in order.
- (iv) If she has a mortgage on her existing property, we would make sure that there is a redemption figure on file from her mortgagee, and that the sale proceeds will be sufficient to discharge it.
- (v) We would ensure that the local authority search and all other relevant searches have been made and that the results are satisfactory and do not reveal anything adverse.
- (vi) We would check that we have on file satisfactory replies to all relevant pre-contract enquiries, and that there are no adverse replies.
- (vii) We must be satisfied that the client is happy with the result of her surveyor's report and her own inspection of the property.
- (viii) It is vital that the title to the purchase property is good and marketable and free from any onerous or unusual incumbrances. If the title is registered, there should be up to date official copies in the file which we would inspect. If the title is unregistered we would consider the abstract or epitome. If the solicitor who has the conduct of the file has raised any requisitions on the title, we should check that these have been answered satisfactorily.

- (ix) Following on from the above, we would, as a matter of good practice, always read the entire correspondence files to verify that there are no unresolved issues between the solicitors and that we are entirely happy.
- (x) We would check the files and make sure that our firm has reported fully to Emma on the results of our pre-contract searches and investigations, and the terms of the contracts. Preferably the report should have been written, in which case there should be a copy on file. If the report was delivered orally, for example at a meeting with the client, then an attendance note of the meeting should have been placed on the correspondence file.
- (xi) If we have any doubts at all, we should not exchange but refer the matter to a partner. In the event of uncertainty it may be necessary to contact our colleague in his or her sick bed!
- (xii) Even if we are happy that everything is in order, we obviously cannot exchange until Emma's buyer and seller are also ready to exchange. Emma's sale and purchase are dependent upon each other and so the exchange of contracts and completion dates for each property must be synchronised. We shall therefore have to contact the other solicitors by telephone to discuss exchange and any proposed completion dates.