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**Response to The Law Society's Consultation on
the Draft Code for Signing and Exchanging
Property Contracts**

November 2023

Response of the Property and Development Committee of the Birmingham Law Society to The Law Society's Consultation on the Draft Code for Signing and Exchanging Property Contracts

This response has been prepared by the Property and Development Committee of the Birmingham Law Society. The Society is the largest local law society with some 9,000 members from all branches of the legal profession and practising in all aspects of law. The response represents the collective views of the Property and Development Committee whose members include specialists in property and development.

Response

The Birmingham Law Society Property and Development Committee discussed the Law Society's Draft Code for signing and exchanging property contracts and have the following comments to make:

We understand that the rationale for the changes is due to the fact that many firms are not using the current Formula in the correct way and that firms are using Formula "B" where perhaps "C" should be used. We also understand that the changes are recommended to be dealt with to reflect changes in technology. Some of the Committee members did not feel that there was a great need for change to the formula for exchanging contracts, especially when there are more pressing property issues at present.

The points raised were as follows:

1. We understand that the current Contract requires updating as it is still referring to matters such as using a Telex machine and also needs amending to embrace technology such as DocuSign.
2. We feel that it is unnecessary to change the Contract completely. A preferred alternative may be perhaps some form of education to all members as a reminder of which Formula should be used. This option would, in the Committee's opinion, be more prudent and cost effective than changing the

whole process of exchange and also changing the layout and familiarity of the current contracts.

3. Having read and digested what the Law Society intend for the new Protocols, there appear to be matters that are already in force but, making the scenario of exchange more complex, primarily it would seem, by the wording and steps for Protocol. For example, the Protocol states what should happen before signing of a contract, on signing of a contract, paying and receiving deposit moneys and provisions immediately before and release of contracts etc. These should be part of legal training for anyone that is dealing with conveyancing and dealing with exchange of contracts. Also, certain points on the Protocol are already within the Standard Conditions of Sale.
4. Before the Birmingham Law Society Property and Development Committee would affirm their agreement of the new Protocol, we consider that the following matters require addressing:
 - a) Is the new Code to be adopted by all firms not just CQS firms and will it include CLC regulated firms and also CILEX? If the new Contracts are not compulsory for firms who are not CQS, Licensed Conveyancers and Chartered Legal Executives then the process would fall apart due to some firms preferring the old Formula and others having to adhere to the Protocol.
 - b) At present the way the new Protocols that we have seen, appear to be complicated. Is the Law Society producing a new Contract that will have the boxes to say which Protocol/s is/are being used as on the contracts at present by a box at the top of the contract whereby the Formula are shown and ticked appropriately?
 - c) Whilst the Committee appreciates there are flaws in the way deposits are held to order, clients should always be made aware of the risks and situation at all times. It is felt that the new Protocol would not particularly

change the scenario of deposits on chains, nor eliminate the risk. There is still only one physical deposit that has been paid. Exchanges and completions can be carried out with a day or two to spare or, sometimes on the same day. There would nearly always be a party in a chain where the deposit is Held to Order by that firm, and another party in the chain which would not physically hold the deposit. The risk is then for the person in the chain that is not holding the deposit to take action for a full deposit to be paid. It would seem the only way in practice for security of a deposit to be paid on exchange, is if it were made compulsory for each party to have a full 10% deposit available and say at least 5 working days between exchange and completion for a deposit to be transmitted along a chain. However, it is usual these days for deposits not to be a full 10% Maybe the compulsory deposit to be paid is reduced to 5%. All parties should have at least a 5% deposit available as most mortgages are not 100%. It would still need time to be transmitted along a chain. It was once the norm for all parties to have an agreed deposit, usually 5% or 10% and that deposit would then automatically protect the non-defaulting party appropriately. However, a culture of apathy has grown where the seriousness of the situation is overlooked alongside the reduction in time between exchange and completion. Maybe the apathy should stop and deposits are compulsory as stated above.

- d) The Committee felt that a new version of the Contract should be available to allow the Committee to look at how the Contract would work in practice before making any comment as to the usability.
- e) What target date have the Law Society set for the changes to the new Protocol?

The general opinion of the Committee was that whilst there is a need for an update on the present Contract for Sale such as including a section for DocuSign and removing out of date words such as telex, the majority of the Committee members

could not see a need for the change in Formula and regard it as “using a sledgehammer to crack a nut” as the old saying goes.

The Law Society did a very good job in the Covid lockdown by introducing an additional paragraph to amend the existing contracts for Covid exchanges. It would seem that maybe an additional clause regarding electronic signatures is required and remove the references to out of date technology is needed with additional reminders to firms regarding the use of deposits.

Birmingham Law Society

Property and Development Committee