London Property Support Lawyers Group

Response to Law Commission Consultation on the Land Registration Act 2002

Additional comments and concerns arising from the consultation process

1 INTRODUCTION

In preparing its response to the Law Commission consultation on the Land Registration Act 2002, the London Property Support Lawyers Group has identified additional issues that it believes should be considered alongside the proposals set out in the consultation paper. These are set out below.

2 REGISTRATION GAP

2.1 In Chapter 5 of the consultation document, the Law Commission acknowledges the issues arising from the "registration gap" but concludes that it is not capable of a legal solution (paragraph 5.74). We disagree with the Law Commission's analysis that the issues are practical ones caused by operational limitations, rather than legal ones. The registration gap issues are legal ones that are being exacerbated (not caused) by operational issues at the Land Registry where it can take upwards of 6 months or more for complex transactions to be registered. The root of the issue is that under section 27 of the Land Registration Act 2002, a person is not the legal owner of the property until completion of registration. Upon completion, they are then taken to have been the legal owner from the date that the application to register the disposition was entered onto the day list.

2.2 Although some drafting can be included in documents to assist with the issues arising from the registration gap (for example stating that the tenant's right to break a lease comes to an end on the date of the deed of transfer to avoid the particular issue in the *Brown & Root* case), this is not always possible and does not address specific issues in relation to leases, many of which were drafted before the consequences of the registration gap were fully appreciated.

2.3 One example of where practical issues arise is in relation to serving section 25 notices to determine a tenancy protected by the Landlord and Tenant Act 1954. Landlord A sells property to Landlord B. Landlord B proposes to redevelop and wishes to serve section 25 notices relying on the re-development ground. Assume that the best, or depending on the length of time taken to register, the only, time to serve those notices is during the registration gap. Landlord B could take an authority/power of attorney to serve notices in the name of Landlord A during the gap, but if Landlord A does not have any intention to develop, the validity of the notice must be in doubt. Landlord B can only serve a notice in its own name once registered, so you get a timing problem that is not capable of being easily resolved.

2.4 Another example is where a lease contains a tenant's break clause that comes to an end on the first assignment of the lease (*Brown & Root*). The lease is assigned and the original tenant agrees with the assignee not to exercise the break clause. During the registration gap, the original tenant nonetheless exercises the break clause and the landlord accepts the notice. Does the fact that the original tenant served the notice in breach of a contractual obligation to the assignee affect the validity of the notice between the landlord and the original tenant? Again, even if procedures are put in place to mitigate the effect of the registration gap, they are not always able to cover every eventuality.

3 EXTENT OF PROTECTION GIVEN BY NOTICES

3.1 The Land Registry will include an entry on the register of a lease that is not registrable in its own right if that lease grants easements over the property or the Land Registry may include an entry in the form "a deed dated X contains covenants – copy filed."

3.2 Questions sometimes arise over the extent of the protection afforded by the notice. In the examples above:

3.2.1 the lease contains a tenant's option to acquire the freehold reversion or an option to renew the lease (either of which would be capable of being noted in their own right). Does noting the lease (originally only to protect the easements) have the effect of also protecting the option in the lease? There is no clear guidance on this; and

3.2.2 the deed of covenant also grants a right over the property. Does the noting of the deed also give notice of the easement?

4 MISSING AND ILLEGIBLE COPIES

4.1 The issue of missing and illegible copies arises largely as a result of the scanning exercise that the Land Registry carried out to digitise all documents referred to on a register.

4.2 As a result of this process, there are some documents that we come across where the register says that a copy has been filed but neither the original document or a scanned version of it can now be found.

4.3 On other occasions, the scanned copy is received but for whatever reason, is illegible as the paper version has not scanned clearly.

4.4 As to missing copies, the register will refer to a document and then state "Copy filed" or "Copy file under title number xxx". When we apply for an official copy of that document we frequently receive the response that the Land Registry is unable to produce it. It seems to be that in some cases the paper copy has, over the years, been put in the "wrong" paper file and so is now missing or that it has simply become lost while in the care of the Land Registry. For whatever reason, the failure to produce such documents means that the register is incomplete.

4.5 Could the Law Commission consider whether the indemnity provisions in the Land Registration Act 2002 need to be widened to allow a registered proprietor to be indemnified where the information previously held in paper form has now been destroyed or has become illegible as a result of the digitisation project and where the Land Registry is unable to produce an official copy of a document which has been sent to it and which, at some stage, has been the subject of the "copy filed" note on the register?

5 REGISTRATION OF LEASES

5.1 Under section 4 of the Land Registration Act 2002, a lease granted "for a term of more than seven years from the date of grant for valuable or other consideration ……." must be registered.

5.2 The reference to date of grant has an uncertain effect where a reversionary lease is granted and the term commencement date falls within three months of the date of the lease so that the lease is not registrable as a result of the rules relating to reversionary leases.

5.3 The following illustrates this. On 1 May 2016 I grant a lease to take effect in possession on 1 July 2016. The term of the lease will run from 1 July 2016 to 31 May 2023. The term is less than seven years but it expires more than seven years from the date of grant. Is it for 'a term of more than seven years from the date of grant'?

5.4 The same question arises under section 27(2)(b)(i) in relation to grants out of registered land.

5.5 Although this is a minor point, it could usefully be clarified as part of the consultation process.

6 PROTECTION OF AGREEMENTS FOR UNDERLEASE

6.1 A freeholder enters into an agreement for a headlease to be granted out of a registered title. The proposed tenant then enters into an agreement for underlease with a proposed undertenant. How should the proposed undertenant protect its estate contract?

6.2 The following table illustrates the various permutations that have to be considered:

Notice of the agreement for lease on freehold title	**Notice of the agreement for underlease on the freehold title**	**Effect**
No	No	If a third party buys the freehold, it takes free of the agreement for lease and the agreement for underlease. The undertenant loses everything. *(This is subject to the rule in Lyus v Prowsa Developments Ltd [1982] under which a third party will take its interest subject to the second party's rights in certain cases*)
No	Yes	If a third party buys the freehold, it takes free of the agreement for lease and the agreement for underlease. Undertenant loses everything. *Some take the view that putting a notice of the agreement for underlease on the freehold title means that a third party dealing with the freehold will take subject to the agreement for underlease. However, the freeholder could presumably get the notice taken off as not protecting an interest affecting the freehold*
Yes	No	If a third party buys the freehold, it takes subject to the agreement for lease. However, once the lease has been granted, nothing protects the agreement for underlease unless either (a) the tenant mentions the agreement for underlease in its application for first registration of the headlease or (b) the undertenant itself puts a notice of the agreement onto the register of the headlease – but this is unlikely given that it will not know when the lease has been granted
Yes	Yes	This must be the same answer as immediately above. In particular, once the headlease has been granted, the notice on the freehold title to protect the agreement for underlease cannot possibly work. The only place that such a notice can be put now is on the title to the new headlease

6.3 In addition to protecting the interest of the undertenant, a person taking security over the undertenant's interest in the property has no means of protecting its interest until the underlease has been granted.

7 CAUTIONS AGAINST FIRST REGISTRATION

7.1 These were not discussed in the Law Commission consultation but can cause some issues in practice where the caution is registered to protect the potential first registration of a head lease.

7.2 Assume a registered freehold title. A lease for 15 years was granted in 2000 (so unregistrable at the time, but potentially registrable after 2003 on assignment). In 2010 an underlease was granted for 5 years and was not capable of registration. The undertenant registered a caution against first registration of the leasehold title. In 2015 the underlease (and the lease) expire and the property becomes vacant.

7.3 The freehold title changes hands and the freeholder grants a new registrable lease. The tenant applies for registration and the application gets stuck because of the caution. The freeholder cannot withdraw/cancel the caution because it is registered against the first registration of a lease title and not the freehold title.

7.4 Two issues arise here. The first is that the only way that the caution can be discovered is by carrying out a SIM search as no notice of it can appear on the freehold title. As it should not usually be necessary to carry out a SIM search on the acquisition of a single freehold registered title, the caution may come as a nasty surprise and the caution can be difficult to remove. More importantly, there does not seem to be any procedure to time limit cautions against first registration against a leasehold title so as to expire with the lease to which they relate or, if earlier, with the underlease that they protect. Could the Law Commission give consideration to allowing cautions against first registration of a leasehold title to be limited in time to prevent them remaining registered after the leases to which they relate have come to an end?

8 PRIORITY AND OVERRIDING INTERESTS

8.1 Ruoff and Roper states (at para 30.013): "A registrable disposition of a registered estate for valuable consideration, when completed by registration, takes effect subject to interests which are protected by a notice in the register and overriding interests. Making an official search with priority can get round the problem of third party interests being noted in the register in the period up to registration: this is done by deferring dealing with the third party's application for entry of the notice until the end of the purchaser's priority period. During this time, the purchaser's application should have been made. **But an official search does not give the purchaser priority over an interest which is an overriding interest. Such an interest is instantly binding, without there having to be any application for an entry in the register to protect it: there is nothing to defer.**"

8.2 This is undoubtedly a correct statement of the law but it can create issues where an overriding interest comes into being between the date of a priority search and the registration of a transaction protected by that search.

8.3 Assume a bank taking security does a priority search: it is clear. Before completion of the charge, the owner grants an unregistrable lease and tenant takes up occupation. The lease includes an option for the tenant to buy the freehold. The charge is subsequently completed and registered and, at a later date, the lease and the option to purchase in the lease are noted on the title.

8.4 The option and the lease are both overriding interests unless the bank can show that the tenant's occupation and the bank's knowledge of it was 'not enough' for Schedule 3 Land Registration Act 2002. That will probably be difficult in practice, since it is occupation at the date of disposition which is relevant. How in practice can a bank (or realistically any purchaser) check that? It raises the following question that we believe the Law Commission should consider:

8.4.1 should occupation protect an option which ought to be protected by notice? We don't think it should, especially if the proposals in chapter 7 are enacted.

8.4.2 If the lease was registrable and registered at the same time as the option, we think the lease itself would also be an overriding interest and so have priority over the charge (because the only exclusion of leasehold estates from paragraph 2 of Schedule 3 to the Land Registration Act 2002 relates to reversionary leases (para 2(d)). If a lease is not within paragraph 1 of Schedule 3, should occupation make it an overriding interest under paragraph 2?

8.5 More generally, should a priority search afford protection to the holder of the search in relation to overriding interests that come into being during the priority period?

8.6 This issue also highlights another point of concern where a person has obtained the benefit of a priority search and another person applies to register a unilateral notice in respect of mines and minerals or chancel repair liability. These overriding interests are, by their very nature, difficult to spot. Even though they lose their overriding status on completion of a disposition after 12 October 2013 where they have not been noted on the register, they still appear on the register where the application to note them was made during the currency of a priority search. To provide greater clarity and transparency, we suggest that a priority search should provide priority against the registration of a notice to protect an overriding interest whose overriding status would come to an end on completion of the disposition to which the search relates within the priority period.

9 PROTECTION OF INTERESTS THAT ARE VARIED

9.1 A number of issues arise where an interest protected by a notice on the register is varied that could usefully be clarified as part of the Law Commission's review.

9.2 A grants B an option to purchase A's freehold. The option is to last 10 years. B registers an agreed notice on A's title. A charges the property to C and the charge is registered. A and B then agree that the option period will last another five years.

9.3 The Land Registry's view is that a new notice is required to protect the option as varied; the existing agreed notice will be removed and the new AN1 will appear below the charge. This does not seem right. At least the existing AN1 should stay so if the option were exercised within the initial 10 years then it has priority over the charge.

9.4 A similar point arises from the case of *A2 Dominion Homes Ltd V Prince Evans Solicitors* [2015] EWHC 2490 (Ch). Perhaps not on the facts of that case, but if an AN1 protected an agreement for lease, then there was a charge, then a variation of the agreement for lease (within section 2 Law of Property (Miscellaneous Provisions) Act 1989 essentially meaning there is a second contract) should the tenant lose priority over the charge?

9.5 A broader question is whether the decision in the *A2 Dominion case* should be put on a statutory footing?

10 SALE BY EQUITABLE CHARGEE

10.1 The way in which restrictions work can put an equitable chargee in a stronger position than a registered one. To illustrate:

10.1.1 there is a restriction on title preventing dispositions by the registered proprietor or the proprietors of a registered charge without consent;

10.1.2 a later notice is added to the title to protect an equitable charge; and

10.1.3 the equitable chargee obtains a court order allowing a sale.

10.2 The sale by the equitable chargee is not a disposition caught by the restriction so the transfer will be registered. The restriction will remain on the title. If the transferee wishes to dispose then the restriction must be satisfied.

10.3 Whether this creates a problem will depend on what the restriction is protecting. However, it places an equitable chargee in a better position than a registered chargee which seems anomalous. It also creates a trap for the person with the benefit of the restriction, for example if the restriction is only intended to apply until the first transfer, its benefit may be lost.

11 PRIVATISATION OF THE LAND REGISTRY

11.1 The Law Commission states that the question of whether Land Registry operations should be moved to the private sector is outside the scope of the project. That may be so, but the possibility that they might be has many consequences for the Act which we believe should be considered within the project.

11.2 The Act (and its predecessors) have all been written and enacted on the basis that the Land Registry is a public sector body and that the Registrar is a public servant. There are many places in the Act which give the Registrar a discretion, some of them involving fundamental issues; for example: section 72, sections 9 and 10, section 34, sections 41, 42 and 43, sections 92 and 94, section 100(4), sections 104 and 105, Schedule 4. There are also many other places in the rules where the Registrar has a discretion.

11.3 The possibility that Land Registry operations may be moved to the private sector and that statutory discretions could be exercised by the private sector (bringing with it inherent problems of potential conflicts of interests and confidentiality) means that the question of the Registrar's discretion should, we believe, form part of the Law Commission's review.

12 SEARCHES OF PART AND SEARCHES FOR EASEMENTS

12.1 We would like the Land Registration Act 2002 to clarify the position on searches on a disposition of part. In practice problems arise where a landowner is making multiple dispositions of part, for example to tenants, and the tenants make OS1 applications. Subject to the points made below in relation to easements, we believe the Act should state that a search of whole does not afford priority on a disposition of part.

12.2 The position relating to priority searches on a disposition of part with easements being created over the retained land is more problematical and unsatisfactory. Either the disponee (T1) makes a search of the whole title and risks the search not being the "appropriate" search under rule 147(3) with the result that there is no priority or T1 makes an OS2 search over the land being acquired and relies on rule 148(3) to the effect that the search affords priority on the ancillary disposition (of the easements) as well. The risk with rule 148(3) is that it is subject to

the application for the search being "in order" and it is not clear what is meant by that. It is also unsatisfactory from the point of view of a disponee of the retained land (T2) as the pending grant of the easements will not be revealed. If this means that T2 takes free of the easements T1 is prejudiced (T1 cannot control the terms of the disposition to T2 so as to ensure that there is a suitable 'carve-out' in relation to the easements). If T2 takes subject to the easements then (whilst it might have a claim against the disponor) it has a clear search, which is at best misleading.

12.3 Ruoff and Roper at paragraph 30.006 states that "A search of whole is not normally required in order to protect easements and other rights granted over the retained land. Priority is accorded to "any entry made in pursuance of" the application protected by the search" and cites section 100(3) but this seems to be an incorrect reference and probably should refer to section 72(2) of the Land Registration Act 2002.

12.4 One solution might be to require or permit T1 to make a second OS 2 search over the retained land in respect of the easements, and to amend the OS forms to add an 'E' category. Sufficient flexibility would need to be allowed with the definition of the land to be searched so as to allow easements over a defined strip of land, such as a right of way and easements over a much more diffuse area and which might not be easily plotted on a plan, such those through wires and cables through a building or over, effectively, the whole of the retained land.

12.5 The same problems would arise if the proposals to make other interests (such as restrictive covenants) protectable by a priority search were enacted.