

November 2018

REAL ESTATE FINANCE UPDATE



INTRODUCTION

Welcome to the first edition of the Addleshaw Goddard Real Estate Finance Update, which we intend to issue on a regular basis.

The aim of this publication is to provide useful, easy to digest summaries of topical issues, new legislation and cases that are of interest to those of you operating in real estate finance from a practical, legal and/or market perspective.

In this edition at page 1 we highlight the Law Commission's consultation on the electronic execution of documents. This is an issue that affects the whole legal market but is of particular interest for the real estate finance market due to the high number of deeds that our work produces and the fact that some of the key uncertainties raised around electronic signatures relate to deeds.

We also examine at page 2 the draft Registration of Overseas Entities Bill, which is raising a number of concerns for real estate finance lenders and borrowers alike, as highlighted in particular by the Loan Market Association's (LMA) recent response to the Department of Business, Energy and Industrial Strategy consultation.

Finally, we consider the recent Court of Appeal decision in *Baker v Craggs* at page 3, which illustrates the problems that can arise as a result of the 'registration gap' where a transferee is not regarded as having legal title to a property until HM Land Registry has registered them as the actual owner; and the actions we can take to reduce any risks associated therewith.

We do hope these updates are of interest – do not hesitate to contact any of the team if you would like to discuss (see page 5 onwards) or if there are particular topics which you would like us to tackle in future editions.



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"What I like about the firm is their responsiveness, flexibility and real willingness to take control of a deal and drag it over the line where required"

ELECTRONIC SIGNATURES

The Law Commission has launched a consultation of the electronic execution of documents. Given the pace that technology is transforming the way we do transactions now, it was only a matter of time before the spotlight focussed on electronic signatures.

Whilst virtual signings are now considered the "norm", electronic signatures go that one step further. Current law says that electronic signatures are admissible in evidence in legal proceedings and the Law Commission's provisional conclusion is that an electronic signature is capable (in general) of meeting a statutory requirement for a signature and that no legislative reform is necessary, however, there continues to be uncertainty – particularly with electronic execution of deeds (which requires that a deed must be signed "in the presence of a witness and attested").

Therefore, in addition to providing clarity based on the current legislation, the Law Commission is seeking views on whether there should be a further project on whether the concept of deeds is fit for purpose in the 21st century, particularly in relation to the requirements of witnessing and attestation and delivery. For example, could it be possible to use webcams or video links instead of a physical witness?

We believe that this consultation is very welcome as it will hopefully seek to remove current uncertainties in the law, allowing businesses to speed up transactions by going fully digital. Quite how far the recommendations will go remains to be seen. Electronic signature platforms currently do exist but our understanding is that the lack of clarity in the law is discouraging its use on commercial transactions.

The deadline for responses to the consultation is 23 November 2018. If you would like to read the full consultation you can do so by [clicking on this link](#).

As a firm committed to embracing legal technology, we will, of course, be keeping up to date with any developments on this.

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REGISTER OF FOREIGN COMPANIES OWNING UK PROPERTY

What is this new register?

In July of this year the government published its draft Registration of Overseas Entities Bill (the Bill) setting out provisions to establish a new beneficial ownership register of overseas entities that own UK land. It is intended that the register will be held at and maintained by Companies House.

Essentially any overseas entity that wishes to own UK land will be required to register themselves and their beneficial owners on the new register and update the information on that register annually. Any failure to keep the register updated or the delivery of misleading, false or deceptive information will be an offence.

Registration itself is voluntary, however, failure to register, or to comply with the annual updating duty, will mean that an overseas entity cannot acquire full legal title to land as the entity will be unable to register as proprietor or owner of land in the UK. Failure to register will also impact an overseas entity's ability to sell or lease the land, or create a legal charge over the land, because any buyer, tenant or a mortgagee (as the case may be) would be unable to register that disposition with the (relevant) land registry in any part of the UK.

These proposals form part of the government's drive to improve corporate transparency and are aimed at reducing such activities as tax evasion, money laundering and terrorist financing. The aim is to have the register operational by 2021 with an initial 18 month transitional period being put in place.

What are the concerns with and the possible consequences of this register in practice?

From a legal perspective, the Loan Market Association (LMA) highlighted a number of concerns in its response to the open consultation on the Bill in September 2018, including the following points that could raise particular concerns for lenders and security agents and the industry hopes will be addressed in the final draft of the Bill:

- where a loan is provided to an overseas borrower to acquire UK land the lenders can of course require, as a condition precedent, that the borrower completes the register. However, going forwards during the term of the loan the requirement for the borrower to keep the register updated is outside the control of the lenders, who will have taken security over the land now owned by the borrower. Consequently, lenders will want reassurance that, if necessary, they can still enforce their security over the land without any impediment arising from non-compliance with the register update requirements, e.g. that the borrower's failure to comply with the regime will not affect the registration of a disposal by a lender or security agent; and
- where lenders have also taken share security over a borrower they will want to know that they will not be administratively burdened or criminally liable under the new regime, for example, by having to appear as "registrable beneficial owners" and, consequently, the LMA have asked that this definition be reviewed and amended to make this point clear.

From a market perspective there is obviously going to be an economic cost to compliance, which may act to discourage UK real estate purchase by overseas entities. On the flip side if beneficial owners wish to avoid the need for compliance with the new regime there may be an increase in property transactions during the proposed 18 month transition period, as those owners seek to dispose of UK land.

What next

The Department for Business, Energy and Industrial Strategy (BEIS) closed the consultation on the Bill on 17 September 2018 and will now consider all responses, including those made by the LMA. AG will be keeping abreast of further developments relating to the Bill and will, in turn, keep you updated once the results of the consultation or a revised draft of the Bill is published.

LAND REGISTRATION AND THE ISSUE OF PRIORITIES — BAKER V CRAGGS [2018] EWCA CIV 1126

Why is this case of interest?

This case illustrates the problems that can arise as a result of the 'registration gap', where a transferee is not regarded as having legal title to land until HM Land Registry (HMLR) has registered them as the actual owner.

What is the 'registration gap'?

The 'registration gap' is the period between completion of the transfer of land and the subsequent entry of the transaction on the register of title at HMLR, which effects the transfer under section 27(1) of the Land Registration Act 2002. Until such registration is effected the transferee is merely the owner in equity.

Brief facts of the case

The solicitor of a new landowner (A) did not register his purchase of land at HMLR until after the expiry of the priority period. In the meantime, the sellers of the land had sold other land to a third party (B), which included the grant of a right of way in favour of B over the land that had already been sold to A.

What did the court decide?

The Court of Appeal held, overruling the earlier High Court decision, that A owned his land free from the right of way created by the former owners. The right was created in the period between the sale to A and his registration as owner of the land at HMLR. Despite various failings to register the ownership of A within the required timeframe, the Court of Appeal held that because A was in occupation of the property, his rights of occupation took priority. His 'overriding interest' (i.e. the interest belonging at the time of the disposition, in this case the grant of the right of way, to a person in actual occupation) could not be overreached (i.e. in this instance by the paying of monies to two trustees for the grant of the right of way) and the right of way in favour of the sellers, therefore, should be removed from the title.

The Court of Appeal said overreaching applies only to the sale and purchase of freehold and leasehold titles in land. It does not apply to the creation of rights (such as a right of way) over other land.

So, in this particular case A was saved from the potentially detrimental consequences of the 'registration gap' by an overriding aspect of land law, however, that will of course not be the case in the majority of instances and the risks of the 'registration gap' remain relevant for every transfer of land.

What next and practical considerations

The Court of Appeal's decision in this case is helpful in clarifying the law regarding 'overreaching', however, it does not directly address the registration gap issue that was clearly highlighted by this case.

In July 2018 the Law Commission issued its report on updating the Land Registration Act of 2002 and, although, it discussed the 'registration gap' issue it did not propose any reforms in relation thereto. The Law Commission argued that the proposals for solving the 'registration gap', i.e. by either changing the time at which legal title passes from the point of registration to the point of transfer or taking away the registered proprietor's power to deal with the land once it has been transferred, raise too many problems of their own by fundamentally undermining the land registration structure and the integrity of the register.

In the absence of any statutory intervention to solve the problem of the 'registration gap' we must remain alert to the issues associated with it and continue to take the following actions to manage the risks in the best ways available:

- **Prior to completion of a transaction, when acting for the lender or purchaser we will obtain undertakings from the Borrower's solicitor to submit the Land Registry application prior to the expiry of the priority period (being 30 working days) and to promptly deal with any requisitions raised.** If requisitions aren't adequately dealt with in the timescales specified by the Land Registry then the Land Registry will cancel the application. If this happens, new priority searches will need to be carried out albeit, again, there remains the risk discussed above.

- **Priority searches should be put in place a couple of days before completion.** This allows a small period of time prior to completion to deal with any prior Land Registry applications that we may not have been aware of. It also allows for the priority period to run for as long as possible post completion. This period post completion allows time for Companies House registrations to be completed and then certified copy documents to be sent to the Borrower's solicitor for them to submit the Land Registry application.
- **In the event completion is delayed, it is important to keep an eye on the length of time remaining on the priority searches.** It may be that, even though there is time left before the priority period expires, it isn't a sufficient amount of time to deal with Companies House and certified copy documentation. Priority periods cannot be extended - new priority searches need to be applied for, albeit there remains the risk that a third party may have submitted a separate application or priority search which would have priority.

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