

## **City of London Law Society Land Law Committee response to the Law Commission's Consultation Paper "Updating the Land Registration Act 2002"**

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### **Introduction**

The City of London Law Society ("CLLS") represents approximately 17,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees.

The Committee would like to congratulate the Law Commission on its excellent Consultation paper "Updating the Land Registration Act 2002". It raises some fascinating and very significant issues in relation to the 2002 Act and has given us all much pause for thought.

Many of the member firms of the Committee are represented on the London Property Support Lawyers Group, which has produced a detailed response to the Consultation. The response was sent to Jennifer Boddy of the Law Commission under cover of letter dated 14 June 2016. The Committee endorses the response and also the additional questions and issues sent as a separate document with the response.

The Committee would also like to add the following observations of its own.

### **3 The Registrable Estates**

3.1 The Committee understands the cautious view taken by Land Registry in view of the uncertainty about the legal status of the landlord's freehold following enlargement. The Committee would add that the concept of there being two freeholds to the same piece of land has met and continues to meet with consternation on the part of many practitioners and their clients. It appears to undermine the very nature of a freehold, being the ultimate form of ownership of land.

It would be interesting to understand the attitude of lenders with security either over the landlord's freehold or over the long lease in relation to the preservation of the landlord's freehold. Would lenders perceive this as having any adverse impact on the value of their security? The lender with security over the enlarged lease is the one likely to be disconcerted by there being two freeholds, although the valuation impact would seemingly usually be relatively insignificant.

3.5 The Committee would emphasise the importance of the concerns raised by the LPSLG response, which cause real problems in practice. The failure to notify surface owners of an application to register qualified title to the mines and minerals beneath their land is leading to firms having to spend additional resources to carry out extra SIMs with a knock-on impact on Land Registry and there is also greater uncertainty in relation to the certifying of title. The title number to the estate in mines and minerals (whether a qualified or absolute title) should be referred to on the surface title.

## **8 Priorities under Section 29: Postponement of interests and the protection of unregistrable leases**

8.1 The Law Commission highlights a concern about unilateral notices. Under the current procedure, there is no requirement for the beneficiary of the notice to produce evidence in support of the right claimed. That may hamper attempts between the parties to negotiate a solution if there is a dispute over the existence of the right.

The Committee, however, acknowledges that the current unilateral notice process provides a fairly flexible method to protect agreements relating to land. Since the agreement itself does not need to be sent to Land Registry, this can be helpful if the agreement contains confidential provisions.

There is some concern whether the Law Commission's proposal to require the provision of reasons, might make the unilateral (or replacement "summary") notice process less useful.

If evidence in relation to confidential agreements which of itself may be confidential will be required in future, the Committee questions what Land Registry would do to protect the evidence from disclosure in view of the requirement for public disclosure (subject to limited exceptions) of information held by Land Registry.

There is some merit in the requirement to provide reasons, since this may prevent what happened when chancel repair and manorial rights ceased to be interests with overriding status at the end of 12 October 2013. A large number of unilateral notices were registered by PCCs and others, and while many were removed on application by the registered proprietor, the entry of the notices was disconcerting.

The Law Commission proposes that a notice should be entered if the reasons given as to why the interest still binds the title are not groundless. Land Registry may conclude that the reasons for noting a chancel repair liability are not groundless, because of the uncertainties in the law, hence the notice may be entered anyhow. The Law Commission should revisit the "not groundless" test as part of considering the basis for entering a notice.

The Committee would also like to raise another issue concerning priorities under sections 29 and 30 of the Land Registration Act 2002 - a problem scenario relating to priority of interests on a loan transfer.

As context, section 30 sets out rules of priority and “postponement” of interests in the case of dispositions of charges, and section 29 does the same for dispositions of estates. The consultation paper contains an entire chapter (8) on the operation of section 29 and the Law Commission states in paragraph 7.77 (page 134) that “the reforms that we have proposed in the context of section 29 of the LRA 2002 cannot easily be applied in the context of charges. Nonetheless, to the extent that our proposals can sensibly be applied to dispositions of charges, we see no distinction in principle between sections 29 and 30”. As such, the Committee has assumed that the Law Commission's comments, insofar as relevant, relate to section 30 as well, albeit only where the comments are applicable to the transfer of charges.

The problem is that, as a result of section 30(1) of the Act, the purchaser of a loan portfolio may take subject to an unregistered lease, which did not bind the original mortgagee. A mortgagor grants a legal mortgage, which is protected by registration in the ordinary way and by a restriction. The mortgagor then grants a six year lease without the mortgagee's consent.

The generally accepted view is that the mortgagee is not bound and can sell free of the unauthorised lease (*Lever Finance v Needlemans' Trustee* [1956]). However, if the mortgagee sells the mortgage to a new lender, under section 114 of the Law of Property Act 1925, the new lender stands in the mortgagee's shoes and has all the mortgagee's powers (including the power to sell free from the lease). The Land Registration Act 1925 was aligned with the Law of Property Act 1925, so that under section 34(4) of the LRA 1925, the proprietor of a registered charge sold free of interests inferior to his, but subject to everything affecting the title at the time of registration of the charge. However, under section 30(1) of the 2002 Act, the new lender is bound by anything registered by notice, or any overriding interest at the time of registration of the transfer. So the question is whether (as it seems) the new lender will be bound by the unauthorised lease, even though the original mortgagee had no knowledge of it and it is not on the title.

Section 29(4) deems the lease to be registered by providing as follows:-

“Where the grant of a leasehold estate in land out of a registered estate does not involve a registrable disposition, this section has effect as if-

- (a) the grant involved such a disposition; and
- (b) the disposition were registered at the time of the grant”

There is no equivalent subsection (4) in section 30 and it strikes the Committee that the above issue might merit similar consideration.

## **11. Overriding interests**

11.1 The Committee agrees that estate contracts should be registered and, if they are not, beneficiaries of the contract should not be able to rely on their actual occupation to protect the

contract as an overriding interest. If there is no estate contract or other document that can be registered, it is a different matter.

The Committee is sympathetic to the policy of trying to reduce the amount of interests with overriding status and emphasising the primacy of the register. This is consistent with and promotes electronic/digital conveyancing.

## **12. Lease variations and registration**

12.3 The property industry encounters many problems with the operation of the Landlord and Tenant (Covenants) Act 1995 and uncertainties and omissions in the legislation can have a materially adverse valuation impact. The Committee believes that a full review of the Act is required to address concerns.

The Committee is also concerned with uncertainties in the operation of the contracting out provisions in Part II of the Landlord and Tenant Act 1954, which cause problems and lead to differing approaches in practice. The Committee recommends that the Law Commission also undertakes a full review of those provisions.

## **13. Alteration and rectification of the register**

13.2 The Committee opposes this proposal. It considers that the chargee's interest may extend beyond a financial one and, therefore, the chargee should be able to resist rectification, especially if there is a limit on the chargee's ability to obtain an indemnity.

13.16 The London Property Support Lawyers Group's response refers to the important High Court decision in *EMI Group Limited v O&H Q1 Limited* [2016], which could potentially be problematic in working through the consequences in Land Registry terms of an assignment being void for failing to comply with the Landlord and Tenant (Covenants) Act 1995. This reinforces the need highlighted at 12.3 above for the Law Commission to review the operation of the Act.

## **14. Indemnity**

14.1 The Committee strongly opposes any cap on or other watering down of the indemnity. Separate private insurance in the open market will not be an adequate substitute. Interfering with the indemnity could lead to a loss of public confidence in the operation of the register and to the less efficient operation of the property market.

14.4 The Committee opposes a general statutory tort imposing a duty to take reasonable care in respect of the granting of deeds intended to be registered and applications made to Land Registry.

A statutory duty of care would go much further than is necessary to deal with the problems with the current law that are under discussion.

There is already an existing statutory right of recourse for Land Registry (where it has paid out under the indemnity) against conveyancers, who do not take proper care, including the statutory right to recover indemnity payments under paragraph 10 of Schedule 8 to the Land Registration Act 2002. The Committee considers that existing rights together with the more specific solutions

suggested in Chapter 14 of the Law Commission's Consultation paper are preferable to the sledgehammer approach of a new general statutory tort.

The Committee also disagrees with the implication that an indemnity should be denied to a potential claimant whose conveyancer has acted in breach of such a duty and who would instead have to rely on a course of action against the conveyancer. This is contrary to a key principle of the current indemnity scheme – that an indemnity is available as a first resort. In the Committee's view, this important element of the scheme should be retained.

14.5 Rather than having a new specific statutory tort imposing a duty of care in respect of verifying identity, the Committee considers that it would be better to include extra statutory rights of recourse in relation to the conveyancer's breach of any identity requirements (current or rationalised). However, the conveyancer should only have a liability where the identity requirements relate to the conveyancer's own client.

14.6 Member firms of the Committee have encountered problems with identity checks for attorneys who sign, for example a transfer, on a company's behalf. Does the conveyancer for the company also act for the attorney? Issues like this create uncertainty and it would be helpful for the legislation to confirm in relation to identity checks that if the company is represented by a conveyancer, the conveyancer is also deemed to represent attorneys who are signatories for the company of the relevant document.

14.8 The Committee believes that the indemnity scheme is a very relevant factor in lending decisions (whether for residential or commercial property) and limiting its availability to lenders would have a significant impact on the mortgage market.

If a lender's rights under the indemnity scheme are limited, it is likely that lenders will as a matter of course require borrowers to cover the risk by obtaining title insurance in the open market for the lender's benefit. This would increase conveyancing costs for borrowers and slow down the conveyancing process.

14.9 The Committee is strongly of the view that mortgagees' ability to obtain an indemnity should not be limited to claims arising from mortgages granted on the basis of a mistake already contained in the register. A mortgagee should not be treated any less favourably than a buyer, as a mortgagee also has a significant financial interest in the mortgaged property. Buyers may buy for investment rather than occupation reasons and, therefore, there is no reason why mortgagees should be treated any differently.

Mortgagees with the best due diligence procedures can still be the victims of fraud and the Committee questions why their right to an indemnity should be limited.

In any event, the Committee is aware that under existing law no indemnity is payable (or it is reduced) if a claimant (such as a mortgagee) has suffered loss as a result of its own lack of proper care. So the mortgagee's conduct is already taken into account in determining the extent to which it can claim on the indemnity.

14.10 The Committee is strongly of the view that mortgagees' entitlement to obtain an indemnity should not be subject to compliance with a statutory duty to take reasonable care to verify the

mortgagor's identity. The Committee considers that the same principles should apply to mortgagees as to other claimants such as buyers.

In the response to 14.9 above, the Committee mentioned that the mortgagee's conduct is already taken into account in deciding whether a claim can be made on the indemnity. The existing legislation can be updated to take account of any rationalised identity requirements in relation to the mortgagor.

## **16 Easements**

16.1 The Committee very much supports the proposal that where the grant of a lease is not a registrable disposition, easements which benefit that lease and which are created within the lease itself should not be required to be completed by registration in order to operate at law. There are differing practices as to whether such easements are registered. Those who do not register the easements often justify this on the basis that why would a successor landlord refuse to honour the easement if it is collecting the rent from the tenant. Requiring the registration of easements clutters the register and when they are part and parcel of a lease that itself does not require registration, to require their registration is inappropriate.

## **18 Electronic Conveyancing**

The Committee is aware of Land Registry's requirements for registrable documents to have a wet ink signature. There have been a number of developments in the property industry in relation to "virtual signings" and the Committee, other committees of the City of London Law Society and the Law Society have been involved in developing a protocol for virtual signings. There follows a link to the protocol - <http://www.lawsociety.org.uk/support-services/advice/practice-notes/execution-of-documents-by-virtual-means/>

The Law Commission may wish to consider whether the approach adopted by the protocol can be of any assistance to the development of future legislation in relation to electronic conveyancing.

### **Additional comments and concerns arising from the consultation process**

The Committee also supports the additional comments and concerns arising from the consultation process mentioned by the London Property Support Lawyers Group in a separate response document. In particular:

#### **Registration Gap**

The Committee considers that the registration gap causes many problems in practice. While operational problems at Land Registry exacerbate the position, the Committee considers that it is a legal issue and the Law Commission should re-consider section 27 of the Land Registration Act 2002, by which a person is not the legal owner of the property until registration is completed.

#### **Missing and illegible copies**

The digitisation of documents by Land Registry has led to missing and illegible documents referred to on the register. The Committee requests the Law Commission to consider whether the indemnity provisions in the Land Registration Act 2002 should be widened to allow a registered proprietor or other person to be indemnified for losses suffered as a result of such missing and illegible copies.

Jackie Newstead, Hogan Lovells International LLP  
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