

Words by
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A few months ago, when such declarations were deemed important, industry at large would have boasted about its 'paperless' ambitions. As everything we know and love gets placed in the cloud, forever accessible, but no longer tangible, we have embraced technology in our daily lives at every level. The world of property transacting has not quite kept pace, however, and the Covid-19 pandemic has placed this discipline's reliance on hard copies, 'wet ink' and physical interaction front and centre of an all but flatlining housing market

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managed to grab some time with Ranjeev Kumar, partner at Watson Farley & Williams, who shared some useful information surrounding what *have* been typical practices, the conundrums posed given the current climate, and the workarounds available to solicitors.

Perhaps underpinning this shift in the way we have come to operate—and heard elsewhere almost daily—is the new working world order which is likely to emerge as a result of the outbreak.

“Rigid and established practices and procedures are being heavily tested and coming under scrutiny, and these are changing to accommodate both the present Covid-19 concerns but also, more broadly, changes to modern ways of working,” Ranjeev believes.

JLL’s March report on the Global Real Estate Implications of Covid-19 predicts that an increase in remote working will likely have an impact on office utilisation rates and, in the long-term, could fast track the investment in collaborative technologies to facilitate it.

The wording of a solicitor’s undertaking—their commitment to do something—is pivotal to any transaction in matters that span pre- and post-completion. Failure for solicitors to observe and perform these undertakings may result in, as a minimum, an aborted transaction (because, for example, there would be no certainty as to how completion monies would be held prior to completion, or how security would be registered afterwards), and possibly even allegations of professional misconduct and sanctions being imposed. But what happens in a time, such as this, when clarity is not the order of the day? How does a solicitor commit to matters which are in a state of constant change? According to Ranjeev, it is all about being “clear and unambiguous”, and then adding in revisions based on restrictions imposed by the crisis, being careful to relate these to specific aspects of the undertaking and avoiding broad, open-ended statements.

Also present in these undertakings should be the obligation for solicitors to support the use of electronic methods of signing, filing and transferring documentation, where possible, using “reasonable endeavours” to act promptly.

The introduction of the use of ‘material uncertainty’ in valuers’ reports means that more scrutiny, and a higher degree of

caution, should be attached to valuations than would normally be the case. Given the amount finance providers rely on these, this clause stands to throw that into question. So, how should lenders proceed? “Any restrictions of information and the ability to inspect, or the assumption of ‘material uncertainty’ need to be explicitly [specified] in the terms of engagement, agreed with the lender, and clearly stated in the report. Any valuation/survey assumptions that are being made because of restricted access and/or valuation information must be expressly stated and agreed in advance. This also means that any existing agreed terms of engagement must be amended and updated accordingly,” explains Ranjeev. Again, it comes down to a complete understanding of what the changes are and how this may impact a lender’s decision to extend the facility. It may be prudent for a lender to appoint a valuer during this time which does *not* insist on the inclusion of this clause in its report. Of course, lenders which specialise in lower value and geared loans, secured on undifferentiated properties in certain towns and cities, will also continue to have the option of a standard desktop valuation.

Now, onto documentation. Land Registry and Companies House are sticklers for getting original documents—and to strict deadlines. Practical challenges are presented by our current state of lockdown, making sending, receiving and checking post difficult.

The expectation is that most large City law firms are operating a skeletal post room, allowing for mail to be received and scanned to the relevant person, and, in some cases, for original documentation to be forwarded to the relevant solicitor to be processed, according to Ranjeev.

His top tips for keeping things in order when it comes to hardcopy documentation include:

- **certified copies of original documents to be prepared and scanned to all relevant parties, as soon as possible**
- **all post to be scanned to the intended recipient before it is dispatched**
- **notification to be provided when post is dispatched**
- **a tracking service to be used where possible**
- **confirmation of receipt of post to be given by the recipient as soon as possible**

He adds: “The Covid-19 outbreak means that, due to the restrictions on sending and receiving hard post, and the fact that many individuals are working remotely, it is difficult to ensure that original documents are in the correct place and with the correct signatories to be signed in ‘wet ink’, witnessed, exchanged and completed. Use of electronic signatures and an already established practice of virtual signings and closings (known as the ‘Mercury rules’) can help to overcome these issues.”

Due to the nature of property transacting, there is still a fair amount of physical interaction between parties, mainly to ensure that no impropriety takes place. However, the Mercury rules are a precedent to how we can facilitate virtual completion. Developed to aid progress in a transaction when one or more signatories are not present at the same meeting, a set of guidelines has been established for the successful remote execution of deeds, contracts and guarantees. In fact, utilising virtual methods of completing is often “much quicker” than traditional approaches, says Ranjeev. “We have never experienced a completion failure in a real estate finance transaction when we have used the Mercury rules, nor have we heard of any failure elsewhere (and [as] the Mercury case is itself from 2008, the rules are now very established).”

“The downside to the Mercury rules is the risk that original ‘wet ink’ documents are not received on completion (but this can be mitigated by ensuring that they are the subject of an undertaking) and, of course, we cannot totally rule out fraud,” he explains, adding that the risk of fraud is present in all transactions.

I’m told that, even in regular life, “many bridging transactions” make use of these rules for speed of execution, resulting in considerable time saving.

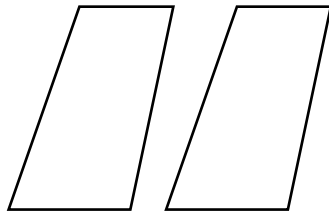
Ranjeev and his team managed, just before the UK went into lockdown, to complete on a multi-jurisdiction property transaction by using the Mercury rules, with another refinance on a London development completing at the time of writing—also using the virtual method.

It is recommended, Ranjeev urges, to apply a “belt and braces” approach and ensure, in all cases, that the ‘wet ink’ docs are supplied as soon as possible, following any electronic signatories.

When it comes to the Land Registry, things are a little more inflexible. Ranjeev explains that law dictates that any contract for the sale or other disposition of an interest in land must be in writing and signed for on behalf of each party—per Section 2 of the Law of Property (Miscellaneous Provisions) Act 1989—and an electronic signature is a valid signature for the purposes of a contract. The problem relates to deeds which need to be registered at the Land Registry: these must be signed, witnessed, and delivered—per section 52 of the Law of Property Act 1925, and section 1 of the Law of Property (Miscellaneous Provisions) Act 1989—and therefore face additional issues to those surrounding simple contracts. This is partly because a deed requires a witness, and also because there is currently no scope to register an electronically executed deed at the Land Registry—a requirement that isn't likely to be relaxed anytime soon. What the Land Registry *has* done, however, is announce that there will be no cancellations of applications until 1st June 2020, effectively buying applicants more time to deal with requisitions—such as the presentation of original documentation.

Ranjeev suggests that parties should be discussing potential problems (such as printing off documents, execution, and sending original deeds to the other side) at the outset of the transaction. To alleviate this, I am told that many solicitors and clients have purchased new printers. The good news is that postal services and couriers are still operating, so solicitors have been able to move original documents, although it is necessary to factor in additional time, as this has been slower than normal.

Registering a charge with Companies House requires the applicant to submit an original or certified copy of a document intended for registration, Ranjeev explains. “Again, the restrictions on sending and receiving hard post, and the fact that many individuals are working remotely, make it difficult to ensure that original documents are in the hands of the applicant (or their solicitor) at the time an application is made. A combination of appropriate solicitors’ undertakings (to deliver original documents), and circulation of scanned, certified copy documents should help to facilitate registrations at Companies House. This a fast-developing area and we expect Companies House to issue updated guidance at any time.”



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What about witnesses? “Some of the electronic signature providers also [offer] a facility for witnessing documents, and the witness does not necessarily have to be in the same room. For example, we have come across a web-based facility which provides evidence to a nominated witness that a document has been signed by the signatory and gives that witness five minutes within which to witness the document. This deals with deeds which do not need to be registered,” Ranjeev states.

For registering deeds at the Land Registry or Companies House, a physical witness *is* needed, since electronic signatures are not acceptable, confirmed Ranjeev. This is where the Mercury rules can step in to help. Signing and witnessing can be done remotely, as long as the witness is in the presence of the signatory and doesn't represent any conflict of interest. Countrywide lockdown presents challenges to this as, whereas a spouse or relative may act as a witness, the use of a family member should be agreed between the parties in advance (and it should be noted that some lenders prefer an independent/non-family member witness, for obvious reasons). Ranjeev advises that it has, in most cases, still been feasible to request a neighbour to fulfil this duty, while observing social distancing and, he has heard that, in extreme cases, witnessing has taken place from the other side of an open window.

Is it, ultimately, reasonable to expect property transactions to go through under such unprecedented conditions? “Completing a transaction under the current circumstances is difficult, but not impossible” says Ranjeev. “Lenders and borrowers cannot afford to sit on their hands for months to come and, together with other professionals, solicitors will be as important as ever in helping their clients navigate the current landscape and providing creative, flexible and practical solutions in a risk managed manner”. ■