

CONDITIONS OF SALE 2019 EDITION

FREQUENTLY ASKED QUESTIONS



1. Please explain the proposed change introduced by the Conditions of Sale 2019 Edition
Conveyancing practice is changing to a system whereby purchasers satisfy themselves in relation to all title and related matters before entering into the contract for sale. Purchaser's solicitors will therefore receive all relevant title documentation and other relevant information pre-contract, and will investigate title, raise any concerns and satisfy themselves in relation to all title and related issues before advising their client to sign the contract.

2. Why is this change being made?

There are a number of reasons:

- the practice has been evolving of purchasers' solicitors raising lengthy pre-contract enquiries in relation to a range of matters. This was leading to significant duplication when investigation of title was carried out post-contract.
- it was already recommended that some matters, for example MUD's Act, planning, VAT, and services available to the property be investigated pre-contract.
- in new build residential sales, in larger transactions, and increasingly in standard transactions, the practice was evolving of vendor's solicitors producing the complete title pre-contract, together with a standard set of replies to requisitions on title, and precluding title enquiry post-contract.
- there is a concern among practitioners that a purchaser's solicitor could delay completion of a transaction by raising title issues post-contract, whether or not meritorious.
- in extreme cases, and given the delays in having matters determined by the courts, this could give rise to abuses. The move to pre-contract title investigation gives more certainty to the conveyancing process.
- at the date of entering into the contract the purchaser will have all relevant available information regarding the property there is thus less likelihood of something being overlooked.
- the new procedure will facilitate conveyancing.
- there will be greater "deal certainty" from the Date of Sale.

3. How will the new system work in practice?

It is anticipated that when vendors' solicitors receive instructions for sale, they will, when drafting the contract, prepare replies to standard Law Society Requisitions on Title and will furnish the complete copy title and those replies to the purchaser's solicitor (under the existing system, this happens post-contract). This will be similar to the long established practice in relation to new house sales.

Purchasers' solicitors will then investigate the title and raise such enquiries as they deem appropriate. Only when satisfied as to the title offered and related matters will the purchasers' solicitors advise their clients to sign contracts. The new General Condition 6 (c) provides that the purchaser confirms

- i. that he has been afforded the opportunity to raise requisitions prior to the date of sale, and
- ii. that he 'Accepts' the title offered.

'Accepts' is a defined term in the definitions section of the contract and provides that for the purposes of the Conditions the purchaser has, and shall be deemed to have acknowledged and satisfied himself as to the matter concerned prior to the Date of Sale and thereby has accepted and agreed to be bound by it (underline is added). The purpose of the use of 'Accepts' is to emphasise and make clear that the purchaser has raised all questions, queries, requisitions and rejoinders on the title prior to the Date of Sale and, save in the limited circumstances provided for in General Condition 7, cannot raise any requisitions after the Date of Sale.

This is a radical departure from the existing contract position, which provides for a post-contract investigation of title.

4. Does the new system front load the work and the costs?

The short answer is yes, for both the vendor and the purchaser, but it is the view of the Conveyancing Committee, for the reasons set out above, that the change makes sense. The change will avoid duplication of work. Importantly, the new system will reduce significantly the possibility of title issues arising post-contract. Solicitors should agree dead deal fees with their clients to reflect the work done.

5. How will the new system work in respect of auctions?

It is recognised that a prospective bidder at auction will need to fully investigate title and be satisfied as to the title offered. This may involve a considerable amount of work and solicitors acting for prospective bidders should agree fees with their clients which reflect that level of work if their client's bid is unsuccessful.

6. General Condition 6(a) says that the common law and statutory provisions govern deduction and investigation of title while General Condition 6(b) states that the title is as set forth in the contract. Is there not a conflict there?

The purpose of General Condition 6(a) is to reinforce that the new system is not intended to dilute existing conveyancing standards and practice. Accordingly for example, the purchaser will still expect to receive a root of title of at least 15 years, or, in the case of leases and fee farm grants, commencing with an older root and passing to a deed for value at least 15 years old.

However, in the case of conflict between General Conditions 6(a) and 6(b), the provisions of General Condition 6(b) prevail. The parties may therefore agree, in a particular circumstance, to accept less than a generally acceptable title. This is not new, and could arise under the existing regime.

It is good practice for solicitors to commit their advice to their client to writing in such circumstances, to avoid any ambiguity as to the advice given.

Solicitors acting for purchasers should be aware that if they accept a lesser title, they will not be able to certify good marketable title to a lender without agreed qualification.

7. Why have the General Conditions dealing with prior title and intermediate title been removed?

As purchasers will have investigated and satisfied themselves as to title prior to exchange of contracts, these provisions are superfluous.

However, pursuant to General Condition 6(a), it is envisaged that existing common law and statutory provisions will continue to apply to the title being proffered. Thus for example, title commencing with a nineteenth century lease and passing to an assignment for value in excess of 15 years old will still be the norm.

8. If all title investigation is carried out pre-contract, why does General Condition 7 allow for raising requisitions post-contract?

General Condition 7 is a recognition that an issue may arise following the exchange of contracts which the purchaser was not previously aware of, despite having made all appropriate enquiries. Only in the very limited circumstances specified in General Condition 7 can the purchaser raise requisitions following the exchange of contracts.

The Purchaser will need to work closely with his solicitor at the pre-contract stage in order to establish what exactly the purchaser has been made aware of and what exactly has been disclosed to the purchaser pre-contract. Vendors and their solicitors should be particularly mindful of the disclosure obligations contained in General Condition 13 (which are the same as in General Condition 15 of the 2017 Contract).

9. Does this mean that a planning search needs to be carried out by the purchaser pre-contract?

It was always the case that the General Conditions of sale anticipated that the purchaser had carried out a planning search pre-contract. That position remains unchanged.

Under the new regime, it would be advisable that the vendor also carry out a planning search pre-contract to ensure that the replies to standard requisitions on title are accurate.

10. Should the purchaser carry out a full suite of searches pre-contract?

General condition 15 deals with searches. The vendor is required to furnish all searches listed in the searches schedule and those in his possession, relevant to the title, prior to the exchange of contracts. It is not essential that a purchaser carry out pre-contract Registry of Deeds, Land Registry, Judgement, Bankruptcy, Insolvency or Sheriff searches in a typical conveyancing transaction but where the purchaser has any particular concerns he should do so. The purchaser will require any acts appearing on those searches be explained by the vendor pre-contract.

11. Should the vendor carry out a full suite of searches pre-contract?

It would be good practice for a vendor's solicitor to carry out registry of deeds searches against the property pre-contract so as to ensure there are no surprises on completion.

12. Does the new system involve a change in the procedures relating to the draft deed of assurance?

The new system does not envisage the deed of assurance being drafted by the vendor. General Condition 16 provides that if the draft assurance has not been agreed before the contract is exchanged, a draft will be submitted to the vendor's solicitor not less than seven Working Days, and the engrossment not less than four Working Days, prior to the Closing Date.

While the General Conditions are not prescriptive, it is anticipated that in many cases, the parties will agree the form of the deed of assurance pre-contract and incorporate the agreed draft into the contract by way of Special Condition. This removes the potential for a dispute as to the form of assurance following exchange of contracts.

However, there is no obligation on the parties to agree the deed of assurance pre-contract. It is anticipated that where the PRA standard form transfer in form 19 applies, the parties will not do so. Likewise for a standard conveyance or assignment. However, where easements, rights and privileges are being granted or reserved, or the assurance contains covenants or conditions, then the parties may decide to incorporate an agreed form of assurance into the contract.

General Condition 18 of previous versions of the Law Society Conditions of Sale contained a provision that if there was a dispute (inter alia) with regard to the form of the deed of assurance that was not resolved between the parties, the vendor could ultimately rescind the sale. That provision no longer applies. However the dispute resolution provisions in General Condition 47 has been expanded to capture disputes relating to the form of the deed of assurance (General Condition 47(i)).

13. Should the form of all statutory declarations be agreed before contracts are exchanged?

It is not anticipated that the parties will agree the form of all statutory declarations to be furnished. For example, family law declarations, section 72 declarations and declarations with regard to long leases, if being furnished in standard form, may not be drafted pre-contract, or appended to the contract.

However, where there may be disagreement with regard to the terms or extent of a statutory declaration, it would be considered best practice to have its form agreed and appended to the contract. Thus, for example, where statutory declarations are required in relation to a possessory title or a prescriptive easement, the parties should agree the terms and incorporate the agreed drafts into the contract by way of special condition.

14. What about declarations of Identity?

General Condition 11 deals with identity. General Condition 11(b) provides that the vendor is not required to produce a statutory declaration of identity that the property has been held and enjoyed for any period in accordance with the title shown unless that is provided for in the contract.

Where there is an issue of identity, such as where the property is held under a number of different titles, or it is unclear as to whether the property falls within a particular title, the purchaser may insist on a declaration of identity. The form of the declaration of identity should be agreed between the parties before exchange of contracts to avoid a subsequent dispute.

15. **When preparing the standard replies to requisitions on title should the vendor's solicitor complete requisition 44 – the list of completion requirements?**

It is not anticipated that the vendor will complete the list of completion requirements at requisition 44. It is a matter for purchasers to list and ensure that they get all of the documents they are entitled to under the contract. The parties are free to agree that list pre-contract, but it is also open to a purchaser's solicitor to leave over the compiling of the list of completion requirements to a date in advance of completion. As the documentation which the purchaser is entitled to should be clear from the pre-contract title investigation, and terms of the contract, there should not be a dispute as to those documents.

Many solicitors acting for purchasers will prepare their list of completion requirements contemporaneously with their title investigation, and in those circumstances the parties may take the opportunity of agreeing that list pre-contract.

16. **Why is there still a period of five weeks between the Date of Sale and The Closing Date?**

The parties are free to agree a Closing Date, as heretofore. However, the default position, appearing in the definition of Closing Date, has been retained as five weeks. It is recognised that purchasers may need time to deal with their lenders in order to arrange draw down of funds.

As the profession becomes more familiar with the new regime, consideration will be given to reducing the default timeframe.

17. **Under General Condition 10(c) the vendor confirms that he has produced an up to date Land Registry copy folio and filed plan. Is this new?**

Previous versions of the Conditions of Sale provided that the copy folio and filed plan would be furnished following the exchange of contracts. They did not directly address what the position would be if something unexpected appeared therein.

Now the obligation is on the vendor to produce an up to date (or as near as practicable up to date) Land Registry sealed and certified Folio and filed plan prior to the Date of Sale (i.e. the date the contract becomes binding on the parties).

There are two aspects to this. First, if the vendor has not produced a sealed and certified copy folio and filed plan pre-contract, the purchaser should insist on it. If it is not available, or its availability would delay the transaction beyond the requirements of the parties, then the matter should be addressed by Special Condition in the contract.

Secondly, it is incumbent upon vendor's solicitors to ensure that the copy folio and filed plan being furnished is up to date (or as nearly as practicable up to date). Therefore, producing a sealed and certified copy folio and filed plan that was with the historic papers would not be a safe practice without the results of searches to confirm it is up to date.

18. **Will the new system change the practice for exchanging contracts?**

No, the new system does not require any change. However concerns have been expressed that the practice of gazumping could become more prevalent, as there may be a longer period between a sale being agreed and contract exchanged. Purchaser's solicitors may also want to retain control

of the “Date of Sale”, it being noted that the Date of Sale, as defined in the Conditions, is not necessarily the date on the contract, but rather the date the contract becomes binding on the parties. A purchaser who signs a contract and sends it to the vendor is relying on the vendor to sign it and complete the exchange. Alternative methods of exchanging the contract are that each party signs one copy, and the solicitors then exchange them, either personally or by post (with email or telephone coordination) or the parties meet to sign the contract and effect the exchange. Practitioners can decide which method is appropriate in given circumstances.

19. **Pre-contract title investigation will lengthen the time period before a contract is entered into. Will this not increase the risk of gazumping?**

Gazumping is rare. It usually happens before contracts are issued. While the window for gazumping may increase slightly with pre-contract title investigation, gazumping is not expected to increase in reality. Any new/alternative purchaser would also have to go through the same due diligence i.e. pre-contract title investigation. If practitioners have a concern in an appropriate case, they can arrange a contemporaneous exchange of contracts, or use an exclusivity/lockout agreement as a protection.

20. **Can a ‘subject to loan’ clause still be used?**

Yes. It is not intended that loan funds would be requested before contracts are signed. Greater care is needed to ensure that any qualifications to a solicitor’s undertaking or certificate of title are cleared in advance of entering into contract. Where a purchaser is concerned that any aspect of title might be a cause of concern to a lender, they would need to ensure pre-contract that the lender is prepared to accept the title. It is a good thing to get any difficult issues out of the way as early as possible.

21. **General Condition 9(a) says that a purchaser is required to accept that a lease was validly made.**

This provision is effectively the same with the 2017 Contract. Sections 56 and 57 of the Land and Conveyancing Law Reform Act 2009 deal with this. However, it is possible to contract out of those two sections – as per Section 56(3) and Section 57(5) of the Act which provide that Sections 56(1) and Sections 57(1) and (2) respectively are subject to the contract. It is a matter for a purchaser to satisfy himself in this regard before signing the contract.

22. **There is no longer a section at the beginning of the Requisitions on Title for objections. Does this mean that the purchaser can’t raise objections?**

No – objections on title can still be raised in the pre-contract phase or in rare cases where General Condition 7 applies post-contract. Objections will now be made in writing/letter format between the two solicitors rather than on the face of the Requisitions document. This is because the Requisitions document will now be produced at an earlier stage than previously, and will usually be produced by the vendor’s solicitor and sent (with replies already endorsed) to the purchaser’s solicitor along with the contract.

23. **Must all requisitions on title be answered and all supporting information and documentation now be produced to the purchaser at the pre-contract stage?**

Inherent in the new Requisitions on Title document is the principle that any question raised or documents (drafts or otherwise) requested are now required to be answered or, if agreed, delivered contemporaneously with the replies to requisitions, unless otherwise stated. It is envisaged that

this will happen at the same time as the vendor's solicitor issues the draft contract to the purchaser's solicitor. This is consistent with the requirement for full disclosure and full title investigation at the pre-contract stage. Where a document is not yet available, such as exemption certificate for NPPR, then the matter may be dealt with by way of special condition or reply to Requisitions in which it is agreed that it will be furnished on completion.

24. **Will a purchaser's engagement with the sale in the post-contract period have to change?**
Purchasers will have to make sure that they are available during the period between contract and closing, for example to receive notice of any change or matter to which General Condition 7 might apply. An advantage for a purchaser in the 2019 contract is that he can now raise a post-contract query in relation to any title matter – not just on a matter that went to the root of title, which was the previous position.
25. **Do replies to Requisitions now have more contractual significance than they did before 2019?**
Arguably they do, because they are referenced in General Condition 6 and further it is clear that inaccurate replies to Requisitions on Title (not just replies to the Non-Title Information Sheet, as before) may constitute an error to which General Condition 29 may apply, providing a purchaser with an additional remedy.
26. **Are standard pre-contract enquiries envisaged?**
The standard Requisition on Title 2019 will be the standard pre-contract enquiries.
27. **Would it not simplify matters if the vendor simply warranted the title offered?**
This would be a radical departure from the long established *caveat emptor* principle. The value of a title warranty in the hands of the purchaser is only as good as the ability of the vendor to cover the costs, losses etc. of the purchaser. Even if that warranty were backed by a title bond, it is difficult to see a purchaser not wanting to carry out title due diligence. The purchaser's primary motivation will be to use and enjoy the property as per the title offered; so if he cannot do that, access to compensation may only be of secondary value.
28. **What penalty is there for a Purchaser, who as a delaying tactic, purports to raise a Requisition under General Condition 7?**
General Condition 21 provides that if by reason of any default of on the part of the Purchaser, the sale shall not have completed by the closing date, and the delay is not attributable to the Vendor, the Purchaser must pay interest to the Vendor on the balance of the Purchase Price. If a Requisition is inappropriately raised under General Condition 7 the Vendor may be entitled to charge interest. This will not always be the case especially when the Requisition is reasonable and raised in good faith.