

APSL Working Party – March 2020

- **Law Society Formulae for Exchange**
- **Law Society Code for Completion by Post**
- **Solicitors Undertakings**

Participants

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Introduction

This paper sets out the conclusions of the APSL working party established in March 2020 with the aim of establishing a simple set of suggested modifications to be used by the profession during the Covid-19 emergency in relation to the Law Society Formulae & Code and solicitors undertakings.

This document is intended to assist the profession by reducing the time spent negotiating bespoke modifications.

Fee earners proposing to adopt any part of this paper are free to share in its entirety with other firms as necessary.

Comments arising from use of this document should be fed in to the working party via: tom.hubbard@dwf.law.

Notes

- I) The working party took the general view that deviation from standard practice should be kept to a bare minimum.
- II) Widely drafted caveats and qualifications relating to Covid-19 should be resisted because they may lead to uncertainty and loss of trust.
- III) Consistent language in respect of Covid-19 is used throughout. The working party took the view that qualifications wording should refer only to compliance with regulations and guidance relating to Covid-19.

- IV) In respect of the **Formulae for Exchange**:
- a. suggested modified forms of the formulae are set out in tracked changes;
 - b. all parties to the exchange need to confirm in advance with the other what they mean when they say "signed" – (i.e. do they hold wet ink signature, signed on behalf of their client, PDF, Docusign);
 - c. during the lockdown the completion date needs special consideration, any special provisions dealing with this should be set out in the contract;
 - d. notwithstanding the terms of the formulae it is always recommended that the deposit is transferred to the Seller's solicitor ahead of exchange in cleared funds with agreement to hold to the order of the Buyer's Solicitor;
 - e. the parties agree to send out the signed contract "*as soon as reasonably practicable*" (having regard to compliance with Covid-19 regulations and guidance) as a balanced approach allowing for practical issues with stationery supplies and Post Office availability during the lockdown period ;
 - f. the obligation to pay the deposit (by electronic payment) following exchange is included as a safety net in case of delays in firms' payment processes and can be retained if already satisfied by earlier payment;
 - g. reference to first class post is removed to allow flexibility and provision is made for electronically signed contracts to be sent via email.
- V) In respect of **Memorandum of Exchange**:
- a. this reflects the language of the amended formula B;
 - b. FE are encouraged to agree the use of this memorandum in advance;
 - c. where e-signatures are being used a short protocol is provided to ensure the contract is electronically dated at exchange.
- VI) In respect of the **Code for Completion**;
- a. minimal amendments were thought to be required save for a simple qualification in respect of the undertakings given in paragraphs 12 & 13;
 - b. the qualification wording is largely consistent with the Formulae for Exchange but with a short proviso;
 - c. provision is made for electronically signed contracts to be sent via email.
- VII) In respect of **Solicitors Undertakings**;
- a. wide ranging language was considered to be unnecessary;
 - b. undertakings to pay monies (e.g. costs , mortgage redemption) should not be qualified, there is no reason to expect the financial system to cease operation.

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Chapter 1 - Law Society Formulae for Exchange

Law Society telephone/telex exchange - Formula A (1986)

(for use where one solicitor holds both signed parts of the contract):

[Covid-19 Modification]

~~A~~The completion date ~~of is agreed.~~ is set out in, or calculated pursuant to, clause [] of the contract.

The solicitor holding both parts of the contract confirms that he or she holds the part signed by his or her client(s), which is identical to the part he or she is also holding signed by the other solicitor's client(s) and will forthwith insert the agreed completion date in each part.

Solicitors mutually agree that exchange shall take place from that moment and the solicitor holding both parts confirms that, as of that moment, he or she holds the part signed by his or her client(s) to the order of the other.

He or she undertakes ~~that day by first class~~ to:

send as soon as reasonably practicable following exchange (having regard to the latest regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus) by post, or where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor's office, ~~to send~~ or where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange, his or her signed part of the contract to the other solicitor, ~~together, ; and~~

(where he or she is the purchaser's solicitor and insofar that the deposit has not already been paid to seller's solicitor, ~~with a banker's draft or a~~ as soon as reasonably practicable following exchange to instruct their bank to send an electronic bank transfer to the seller's solicitor's client account ~~cheque~~ for the deposit amounting to ~~£.....~~ £[]].

Note:1. A memorandum should be prepared, after use of the formula, recording:

- a) date and time of exchange;
- b) the formula used and exact wording of agreed variations;
- c) the completion date;
- d) the (balance) deposit to be paid;
- e) the identities of those involved in any conversation.

Law Society telephone/telex exchange - Formula A (1986)

(for use where one solicitor holds both signed parts of the contract):

[Clean copy inc. Covid-19 Modification]

The completion date is set out in, or calculated pursuant to, clause [] of the contract.

The solicitor holding both parts of the contract confirms that he or she holds the part signed by his or her client(s), which is identical to the part he or she is also holding signed by the other solicitor's client(s) and will forthwith insert the agreed completion date in each part.

Solicitors mutually agree that exchange shall take place from that moment and the solicitor holding both parts confirms that, as of that moment, he or she holds the part signed by his or her client(s) to the order of the other.

He or she undertakes to;

send as soon as reasonably practicable following exchange (having regard to the latest regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus) by post, or where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor's office, or where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange, his or her signed part of the contract to the other solicitor; and

(where he or she is the purchaser's solicitor and insofar that the deposit has not already been paid to seller's solicitor) as soon as reasonably practicable following exchange to instruct their bank to send an electronic bank transfer to the seller's solicitor client account for the deposit amounting to £[].

Note:1. A memorandum should be prepared, after use of the formula, recording:

- a) date and time of exchange;
- b) the formula used and exact wording of agreed variations;
- c) the completion date;
- d) the (balance) deposit to be paid;
- e) the identities of those involved in any conversation.

Law Society telephone/telex exchange - Formula B (1986)

[Covid-19 Modification]

(for use where each solicitor holds his or her own client's signed part of the contract):

~~A~~The completion date ~~of is agreed.~~ is set out in, or calculated pursuant to, clause [] of the contract.

Each solicitor confirms to the other that he or she holds a part contract in the agreed form signed by the client(s) and will forthwith insert the agreed completion date.

Each solicitor undertakes to the other thenceforth to hold the signed part of the contract to the other's order, so that contracts are exchanged at that moment.

Each solicitor further undertakes ~~that day by first class~~ to:

send as soon as reasonably practicable following exchange (having regard to the latest regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus) by post, or, where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor's office, ~~to send~~ where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange, his or her signed part of the contract to the other ~~together, in the case of a;~~ and

(where he or she is the purchaser's solicitor and insofar that the deposit has not already been paid to seller's solicitor, ~~, with a banker's draft or a~~ as soon as reasonably practicable following exchange to instruct their bank to send an electronic bank transfer to the seller's solicitor's client account ~~cheque~~ for the deposit amounting to £.....[]).

Notes:1. A memorandum should be prepared, after use of the formula, recording:

- a) date and time of exchange;
- b) the formula used and exact wording of agreed variations;
- c) the completion date;
- d) the (balance) deposit to be paid;
- e) the identities of those involved in any conversation.

2. Those who are going to effect the exchange must first confirm the details in order to ensure that both parts are identical. This means in particular, that if either part of the contract has been amended since it was originally prepared, the solicitor who holds a part contract with the amendments must disclose them, so that it can be confirmed that the other part is similarly amended. 9th July 1986, revised January 1996

Law Society telephone/telex exchange - Formula B (1986)

[Clean copy inc. Covid-19 Modification]

(for use where each solicitor holds his or her own client's signed part of the contract):

The completion date is set out in, or calculated pursuant to, clause [] of the contract.

Each solicitor confirms to the other that he or she holds a part contract in the agreed form signed by the client(s) and will forthwith insert the agreed completion date.

Each solicitor undertakes to the other thenceforth to hold the signed part of the contract to the other's order, so that contracts are exchanged at that moment.

Each solicitor further undertakes to:

send as soon as reasonably practicable following exchange (having regard to the latest regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus) by post, or where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor's office, or where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange, his or her signed part of the contract to the other; and

(where he or she is the purchaser's solicitor and insofar that the deposit has not already been paid to seller's solicitor,) as soon as reasonably practicable following exchange to instruct their bank to send an electronic bank transfer to the seller's solicitor client account for the deposit amounting to £[].

Notes:1. A memorandum should be prepared, after use of the formula, recording:

- a) date and time of exchange;
- b) the formula used and exact wording of agreed variations;
- c) the completion date;
- d) the (balance) deposit to be paid;
- e) the identities of those involved in any conversation.

2. Those who are going to effect the exchange must first confirm the details in order to ensure that both parts are identical. This means in particular, that if either part of the contract has been amended since it was originally prepared, the solicitor who holds a part contract with the amendments must disclose them, so that it can be confirmed that the other part is similarly amended. 9th July 1986, revised January 1996

~~for~~ the full deposit specified in the agreed form of contract (divided as the vendor's solicitor may have specified) ~~to the vendor's solicitor and/~~(or to some other solicitor whom the vendor's solicitor nominates, ~~;~~) to be held on formula C terms.

'To despatch' means to send as soon as reasonably practicable following exchange (having regard to the latest regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus) by ~~first class post~~, or, where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead is to be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to the recipient solicitor's office, or where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange.

'Formula C terms' means that the deposit is held as stakeholder, or as agent for the vendor with authority to part with it only for the purpose of passing it to another solicitor as deposit in a related property purchase transaction on these terms.

Notes: 1. Two memoranda will be required when using formula C. One needs to record the use of part I, and a second needs to record the request of the vendor's solicitor to the purchaser's solicitor to activate part II.

2. The first memorandum should record:

- a) the date and time when it was agreed to use formula C;
- b) the exact wording of any agreed variations;
- c) the final time, later that day, for exchange;
- d) the completion date;
- e) the name of the solicitor to whom the deposit was to be paid, or details of amounts and names if it was to be split; and
- f) the identities of those involved in any conversation.

3. Formula C assumes the payment of a full contractual deposit (normally 10%).

4. The contract term relating to the deposit must allow it to be passed on, with payment direct from payer to ultimate recipient, in the way in which the formula contemplates. The deposit must ultimately be held by a solicitor as stakeholder. Whilst some variation in the formula can be agreed this is a term of the formula which must not be varied, unless all the solicitors involved in the chain have agreed.

5. If a buyer proposes to use a deposit guarantee policy, formula C will need substantial adaptation.

6. It is essential prior to agreeing part I of formula C that those effecting the exchange ensure that both parts of the contract are identical.

7. Using formula C involves a solicitor in giving a number of professional undertakings. These must be performed precisely. Any failure will be a serious breach of professional discipline. One of the undertakings may be to arrange that someone over whom the solicitor has no control will do something (i.e. to arrange for someone else to despatch the cheque or banker's draft in payment of the deposit). An undertaking is still binding even if it is to do something outside the solicitor's control (see 18.04, p.353).

8. Solicitors do not as a matter of law have an automatic authority to exchange contracts on a formula C basis, and should always ensure that they have the client's express authority to use formula C. A suggested form of authority is set out below. It should be adapted to cover any special circumstances: I/We understand that my/our sale and purchase of are both part of a chain of linked property transactions, in which all parties want the security of contracts which become binding on the same day. I/We agree that you should make arrangements with the other solicitors or licensed conveyancers involved to achieve this. I/We understand that this involves each property-buyer offering, early on one day, to exchange contracts whenever, later that day, the seller so requests, and that the buyer's offer is on the basis that it cannot be withdrawn or varied during that day. I/We agree that when I/we authorise you to exchange contracts, you may agree to exchange contracts on the above basis and give any necessary undertakings to the other parties involved in the chain and that my/our authority to you cannot be revoked throughout the day on which the offer to exchange contracts is made.

Service and other relevant health or regulatory bodies relating to the Covid-19 virus) by post or, where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead is to be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to the recipient solicitor's office, or where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange.

'Formula C terms' means that the deposit is held as stakeholder, or as agent for the vendor with authority to part with it only for the purpose of passing it to another solicitor as deposit in a related property purchase transaction on these terms.

Notes: 1. Two memoranda will be required when using formula C. One needs to record the use of part I, and a second needs to record the request of the vendor's solicitor to the purchaser's solicitor to activate part II.

2. The first memorandum should record:

- a) the date and time when it was agreed to use formula C;
- b) the exact wording of any agreed variations;
- c) the final time, later that day, for exchange;
- d) the completion date;
- e) the name of the solicitor to whom the deposit was to be paid, or details of amounts and names if it was to be split; and
- f) the identities of those involved in any conversation.

3. Formula C assumes the payment of a full contractual deposit (normally 10%).

4. The contract term relating to the deposit must allow it to be passed on, with payment direct from payer to ultimate recipient, in the way in which the formula contemplates. The deposit must ultimately be held by a solicitor as stakeholder. Whilst some variation in the formula can be agreed this is a term of the formula which must not be varied, unless all the solicitors involved in the chain have agreed.

5. If a buyer proposes to use a deposit guarantee policy, formula C will need substantial adaptation.

6. It is essential prior to agreeing part I of formula C that those effecting the exchange ensure that both parts of the contract are identical.

7. Using formula C involves a solicitor in giving a number of professional undertakings. These must be performed precisely. Any failure will be a serious breach of professional discipline. One of the undertakings may be to arrange that someone over whom the solicitor has no control will do something (i.e. to arrange for someone else to despatch the cheque or banker's draft in payment of the deposit). An undertaking is still binding even if it is to do something outside the solicitor's control (see 18.04, p.353).

8. Solicitors do not as a matter of law have an automatic authority to exchange contracts on a formula C basis, and should always ensure that they have the client's express authority to use formula C. A suggested form of authority is set out below. It should be adapted to cover any special circumstances: I/We understand that my/our sale and purchase of are both part of a chain of linked property transactions, in which all parties want the security of contracts which become binding on the same day. I/We agree that you should make arrangements with the other solicitors or licensed conveyancers involved to achieve this. I/We understand that this involves each property-buyer offering, early on one day, to exchange contracts whenever, later that day, the seller so requests, and that the buyer's offer is on the basis that it cannot be withdrawn or varied during that day. I/We agree that when I/we authorise you to exchange contracts, you may agree to exchange contracts on the above basis and give any necessary undertakings to the other parties involved in the chain and that my/our authority to you cannot be revoked throughout the day on which the offer to exchange contracts is made.

Chapter 2 – Suggested form of memorandum recording exchange of contacts using Formula B

[Covid-19 Modification]

Notes:

- I) Where both parties are to sign under a single signature request (or "envelope" as described in DocuSign) it is strongly recommended that the solicitors agree and undertake ahead of signing that neither will electronically insert dates until the actual moment of exchange.
- II) Remember during the lockdown the completion date needs special consideration. Any special provisions dealing with this should be set out in the contract.
- III) It is always recommended that the deposit is transferred to the Seller's solicitor ahead of exchange in cleared funds with agreement to hold to the order of the Buyer's Solicitor.
- IV) All parties to the exchange need to confirm in advance with the other what they mean when they say "signed" (i.e. do they hold wet ink signature, signed on behalf of their client, PDF, Docusign).
- V) A guidance note on electronic signatures has been produced by the joint working party of the Law Society Company Law Committee and the City of London Law Society Company Law and Financial Law Committees entitled "Execution of a document using an electronic signature" dated 13 July 2016 (it is referred to here as the "JWP Guidance") and can be found here: [Execution of a document using an electronic signature](#)
- VI) When using *Mercury* pdf documents on an exchange please ensure that the formalities set out in the JWP Guidance are correctly observed. In particular make sure that email copy contracts include both the signature page together with a full copy of the underlying contract.

Memorandum recording exchange of contacts using Formula B

Between _____ (for the Seller); and

_____ (for the Buyer)

at _____ (time)

The completion date is set out in, or calculated pursuant to, clause [] of the contract.

It was acknowledged that the deposit had already been transferred electronically to the Seller's Solicitor and had been received.

I confirmed that I hold:

- [a hard copy contract signed by my client with wet ink signature]
- [a hard copy contract with wet ink signature signed by me on behalf of my client with their authority]
- [an e mailed PDF copy of the contract signed by my client in accordance with Option 1 of the JWP Guidance]
- [a contract signed by my client using the [*DocuSign/ Adobe Sign/Nitropro/other*] e-signature platform]

They confirmed that they hold;

- [a hard copy contract signed by their client with wet ink signature]
- [a hard copy contract with wet ink signature signed by them on behalf of their client with their authority]
- [an e mailed PDF copy of the contract signed by their client in accordance with Option 1 of the JWP Guidance]
- [a contract signed by their client using the [*DocuSign/ Adobe Sign/Nitropro/other*] e-signature platform]

in each case in the agreed form

[We noted that at least one of the parties had electronically signed the contract using the [*DocuSign/ Adobe Sign/Nitropro/other*] e-signature platform and adopted e-signature confirmation option [1] [2] as set out below.]

We each undertook to the other to:

hold the signed part of the contract to the other's order, so that contracts are exchanged at that moment; and

send as soon as reasonably practicable following exchange (having regard to the latest regulations and advice from the UK Government, the National Health Service and other relevant

health or regulatory bodies relating to the Covid-19 virus) by post, or where the other solicitor is a member of a document exchange (as to which the inclusion of a reference thereto in the solicitor's letterhead shall be conclusive evidence) by delivery to that or any other affiliated exchange, or by hand delivery direct to that solicitor's office, or where such contract is held only in an electronic or virtual format by way of email to the other solicitor who is party to the exchange, his or her signed part of the contract to the other.

e-signature confirmation

Option 1 – signature by multiple parties using single signature request – one solicitor to insert date electronically for both parties

[We confirmed that *[insert solicitor name]* was authorised and able on behalf of the parties to access the electronically signed contract upon the relevant e-signature platform and date it.

We confirmed that *[insert solicitor name]* had accessed the electronically signed contract upon the relevant e-signature platform and had duly dated it.

We agreed that if any part of the contract is not automatically sent to both solicitors through the relevant e-signature platform, the solicitor with access to it would send a copy of the contract to the other solicitor by email today.]

Option 2 – signature by single or multiple parties using separate signature requests- each solicitor to separately insert date electronically

[We confirmed that *[insert solicitor name]* was] [we each were] authorised and able (on behalf of the relevant party or parties) to access the electronically signed contract upon the relevant e-signature platform and date it.

We confirmed [to each other] that *[insert solicitor name]* [we] had accessed the contract electronically signed by [his/her] [our respective] client[(s)] upon the relevant e-signature platform and had duly dated it.

We agreed that if any part of the contract is not automatically sent to both solicitors through the relevant e-signature platform, the solicitor with access to it would send a copy of the contract to the other solicitor by email today.

Chapter 3 - Law Society Code for Completion

Notes:

- I) The text of the Law Society Code for Completion can be found here: [Code for Completion by Post - The Law Society](#)
- II) Please see requisitions:
 - a. TA13 32(a): *"We wish to complete through the post in accordance with the Law Society's Code for Completion by Post 2019 (the Code). Please confirm that: (a) You undertake to adopt the code: "*
 - b. SCR 3.1 question 1.1: *"We wish to complete by post. Please confirm: (a) you will adopt the Law Society's code for completion by post (2019 version) (2019 Completion Code);"*

Suggested reply to requisition:

Confirmed we will adopt the Law Society's Code for Completion by Post 2019 ("the Code"), subject to the following qualifications:

1. The completion monies shall be held to the Buyer's Solicitors order pending completion.
2. The Seller's Solicitor shall not be considered in breach of its undertakings set out in paragraphs 12 & 13 of the Code to the extent that its performance of them is delayed or its ability to perform them is materially impeded by compliance with regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus PROVIDED THAT where any such delay or impediment occurs the Seller's Solicitor shall promptly notify the Buyer's Solicitor and shall use reasonable endeavours to manage and mitigate the same and carry out the actions required to perform the undertakings given as soon as reasonably practicable and, in the event of a delay or impediment caused by the closure of any office of the Seller's Solicitor, within ten business days of the relevant office being re-opened for business.
3. For the purposes of paragraph 13(iii) of the Code written confirmation that completion has taken place may be given by email, and documents specified under paragraph 9 may be sent by email where they have been electronically executed and are held only in an electronic or virtual format.
4. For the purposes of paragraph 13(iii) of the Code the words "first class" shall be removed.

Chapter 4 - Solicitors Undertaking

Note:

It is not considered that obligations to pay monies (including costs, mortgage redemption sums) are appropriate subject matter for qualification. It is thought that these should remain unqualified.

Suggested wording:

We shall not be considered in breach of paragraphs [*specify which paragraphs of the undertaking to be covered by the qualification*] of this undertaking to the extent that our performance of them is delayed or our ability to perform them is materially impeded by compliance with regulations and advice from the UK Government, the National Health Service and other relevant health or regulatory bodies relating to the Covid-19 virus PROVIDED THAT where any such delay or impediment occurs we shall promptly notify you and use reasonable endeavours to manage and mitigate the same and carry out the actions required to perform the undertaking given as soon as reasonably practicable and in the event of a delay or impediment caused by the closure of any office of this firm within ten business days of the relevant office being re-opened for business.