



PURCHASING A PROPERTY IN ENGLAND AND WALES

In reading this note, one should have regard to the following:

- It only addresses the purchase of property in England and Wales – different laws and regulations apply elsewhere in the United Kingdom.
- This note is a much simplified overview of some key points and is not intended to be an exhaustive legal treatise nor can it address the myriad considerations that might arise when purchasing real estate in England and Wales.
- It does not constitute legal advice on which you are entitled to rely. Each transaction is different and must be approached as such with the benefit of independent legal advice.
- Be prepared to provide identification for the purchaser. Money laundering regulations are severe. They compel professionals to carry out searching due diligence at the inception of a transaction. If you are not already an established client and have previously been verified, you are advised to prepare the required papers as early as possible since otherwise delays can arise. Whilst the precise requirements will vary depending on who the purchaser is, in broad terms one needs to be able to prove one's identity in a manner that is capable of being independently verified.

In the case of an individual purchaser, identification may include disclosure of an original valid passport and evidence via a recent utility bill of one's current residential address. A corporate purchaser will need to provide accounting details including lists of officers, its constitution, certificate of incorporation and so on.

- A solicitor cannot represent a client unless they have first signed their terms and conditions of business and provided satisfactory identification.

Conceptual Background

The best possible property interest one can have is an unqualified freehold interest. In turn, the freeholder may lease his property to another – that other “holds” the property from (or “of”) the freeholder. That other is known as a leaseholder (or “head-leaseholder” or “head-tenant”) since he is first in line after the freeholder. The head-leaseholder may in turn sub-lease the property to a sub-leaseholder (or “sub-tenant”).

In this way, it is possible to see how it may be possible, from the one property, to carve out a number of different interests.

Each of these different interests will have its own value. Many of these interests are capable of being used as a security in support of borrowings provided that they satisfy the criteria prescribed by lenders.

Freeholders enjoy the greatest degree of flexibility as to how they might use their property.

Leaseholders are constrained by the terms of their lease. The rules which apply to private residential leases are very different from those which apply to commercial leases. Whereas a broad degree of protection is afforded to residential lessees, commercial lessees must to a far greater extent look to protect themselves by careful negotiation of the lease terms.

For the best part, this note focuses on the purchase of freehold and leasehold interests, but before one looks at these in a little more detail a brief mention should be made of the Commonhold interest.

Commonhold is a relatively new arrival to the English property scene. A Commonhold interest arises where the freehold interest is divided up into individual units – houses, flats, offices – within either a building or an estate. Unlike with a lease where the lease will be expressed to last for a defined number of years, the Commonhold is not time limited. One purchases a unit. The balance of the property which is not comprised in a unit (eg: the common parts) will be owned and managed jointly by the individual unit-holders through a Commonhold association.

The Process of Purchasing a Property

It can be, but is invariably not, straight forward when purchasing a property in England and Wales. It is rarely “quick” and professional costs can be significant.

Each interest in a property, has its own title. Title signifies ownership – one owns the title to a property, be it the freehold, leasehold or Commonhold title. It will be essential for your legal advisor to check the title and confirm to you that all is in order. Indeed there are different grades of title even within freehold and leasehold, namely possessory freehold or possessory leasehold or good leasehold.

The majority of property interests, especially so in built up and urban areas, are now registered at Her Majesty’s Land Registry. Theoretically, the registered title provides all historical information about the property in the sense that it is definitive of everything that affects the title. However, when investigating the title to a property in connection with a proposed purchase, it is often the case that one finds that the information contained in the public register is inadequate or inaccurate. In which case, it is necessary to carry out other investigations or searches to resolve any potential problems by identifying whether pre-registration documents might still exist or whether other solutions including, for example, defective title insurance might be required.

Some property interests in England and Wales remain unregistered. Investigating the title to such properties can be complicated since it is necessary to study in detail the history to the property, certainly at least for the past 15 or more years. A solicitor who acts for the purchaser of an unregistered property frequently needs to study a large number of historical documents in order to ensure that there are no impediments to

securing a good title at the Land Registry since following completion of the purchase, it will normally be the case that a compulsory application needs to be made for the first registration of the title to the Property.

In the case of the leasehold interests, title will typically comprise the lease and, if registered, a copy of the registered title. Not all leases are registered at the Land Registry. Any lease for a period of 7 years or more, must now be registered at the Land Registry either following its original creation or following a subsequent dealing with that interest (eg: a sale of the lease).

The lease is a contract between a Landlord (or “Lessor”) and the Tenant (“or “Lessee”). Whilst in the case of residential leases their form is fairly standard, this is not the case with commercial leases which will contain terms suitable for the particular transaction. This will usually be gleaned from the Heads of Terms that has been negotiated between the parties.

Frequently leases refer to other documents which will need to be studied. More often than not third party consents are required – for example from the Landlord if the Tenant wishes to carry out alterations to the property or subsequently wishes to dispose of the property. Leases are complex documents behind which stands a large volume of statute law.

The steps to purchasing a property

1. The purchaser’s solicitor receives a copy of the seller’s agents particulars of sale summarising what the seller and purchaser have agreed.
2. In the case of a residential property, it is mandatory that the purchaser be provided with a Home Information Pack (“HIP”) containing title details, an Energy Performance report, a copy of a local authority search and a drainage and water search. Often, these packs are poorly put together – for example, documents revealed may be incomplete copies or refer to other documents which are not disclosed in the pack. Your solicitor therefore has to study this pack very carefully.
3. There is no equivalent of a HIP in commercial property. The well known expression buyer beware is entirely applicable in commercial property transactions. It will be assumed that the purchaser will engage suitably competent professionals to advise him on the contract or lease terms. It is normal to instruct a surveyor or structural engineer to advise on matters concerning the value and condition of the property.
4. In addition to studying the title to the property, your legal advisor will carry out a number of searches in the event that they do not form part of the HIP or if the transaction is of a commercial nature. These may include searches of the local authority registers, drainage and water searches, environmental and planning searches and other searches which may be appropriate having regard to the geographic location of the particular property – for example a mining search in an area where historically there has been a history of mining activity or a radon search where that gas is known to be particularly prevalent.

5. Your legal advisor will raise a detailed list of enquiries with the seller's solicitor – in residential transactions these will be fairly standard and whilst this is also the case with commercial transactions, it is more common in the latter case for additional detailed enquiries to be raised simply because matters tend to be more complex.
6. If there is a third party providing funding for the purchase – for example – a lender, your solicitor will need to receive their instructions and list of requirements. Sometimes, a lender will want to instruct another law firm to represent their interests. This is more common in commercial property matters and where the amount they propose to lend is high.
7. It is sometimes the case that the real estate purchase is an ancillary part of a larger corporate/commercial transaction – for example – a purchase by one company of the assets of another or a share purchase. In this case, it is critically important that everyone involved in the transaction communicates effectively with one another since otherwise key issues can be overlooked. The pace at which the real estate element progresses will be intimately related to the broader commercial intention of the parties.
8. Mention has been made of the need to instruct a surveyor or structural engineer. It is often the case where the transaction is complex, that an accountant needs to advise on the tax aspects to the purchase. Taxes that may need to be considered include a number of corporate and personal taxes, stamp duty land tax, value added tax, inheritance tax, capital gains tax. Foreign or non-domiciled purchasers or purchasers from within an established group or tax structure need to be particularly careful to ensure that the purchase is structured in a way that is not materially adverse to their broader structure and fiscal aspirations.
9. What one has to appreciate is that one is not contractually bound to purchase a property until the parties agree, usually through their respective solicitors, to exchange contracts. This means that up to that point, either party can withdraw. Both parties may have invested a good deal of time and expense and yet the transaction falls apart. Typically, in a residential transaction, one can anticipate a period of 4 weeks from a solicitor receiving the particulars of sale to an exchange of contracts. In a commercial transaction timing is inextricably linked to the specific circumstances surrounding the negotiation.
10. It is only when contracts have been formally exchanged that one would normally have a right of recourse against the other party in the event that they did not proceed to complete the transaction. Should a purchase withdraw, they may lose their deposit and also be subject to a claim for damages. Should the seller withdraw, they too may be subject to a claim for damages. Typically in residential transactions a deposit of 10% of the purchase price is paid at exchange of contracts.
11. There is then usually a period of 4 weeks between exchange of contracts and completion in a residential purchase. Again, in the case of a commercial transaction, timing to completion will depend on a number of factors and there is no standard period. Sometimes, the parties will agree to a simultaneous exchange and completion whereby both the exchange of contracts and the

completion of the transaction happen together. This might not always be possible for a number of reasons.

12. Leases are a particular case. Typically, one will have an agreement for lease. The agreement sets out the terms agreed between the parties and will normally attach the agreed form of lease. Once the agreement for lease has been exchanged there will follow a period of time for the parties to fulfil obligations contained in the agreement at the end of which the parties will complete the lease.
13. Completion is the point at which the purchaser acquires a legal title to the interest which they are purchasing – prior to that point and from the date of exchange of contracts, they have what is referred to as an equitable interest in the property. It is not within the scope of this summary to address the intricacies which surround the distinction between equitable and legal interests in land.
14. Once the property has been purchased, it will often be the case that stamp duty land tax (“SDLT”) needs to be paid. This tax must be paid within 30 days of completion. The amount to be paid is calculated on a scale and ranges in the case of residential land from nil where the value is up to £125,000 to 4% where the value is over £500,000. In the case of commercial property, the range is nil up to £150,000 to 4% where the value is over £500,000. From time to time, the UK Government varies the scale and indeed may suspend payment of SDLT. Currently there is nil duty payable by first time buyers of property under £250,000.

The application of SDLT to lease purchases is more complex and specialist advice is required. The amount of SDLT that may have to be paid will turn on a number of factors including the length of the lease term, the starting rent and whether it is subject to review, whether the purchase is of a new lease or of an existing lease and so on.

15. In addition to payment of SDLT, it will invariably be the case that so as to perfect the legal title to the property, the purchase document and any supporting papers, will need to be registered at Her Majesty’s Land Registry with a fee being paid depending on the value of the property.

Where the title to the property was unregistered, a detailed examination will be carried out by the Land Registry of the papers previously supplied to the solicitor as evidence of the seller’s right to dispose of the property. It is quite common for the Land Registry to raise enquiries.

16. If a lender has been involved, it will be necessary to register their security against the title to the property. If it is a corporate purchaser, then it will also be necessary to register any security against the purchaser at the UK Company Registry. Failure to adhere to time limits and procedural requirements of this nature can have severe consequences for all concerned.
17. Assuming all proceeds well, the Land Registry will either create a new registered title in the case of an application for first registration, or update the existing title in the case of an existing registered property which has been purchased.

18. Where a lender has been involved, it will be usual for that lender to retain the original key title papers in support of its security.

Legal Costs

A solicitor must, at the inception of each transaction, give a prospective client as clear an indication as is reasonably possible having regard to the information then known, as to the likely costs that a client may have to meet in connection with that transaction. If necessary, this information should be continuously reviewed and updated as the transaction progresses since factors that were not previously known may arise or simply, the transaction may become more complex than was originally anticipated.

In straight forward residential transactions, it is not unusual for a solicitor to quote a fixed fee as a percentage of the purchase price.

Whilst fixed fees are not unheard of in commercial property transactions, they are not typical simply because in the nature of commercial transactions, the negotiations between the parties can prove to be extended and complex. Normally, an hourly rate will be quoted.

In addition to payment of the fees, one will be liable for value added tax at the applicable rate on that fee – presently 17.5% - as well as for any expenses disbursements that have been incurred by your legal advisor on your behalf for example search fees or bank transfer fees.

It is not unusual for a solicitor to ask the client to make one or more payments on account of fees and disbursements. This reflects not only the fact that quite sizeable costs might need to be incurred as a transaction progresses but also that the length of time between the receipt of the original instruction to act and completion of all aspects of the purchase, can be many months.

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