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Introduction

This guide aims to address the following questions:

- What is the potential impact of CV on residential property transactions?
- If contracts have not yet been exchanged should they be?
- What options are available?

What is the potential impact of CV on Residential Property transactions?

Put simply, it is significant.

Before exchange has taken place

There is potential for significant delays in the process of transactions if for instance:

- Buyers start routinely demanding that properties are de-contaminated
- Search results, surveys or mortgage offers become difficult to obtain due to lack of people to process them.
- Witnesses for signatories cannot be found

Completion

But the potential for real disruption is when contracts have been exchanged and it becomes impossible to complete. This might be because:

- Sellers refuse to vacate because they are in isolation
- There is failure or partial disruption to the banking system
- Removal companies are reluctant to enter properties
- Conveyancing firms are short staffed or not operating at all
- Lenders are unable to release loans

But other reasons will come to light in the coming days.

If contracts have not yet been exchanged should they be?

Notwithstanding the extraordinary circumstances which CV might throw up, a contract remains a legal document which binds the parties to it. So, if one of them fails to complete for whatever reason, they could be held liable for breach of contract. This might involve paying a penalty rate of interest (until completion does take place), the loss of a 10% deposit (for buyers) and other reasonable costs which follow from the breach of contract.

A decision to exchange contracts at this time should not therefore be taken lightly and consideration should be given to many factors. The following are examples of matters to be addressed:

- 1) Are all those involved in your transaction confident that completion will not be affected by the impact of CV e.g. your lawyer and your lender?
- 2) How long do you need to have between exchange and completion (the shorter the time being better)?
- 3) What arrangements could you make should you or a member of your family need to self-isolate during the moving period?

What options are available?

Simultaneous exchange and completion

By synchronising exchange with completion all the risk of liability for breach of contract is removed and it is therefore an attractive option. However, there are significant issues which include:

- 1) If you are in a chain, all of the parties to the transactions in the chain must agree to do likewise
- 2) Without the certainty an exchange of contracts achieves, there is a risk of something going wrong which delays completion (or even causes the whole transaction to fail). This means the time and work spent preparing for simultaneous exchange and completion could be wasted but will still have to be paid for. That risk must be higher now because of CV.
- 3) Removers usually want a non-returnable deposit to secure a moving date

Varying the contract to allow for CV

It may be possible to insert conditions in a sale contract which deal with CV related issues, although there are the following problems with this approach:

- 1) It will be impossible to draft conditions which deal with every eventuality. The best that can be achieved is to avoid a breach of contract occurring until a CV contingency has been dealt with and to allow for the contract to be ended if this has not happened by a specified date. Such uncertainty is unlikely to be attractive to many.
- 2) Negotiating and agreeing such conditions with other lawyers will not be straightforward and, in a chain, all the contracts will need to say something similar.
- 3) Who pays any costs associated with the delay or ultimate termination of the contract?

A mutual exclusivity agreement

A third option might be for the parties to exchange an exclusivity agreement (see our separate guide to these) as an alternative to a proper exchange of contracts. Each would commit to synchronise exchange and completion on an agreed date and BOTH parties would pay an initial deposit as security for them doing so. If either party then failed to exchange and complete (whether for a CV related reason or otherwise), they would lose their deposit (but suffer no additional liability). The other party could then have the forfeited deposit to compensate them for any costs incurred in the transaction. However, it is not likely that this alternative will work in many cases because:

- 1) Exclusivity agreements are not commonly used and, as our guide indicates, there can be resistance to their use by some lawyers.
- 2) Consequently, the chances of all the parties in a chain agreeing to this approach are remote.

Conclusion

It will be clear from the contents of this guide that there are no easy answers to the issues which CV throws up in residential property transactions. The best we can do is to ensure that our clients are able to make informed decisions and understand what their options might be.

It seems inevitable that these issues will add to the amount of work and time spent in dealing with transactions presently. We will monitor the situation and advise on how best to address this.

Talk to us...



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