

Beneficial Ownership Team
Department for Business, Energy and Industrial Strategy
1 Victoria Street
London
SW1H 0ET

15 May 2017

Dear Sir/Madam

Comments on BEIS's Consultation on register of beneficial owners of overseas legal entities which own UK property

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. A full list of the CLLS corporate members may be found on the CLLS website at http://www.citysolicitors.org.uk/index.php?option=com_content&view=category&id=81&Itemid=468

The CLLS responds to a variety of consultations on issues of importance to its members through its 19 specialist committees. This response is in respect of BEIS's Consultation on the register of beneficial owners of overseas legal entities which own UK property

Questions for Property Lawyers

Question 1 – The Committee agrees that all overseas legal forms that can hold properties should be in the scope of the new register's requirements.

Questions 2 and 3 – The premise behind the proposal is not entirely correct. Leases that are initially for a term of more than 21 years are not necessarily analogous to a freehold. They would usually have to be significantly longer than 21 years to have a capital value and justify the payment of a premium.

Rather than focusing on the length of term of the lease, perhaps the proposal should apply to any lease or assignment/transfer of the lease requiring registration at HM Land Registry where the tenant pays a premium (other than nominal consideration) for the grant of the lease, or a purchaser pays monetary consideration (other than a nominal amount) for the assignment or transfer of the lease. The premium/monetary consideration has to be disclosed in Land Registry's prescribed leases clauses (clause LR7) in a registrable lease or in the Land Registry transfer form and also in the Land Registry application form AP1, so it is easily discoverable for Land Registry.

Question 7 – Land Registry, Companies House and the Department for Business, Energy & Industrial Strategy ("BEIS") should undertake awareness campaigns. There should be an extended transitional period (for example, one year from when the legislation comes into force) during which the new requirements do not take effect. In that period, the property industry in this country and overseas will be made aware through those campaigns of the implications of the new requirements for conveyancing transactions. As the consultation document states, the publicity should include working with international partners of Government to raise awareness of the new regime.

Question 10 – The Committee agrees that the duration of the period given to overseas entities to comply with the new requirements in relation to already owned property should be one year. The consultation states that "This will give entities enough time to dispose of property if they choose to". So if the overseas entity already owns a registered property when the legislation comes into force, does this mean that the new requirements will not apply to a sale, lease or charge of that property if it completes within a year of the date that the legislation comes into force?

The Committee is concerned that the consultation states that in the one year period, entities will be unable to register title to new purchases of property without a registration number. The Committee considers that the transitional period referred to in its response to Question 7 should also apply in this situation. Therefore, in the initial one year period, overseas entities will be able to register title to new purchases of property without a registration number.

Reference is made in paragraphs 46 and 47 of the consultation to a "note" being inserted, at the end of the one year transitional period, into the title register in relation to compliance with the new requirements. A Land Registry restriction is likely to be used and presumably BEIS is discussing this with Land Registry. Since the restriction will simply relate to proving that the overseas entity has an up to date registration number, this should be straightforward to confirm. Will Land Registry liaise directly with Companies House to confirm that the restriction has been complied with?

Question 11 – The proposal on overseas entities that wish to buy property allows for the entity to be registered, although a restriction (of the type mentioned in the response to Question 10) is entered in relation to future sales, leases or charges by the entity. The proposal to make the failure to provide information to the new register a criminal offence seems onerous. The Committee considers that there should be a transitional period of say one year to allow for provision of the information, before the failure to do so becomes a criminal offence. The Committee notes in that respect the comments in paragraph 98 that the Government is considering whether it would be appropriate to create a criminal offence for entities that still own

property **at the end of the transitional period**, but have not complied with the new register requirements **by that time**.

Questions 12, 13 and 14 – The Committee does not agree that the Government should prevent any beneficial interest in the property passing to an overseas legal entity that does not have a valid registration number at completion.

The vast majority of overseas legal entities will wish to be registered as the legal owner at Land Registry. Failure to do so will, as the consultation highlights, prevent the entity selling, letting or charging the property in most situations and certainly in those requiring registration at Land Registry. This will severely inhibit what the entity can do with the property, for example, in terms of generating income. While the entity could let the property for leases that are of a short enough term not to require registration at Land Registry, the fact that the entity is not the legal owner is likely to be problematic for the prospective tenant and their advisers.

The Committee considers that interfering with the passing of the beneficial interest is more likely to create unforeseen consequences and adversely impact on innocent parties. If completion has taken place and the transfer has been dated, the beneficial interest in the property passes from the seller to the overseas entity. The completion proceeds have passed from the entity to the seller and may have been used by the seller to redeem a mortgage, or in a chain transaction or for another purpose.

If the transfer is void, what happens to those proceeds? Do they have to be repaid to the overseas entity? It is easy to see the unfortunate implications for innocent parties, who may have no control over the entity obtaining the registration number. Whilst contractual provisions can be included, in the period shortly after the introduction of the legislation such provisions may not always be included and, if they are not, parties selling to an overseas entity should not thereby be prejudiced.

The Committee, therefore, proposes that the provision of the registration number at Companies House is a requirement for registration at Land Registry, not a requirement for a valid transfer. In this situation, once the transfer is completed, the beneficial interest (entitlement to income etc) passes to the overseas entity and the proceeds received by the seller are not interfered with.

The Committee considers that whilst the registration number is a requirement to be registered at Land Registry, the number must be valid as of the date of the transfer etc (i.e. on completion). The parties to the transaction control when the relevant document such as the transfer is dated. Whilst usually the application to Land Registry to register will be made shortly after completion, there is less certainty over how long such an application may be delayed. Therefore, for reasons of greater certainty for the parties, the date of completion should be the date for judging the validity of the registration number.

If there is no valid registration number at the date of completion, registration should still be permitted if a valid registration number is included with the application for registration.

If the overseas entity is unable to have itself registered at Land Registry because of a failure to provide the overseas registration number, the seller will continue to hold the legal title on trust for the overseas entity. However, that outcome is no different from any other situation where a buyer is unable to be registered at Land Registry following completion of a transfer. Since the buyer has

usually paid a substantial sum for the property, it will be the buyer and not the seller who will be most concerned about its failure to be registered. Even though the seller continues to have possible exposure under certain legislation as a result of remaining the legal owner, such a concern of the seller will usually be trumped by the buyer's more direct financial concerns. The reality therefore is that most overseas entities will want to be registered and do what has to be done to achieve this.

In the unlikely event that the overseas entity refuses to register itself at Land Registry and the seller continues to have an exposure as legal owner, consideration should be given to the relevant legislation including powers for a court to order the overseas entity to provide the registration number to enable registration at Land Registry. Failure to comply with the order may lead to the legal interest in the property passing from the seller to for example the Crown under the equivalent of a bona vacantia arrangement pending the registration of the overseas entity at Land Registry, at which point it passes to the buyer.

A failure by an overseas entity to register itself at Land Registry will also have an adverse impact on a landlord if the overseas entity is a tenant. This is because the nature of the relationship between the landlord and the tenant is thrown into doubt. Whilst there may be contractual protections, that may not be the case and the legislation needs to provide a backstop protection for innocent parties.

Mention is made elsewhere in the consultation of a transitional period of one year. Will there be an equivalent period for overseas entities that buy UK property after the law comes into force? The justification for this is the need to have a reasonable period in which the Government can promote awareness of the new requirements especially to overseas entities which may have missed the initial publicity.

Overseas entities that wish to sell property

The consultation does not ask a question on this section. However, for the same reasons articulated in the response to Questions 12-14, the Committee considers that the transfer should not be void if there is a failure to comply with the new requirements at the time of or following the dating of the transfer by the overseas entity seller.

There should be a requirement for a valid registration number at the transfer date, but the failure to provide this should be a registration matter rather than one relating to the validity of the transfer. So the innocent buyer etc can still benefit from the beneficial interest that it has paid for.

If there is no valid registration number at the date of completion, registration should still be permitted if a valid registration number is included with the application for registration.

Since the overseas entity selling, letting or charging, controls whether it has an up to date registration number, the party dealing with the entity will need to ensure that it has a contractual obligation from them to provide an up to date registration number on completion of the sale, lease or charge. In case there is a failure to include such a contractual provision, consideration should be given to the relevant legislation including powers for a court to order the overseas entity to provide the registration number to enable registration at Land Registry, so the innocent party is not penalised.

Failure to comply with the order could perhaps lead to the legal interest in the property passing from the seller to the buyer. The overseas seller has not been prejudiced since it has already received the proceeds for the sale which the legislation does not interfere with.

Unregistered land

In relation to unregistered land, the consultation states that since a transfer of unregistered land triggers first registration, the proposals will apply to an overseas entity buying unregistered land. The Committee assumes that this means that if the overseas entity is selling the unregistered land, the new requirements will not apply to a non-overseas entity buyer. Otherwise, it may potentially be difficult to ascertain that the seller is an overseas entity and that the requirements need to be satisfied (i.e. the buyer does not benefit from the "note" on the title that registered land can provide).

Questions 26 and 27 – In relation to question 26, trying to define 'legitimate' or accredited lenders is very difficult. Perhaps a better approach would be to prevent lenders who are associated with or connected to the owner from exercising their security rights. Statutes provide various examples of definitions and an example is in the Corporation Tax Act 2010. The Committee is very happy to discuss this further.

An overseas legal entity's failure to obtain a registration number should not adversely impact third parties' contractual or statutory rights that exist at the time the new requirements come into force. An example would be a tenant's existing right to renew a lease, whether contractual or statutory (for instance, under Part II of the Landlord and Tenant Act 1954). It may be that Land Registry requires a confirmation that the new lease is granted pursuant to a contractual or statutory right of renewal, but if this confirmation is provided Land Registry should allow registration, even if the overseas entity landlord has not provided the number.

Similar concerns apply to other types of options and pre-emptions that have been entered into or other statutory rights (such as rights of collective enfranchisement) that have accrued before the new requirements come into force.

Again, the Committee queries whether consideration can be given to the relevant legislation including powers for a court to order the overseas entity to provide the registration number to enable registration at Land Registry.

There may be scope to utilise the provisions of section 2 of the Law of Property (Miscellaneous Provisions) Act 1994 to provide comfort to the disponee, but specific protective provisions in the new legislation will be clearer.

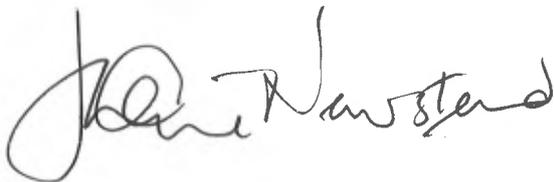
General comment

The Committee wishes to highlight a concern in relation to property that is already owned by an offshore entity when the legislation comes into force. The proposal appears to be that the entity would have 12 months to provide the information to Companies House and to obtain a registration number after which they would be committing an offence. There are thousands of properties across the country legitimately owned by UK pension funds that are held through OPUTs, (Offshore Property Unit Trusts), mainly based in Jersey and Guernsey but also in the Isle

of Man. The registration of those types of entities at the Land Registry usually shows that they are held by X and Y as trustees on behalf of the Z Unit Trust.

It is not clear to the Committee what the requirements would be for such entities. Often X and Y are the same trustees for multiple unit trusts. Presumably, they would need to obtain a separate registration number for each unit trust. Is the obligation then just to provide details of the unit holders? If they are other legal entities, not individuals, how far do the investigations go? This will be a huge logistical exercise and cost burden for a great number of perfectly legitimate entities, particularly taking account of the requirement to keep updating information at least every two years. The Committee does not consider that criminal sanctions for a failure to comply are appropriate in those circumstances, particularly in relation to updating.

Yours faithfully

A handwritten signature in black ink, appearing to read 'Jackie Newstead', written in a cursive style.

Jackie Newstead,
Hogan Lovells International LLP
Chair, City of London Land Law Committee

May 2017

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