

City of London Law Society Land Law Committee response to consultation on moving Land Registry operations into the private sector

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. This response in respect of the Department for Business Innovation and Skills Consultation on moving Land Registry operations into the private sector has been prepared by the CLLS Land Law Committee.

This response is given by those members of the Land Law Committee listed at the end of this response. The following individuals/firms have asked to be excluded from this response - Daniel McKimm/Allen & Overy LLP, Jamie Chapman/Ashurst LLP, Ian Waring/Berwin Leighton Paisner LLP, Michael Edwards/Clifford Chance LLP, Bruce Dear/Eversheds LLP, Jayne Elkins/Field Fisher Waterhouse LLP, Victoria Hills/Freshfields Bruckhaus Deringer LLP, James Barnes/Herbert Smith Freehills LLP, Martin Elliott/Linklaters LLP, Nick Jones/Simmons & Simmons LLP, John Nevin/Slaughter & May and Alison Hardy/Squire Patton Boggs (UK) LLP.

General comments

For the purposes of our comments, we assume that a private company (known as “NewCo” in the consultation) will take over the Land Registry. We make that assumption because of the tenor of the commentary in the consultation that privatisation with a long term contract between government and a private operator and risk transferred to the latter is the preferred model.

We have no objection per se to the concept of privatisation, but have carefully considered the Government’s rationale for its proposals and have some concerns as to the details of the proposals. The Land Registry is an integral element of the world-admired UK property market enabling investors (overseas or domestic) as well as home buyers, tenants and businesses to

have confidence that the registration of their property interest at the Land Registry can be trusted and is guaranteed if there is a problem. A major element of that trust and confidence is the quality of the services provided by Land Registry staff and their high level of independent experience and expertise.

We are worried that the Government's proposals may jeopardise the quality of the Land Registry's services and thereby undermine the confidence in and enthusiasm for the UK property market. We would wish to have more comfort that a sale of the Land Registry (whilst providing revenue to Government) will not impact on the quality of the Land Registry's offerings in future. The global popularity of the UK's property market and its importance to the UK economy are very much dependent on the critical role that the Land Registry plays.

The key requirements constantly repeated in the consultation are customer satisfaction levels and speed of service delivery. Those requirements are undeniably important, but we find disconcerting the lack of emphasis on the imperative of ensuring that there is quality in legal terms in the service provided by the Land Registry and that its expertise on technical points is properly supported. We worry that a future private owner of the Land Registry will not focus on such niceties as they may not help to increase profit. As a consequence, trust and confidence in the operation of the Land Registry may be undermined and this will filter down to and affect the trust and confidence that investors and homebuyers have in the property system in this country.

It is crucial to appreciate the adjudicatory nature of the Land Registry's work on registering title and guaranteeing land rights and the often complex, sometimes contentious, issues that have to be dealt with in relation to the thousands of transactions requiring processing and responding to enquiries on land rights. It is the Land Registry's experienced and professional staff, who act as the gatekeeper of sound title. This should not be jeopardised.

The consultation states that a well-functioning Land Registry underpins housing supply, home ownership and economic growth and we would add that our property market is a key part of this country's economic vitality. While the consultation seeks to give some assurance about Governmental interaction with the private owner of the Land Registry in case things go wrong, very little detail is provided on the protections and contingency plans if the Government needs to step in in an emergency. We query for example what safeguards will be put in place to protect against the insolvency of the private owner. While it may be understandable that such detail may not be available at this stage, without it, it is very difficult for respondents to be in a position to make a proper appraisal of and provide informed comments on the Government's proposals.

We understand that the preferred proposal is to have a separate private company responsible for all of the Land Registry services with a few individuals experienced in Land Registry matters sitting in Government to oversee what goes on. This seems to us to be insufficient oversight and inadequate resourcing for what is a critically important role. Greater thought should be given to how the Government oversees the private company and more formalised structures and arrangements should be put in place with provision for replacement resources of an equivalent level in case the initial expertise departs Government.

We note that the state guarantee, keeping of register/statutory data and fee setting will remain with Government. While we find this reassuring, the interaction of those Government functions

with the day to day activities of the private company running the Land Registry is crucial. Little detail is provided on how this will work in practice and questions must be asked about how seamless and efficient this will be.

At the moment (and in the past) the Land Registry has charged fees on the basis that it is supposed to be run on a not for profit basis. Over the years, Land Registry fees have remained broadly stable at a relatively low level in the context of the overall property transaction. Even with the Government setting the fees in the future, clearly to make this attractive for a private investor they have to be satisfied that they can run the Land Registry at a profit, so it seems inevitable that fees will rise.

We note the comments of the consultation that the current Land Registry is not a suitable environment for its future. Whilst we agree that the Land Registry should embrace the benefits of technology, the work which the Land Registry has already undertaken in recent years, in relation to its digital services such as the electronic document registration system, should not be disregarded. Also there must be considerable resource and talent within Government in relation to the development of digital services and general innovation and we are surprised that the Land Registry has to go into the private sector to best realise its digital future. Little detail is given on the problems with the status quo. They seem to relate to not delivering the desired culture change and incentive to drive transformation, but it is not clear what that actually means.

The consultation emphasises that its proposals will enable "best in class" knowledge to be brought into the Land Registry. What must not be forgotten is the potential loss of experience and expertise and existing best in class knowledge resulting from departures from the Land Registry either due to the uncertainties over its future, or to decisions made by the new private company owner to produce even greater efficiencies to maximise profit.

We are also concerned at how this consultation fits in with the Law Commission's consultation on changes to the Land Registration Act. The Law Commission has produced an outstanding analysis of the problems with the statutory regime and we wonder whether the private company that runs the Land Registry will be obliged to adopt any legislative changes emanating from the Law Commission's findings if they do not fit in with the company's commercial imperatives. What will happen to the Rules Committee? More generally, to what extent will the private company have to work within the parameters of land registration legislation?

We query the need for such a tight timetable of 2017 for delivery. This is too important a change to rush. We also consider that the question of whether a monopoly, mandatory service should be placed in the private sector is not properly addressed.

Finally, we would make the point that with the private company owner of the Land Registry being encouraged to engage in all kinds of innovative ventures and usages of Land Registry data, the Land Registry may lose sight of its key responsibilities of ensuring the integrity of the register. The Land Registry's activities have to be free from any actual or perceived conflicts of interest and we worry that private ownership blurs the line. We query whether the functions of the Land Registry, not dissimilar to judicial functions in many ways, which actually create and confer legal rights on individuals and entities and are good against all the world, are suited to being operated in the private sector. Insufficient attention is paid by the consultation to the need for the private

company to be impartial and contractual obligations to Government are unlikely to ensure impartiality.

Responses to questions

Question 1

We agree that the ownership of the registers should remain in Government. This is crucial to preserving the reputation that the UK property market has for stability and quality land registers underpinning the system. We do wonder and we do consider that more detail needs to be provided on how the Government as owner and guardian of the registers will interact with the private company that operates and changes the registers on a day to day basis. If this is not thought through properly and documented precisely, there may be an adverse impact on the operation of the land registration system with a possible overlap of functions, greater inefficiencies and uncertain allocation of responsibility.

Questions 2-4

We have the following comments on the commentary preceding Questions 2-4. Mention is made of professional staff focusing on exercising judgement on technical land registration issues where required. The exercise of judgement requires a high degree of impartiality as well as the necessary technical skills. Since the Land Registry will be owned by a private company, there may be circumstances where a conflict of interest may arise. For example, a decision may have to be made affecting land registration in relation to property owned by a company connected to the company owner of the Land Registry. What protections will there be to ensure that the connected company is treated in exactly the same way as any other customer?

We believe the consultation underestimates the technical nature of land registration. It is not simply an administrative exercise that can be improved by the better use of technology. For example, while current Key Performance Indicators may show that the majority of registration applications are processed quickly, a significant minority are not, largely due to their complex and/or technical nature and a shortage of expert staff to deal with them promptly. In our experience, many applications to register complex transactions are taking several months, causing commercial and legal difficulties. This issue can only be addressed through the availability of sufficient numbers of expert staff to deal with technical registration issues as they arise on a day-to-day basis.

We also consider that the downsides of taking the core functions of Land Registry out of public ownership are not adequately addressed in the consultation. Much is made in the consultation of the potential benefits (with little supporting evidence), but the disadvantages of the proposals are hardly addressed and ought to have been, to ensure that consultees are provided with a balanced picture to enable fully rounded responses to be provided.

The implication from the consultation is that the Land Registry and Government more generally consider that they are not proficient enough digitally to deal with challenges such as fraud. With all the resources and experience of Government, we are surprised by those remarks. An obvious

response would be to ask why the Land Registry could not remain in the public sector, but employ consultants with the expertise lacking in Government? So we question the proposition that digital transformation cannot be brought about if the Land Registry remained in Government, since it appears to us that other parts of Government have been transformed digitally. Insufficient explanation is given for the Government's view on this.

Indeed, the emphasis in the commentary on maximising the potential of the information held by the Land Registry would seem to suggest that the key motivation to privatisation lies in exploiting that data. The data held by the Land Registry is a great enticement to many private organisations who may seek to use it for their own private purposes. We are concerned about what protections there will be to safeguard the interests of our citizens from a data protection perspective – again, while safeguards are referred to, very little information is provided in the consultation on this critical issue.

The Land Registry has an existing system where documents containing commercially sensitive information can be treated as Exempt Information Documents (or EIDs) so that commercially sensitive parts can be redacted and, generally, sensitive information (but not relating to price paid) can be redacted. However, if part of the value of the Land Registry to a private organisation is being able to take commercial advantage of the information or data available in registered documents, then clearly there will be a conflict of interests when it comes to treating documents as EIDs.

Mention is made of the forthcoming take over by the Land Registry of the Local Land Charges currently run by the local authorities. It is worth reiterating that from the perspective of the legal profession, no greater efficiency is achieved for property transactions by that change, since lawyers will still need to obtain replies to CON29 enquiries from the local authorities. For property transactions, both a local land charge search and replies to CON29 enquiries are required. So unless the Land Registry also deals with replies to CON29 enquiries (which we believe would be a huge undertaking), the Land Registry's takeover of local land charges only means that the information obtained from the Land Registry and the local authority is divided between the two in a different way.

Mention is made in the consultation of other opportunities to take on further registers including some outside the UK. Please provide examples. We would reiterate our concern at the danger of the Land Registry becoming distracted from what we regard as its core function of being the gatekeeper of property ownership in this country.

The objectives of the proposals insufficiently emphasise the integrity of the register, confidentiality, stability and the reputation of land registration.

While it is good to see that the ownership of registers will not change, more detail is required on Her Majesty's Stationery Office's management of the registers and data generally. Will Her Majesty's Stationery Office have enough dedicated resources to ensure that, at the very least, the current levels of service to the public are maintained? We are also uncertain as to how Her Majesty's Stationery Office's management of the data fits in with the private company's exploitation of the data, which is presumably one of the main enticements to a private company taking over the Land Registry.

We welcome that there is no change to the principle of no fault indemnity, although we would like clarification on what is an “appropriate share” of financial risk associated with the indemnity that would be transferred from Government to the private company. What reassurances will Government seek to ensure that the private company has sufficient financial resources to fulfil its Land Registry functions and what will happen if the company has financial difficulties or suffers an insolvency event? More detail is required please.

More detail also needs to be provided on the mechanism for interaction between the private company and the First Tier Tribunal. We also again question the impartiality of the private company to review disputes concerning land registration. Mention is made of the independent complaints service in relation to the private company, but no information is given about it.

On ICT security, it is unclear how IT standards will be safeguarded if it is a private company.

We also struggle to see how a balance is achieved between releasing more data and defining circumstances when there is non-disclosure. Clear criteria must be established for disclosure. This is important to protect the public against a private company’s desire to exploit data for its own interests and those of its shareholders, but at the public’s expense.

We should add that questions 2-4 are very narrowly focused around data exploitation and almost entirely miss the heart of the concerns about Land Registry privatisation. That is why we have commented on the preceding commentary rather than addressing the questions directly.

Questions 5 and 6

We support concerns about possible abuse of a monopoly position and this should be considered for every model. We reiterate our concern that an expansion of services on a commercial basis by the private company could adversely affect the focus on the core services of registration.

We consider that the separate capability in Government to manage the private company relationship is an important safeguard, but there is a need to maintain efficiencies and avoid duplication of roles. The interaction between the Government’s ownership of the registers and the private company’s operation of the Land Registry as a whole needs to be seamless and efficient.

We believe that there needs to be more than a few individuals in Government to ensure that the private company delivers. What happens if they leave? As mentioned, something more formalised or structured is required. What is the relationship between those trusted individuals and Her Majesty’s Stationery Office in the latter’s role in relation to the Land Registry?

Questions 7-10

We have concerns about the preferred option because of our reservations about private ownership of the Land Registry. Our reasons have been stated in this response.

More specifically, further detail is needed on the “defined conditions” in relation to the common features of the model options.

The consultation talks about the contract between government and the private operator not focusing on process. We consider that this risks the integrity of the Land Registry. Again the

emphasis is on customer satisfaction levels and speed of delivery of core functions, undeniably important elements, but there is very little about the quality of the end product.

The consultation suggests that the private company may be paid less over time to deliver core statutory functions. This would surely be a disincentive to the Land Registry providing a quality delivery of its core functions?

Conclusion

We are very concerned about the implications of privatising the Land Registry in terms of its impact on the Registry's statutory registration functions. The private company may focus on what it can do with the data at the expense of the current core functions. The likelihood of a lack of impartiality and conflicts of interest could make it very difficult for the Land Registry to fulfil its adjudicatory functions. There is a lack of detail in the consultation on why this change needs to happen in the first place. For example, there is no detail on the deficiencies with the current system and why the digital transformation cannot occur within Government. Little is said about how Government and the private company will interact and whether the Government will devote adequate resourcing to oversee it effectively. While safeguards are mentioned, there is hardly any detail. We ask the Government to think extremely carefully about the potential damage to a fundamental foundation stone of our vibrant property market, if privatisation is to proceed and insufficient protection is given to the Land Registry's statutory registration functions.

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THE CITY OF LONDON LAW SOCIETY

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