

e-conveyancing Consultation Secondary Legislation Part 3

Response by the Council of Mortgage Lenders to the Land Registry consultation paper

Introduction

1. The CML is the representative trade body for the first charge residential mortgage lending industry, which includes banks, building societies and specialist lenders. Our 108 members currently hold around 94% of the assets of the UK mortgage market. This response has been prepared following consultation and detailed discussion with our Legal Advisory panel. That panel is made up of legal representatives from a wide cross section of our membership.

2. We have responded in detail to previous Land Registry consultations on e-conveyancing and are pleased to respond to this consultation.

General points

3. Some of our members have participated in the e-charge pilot and have reported favourably on the project to date. However we believe that completion numbers have been limited so it is arguable that the product is not yet fully tested.

4. We have in the past called for e-conveyancing to be compulsory on the basis this will lead to an effective aid to the home buying and selling process. However we feel that it would be preferable for changes such as those proposed to be introduced on a voluntary basis before any compulsion is considered and we would hope there would be a full and effective consultation process on compulsion before any decision was made.

5. We note that LR will allow the same firm to act for the transferor and the transferee. We recognise that in some circumstances this is permitted by Law Society rules and is allowed for licensed conveyancers subject to usual conflict requirements. However given the Land Registry's objective of restricting fraud we would have thought this was an area of possible concern and we are therefore surprised by this proposal.

6. The success of e-conveyancing rests with the need for all involved with the process to have confidence in the technology – particularly e-signatures. We have raised this in previous responses. As indicated above lenders engaged in the e-charges pilot have not reported any issues and have been pleased with the pilot. However because of low volumes and time lag for issues to emerge this is another area that seems to us has to have not yet been truly put to the test.

7. In our previous response we raised concerns about fraud with borrowers e-signing in the e-charge pilot- particularly where there are joint proprietors. It seems that under the present system it would be very simple for one party to sign on behalf of both without the acting conveyancer or the Land Registry being aware of this.

Q1 We have already asked your views on the electronic charge in standard form in Part 2 of the consultation published in August 2007. Now that we have developed the concept and extended it to legal transfers are you content with our proposals on the following aspects?

1.1 The content of the e-transfer and legal charge?

8. Save as discussed below we have no comments on either document. We think one form of e-charge with the option for signature either by the borrower or the conveyancer may be simpler.

1.2 E-signature by a conveyancer on behalf of joint proprietors?

9. We note the Land Registry's proposals to include provisions in the new rules that will allow practitioners and their clients to choose how a document is signed – either by the parties or by the practitioner as the client's duly authorised agent.

10. Whilst we would not oppose this change in terms of legislation we think it is worthwhile pointing out that many lenders are unlikely to accept the suggestion that the practitioner signs- whether this is on behalf of joint proprietors or sole proprietors. Lenders have recently experienced unprecedented levels of solicitor led fraud and we doubt that lenders would favour this approach. It is likely that the CML's Lenders' Handbook would prevent solicitors from signing in this way where there is a mortgage involved in a sale and purchase transaction.

11. However where lenders are instructing conveyancers to carry out substantial amounts of re-mortgaging work for them this approach (ie signing with authority) might be favoured by lenders.

12. We are concerned that the law on the delegation of authority to one person by joint proprietors is unclear and are uncomfortable that the Land Registry is endorsing this action without legal certainty. Surely the SI could clarify the legal position on this? At present the validity of this part of the process seems to rest on counsel's opinion – which is a concern for those organisations providing funding for transactions.

13. The delegation process may lead to challenge ie rather than a claim that the mortgage was not signed properly the borrower could claim that the delegation was not signed by borrower.

14. The delegation process also seems to rely on paper which, in turn, contradicts the approach of e-conveyancing. Storage of the delegation will be an issue for lenders to consider. Either they trust that their solicitor has obtained this (and given the incidents of fraud and negligence that are being experienced by the lending industry at present this is unlikely) or they will need to see this themselves. This adds to administration and does not accord with dematerialisation. It would be a considerable re-assurance to the industry if the form of delegation had to be lodged with and retained by the Land Registry as part of the e-conveyancing process. As we mention later in this response the lending industry has had some difficulties on occasion obtaining files from solicitors. There needs to be a mechanism which will allow lenders to obtain a copy of this if needed and it would be appreciated if this could be dealt with in the Land Registry's scheme. This should be done through the Land Registry rather than as an extra part of the lender/solicitor process.

15. We think a more detailed explanation of the changes to the signature process mentioned in 4.1 of the consultation would be helpful. Some members have commented that present arrangements for e-signing have been quite complex.

16. As mentioned above it is proposed that there is a form of e charge for use where the borrower signs and one for use where the conveyancer signs under delegated authority. It would be simpler for lenders if there is one format with alternative prescribed paragraphs for use depending on whether the conveyancer or borrower signs.

1.3 Forms of authority for signature by a conveyancer on behalf of joint proprietors?

17. We have no particular comments on the format – see our comments under 1.2 however

1.4 e-signature on behalf of a sole proprietor?

18. See our response to 1.2

1.5 Forms of authority for signature by a conveyancer acting on behalf of a sole practitioner?

19. See our response to 1.2

1.6 E-signature by transferors, transferees and borrowers (citizen signing)?

20. As mentioned members have reported some practical difficulties with e-signatures on e-charges by the borrower to date. We are not clear how the proposals in this consultation go beyond the present arrangements.

21. Lenders need to have absolute confidence in the e-signature process and the surrounding IT security on this process.

Q2 Do you agree that an impact assessment is not necessary at this stage since the impact of the rules will have limited effect?

22. Yes. However we would ask for a full consultation and impact assessment before any decision on the compulsory use of e-charges and e-transfers is made.

Q3 – It is proposed that the e-transfer should contain the option that it “takes effect upon completion of the purchase of the registered estate which is to be transferred by the transfer”, with the subscriber for the transferor notifying the registrar of the date when completion took place. We do not believe that we could reasonably ask the subscriber to specify the time of completion. This is because, in our view, it might be difficult to determine the exact time of completion. Do you share this view? (see para 19 of section 6).

23. We have some concerns about this proposal unless there is some form of override built into the system and professional codes (Law Society/Council for Licensed Conveyancers) are very clear on requirements. We appreciate that at present completion is effectively agreed between the parties and the transfer released by the transferor's conveyancer. We also appreciate that codes govern practice on this. We would need to know that there is a clear code in place before agreeing to this proposal. We would also need to know that the Land Registry can “retrieve” the e-transfer from the system if needed and make it effective. In the absence of these safeguards we have concerns about this proposal.

24. Take for example a situation where there is a sale and associated new mortgage. If the subscriber for the transferor fails to make the notification of the transfer then the lender has no relationship with the firm and cannot require the firm to make the notification. Money will have passed but the release of the transfer is in the hands of a firm where the lender has no retainer. We note that there is to be an obligation to notify in the transfer and this gives some, but not full, comfort.

25. In terms of timing of completion it is our understanding that timing is important. We assume from the consultation that there is still the ability to protect priority through a land registry search and the resulting e-AP1 can refer to this. Likewise the e-AP1 can specify order of transaction. However what if such a search has not been carried out? Presumably priority will be according to timing of confirmation. This could be particularly complex if an e-transfer is being carried out with an associated charge being carried out through another firm. (We assume first charges only are allowed as e-charges – if not timing would be very important). What happens if there is a chain with notifications of transfers happening at different times? Where there is an associated charge the charge could be registered before the transfer.

26. We welcome the proposal to allow the uncoupling of the e-charge from the transfer.

Q4 – Do you think that reference in the e-transfer to its taking effect upon completion is workable? Specifically would it be treated, as meaning what we have described as “practical completion” as opposed to legal completion? If it is thought not to be workable can you suggest an alternative which might mark the taking effect of the electronic disposition? (See para 20 of section 6).

27. We agree that this is complicated – however it seems to us that a great deal depends on protocols established by the conveyancing professional bodies. So long as there is communication between the parties we would have thought that completion – date and time- can readily be agreed on. We are keen to avoid a situation where the timing is in the hands of the transferor only.

28. Again what happens where there is a chain?

29. As under Q3 lenders really need assurance that if something goes wrong the lenders and the Land Registry and any intervening solicitors can have access to all e-documents and can complete the transaction independently of any solicitor who is failing to act properly.

Q5 Which draft paragraph 1(b) to (d) of Schedule 1 do you prefer? Why? (see paragraph 21 of section 6)

30. Our Legal Advisory Panel prefers the first draft suggested.

Q6 Do you think that the electronic legal charge ought to make express provision allowing for it to be “uncoupled” from a transfer before it (the charge) takes effect? See paragraph 29 of section 6).

31. Yes we think this is essential. As already mentioned we also think that if this happens notification should be given to the lender as a fraud prevention alert. Solicitors instructed by the lender should be able to access the system and continue with completion of the charge if the lender wishes to do so. Effectively both for this and the completion of the transfer there needs to be an override built into the system.

Q7 Do you think that there should be an additional option for when the electronic legal charge is to take effect, namely “upon completion of the charge”?

32. Yes we agree with this.

Q8 Do you have any other comments that you would like to make on the draft rules?

33. None other than mentioned elsewhere in this response.

Q9 Do you any views on proposals relating to the operation of the e-transfer/e-charge? (see section 4)

34. We think it is disappointing that stamp duty land tax is being dealt with by way of a work around because of IT difficulties. The proposals add a further layer of complexity when e-conveyancing should remove such issues. It prevents the instant registration of the transfer – which we understood to be one of the original intentions of e-conveyancing.

35. How are records retained of the electronic transaction? We assume that conveyancers' case management systems have this ability so that should lenders need to check transaction they can do so. If not will the LR retain electronic copies of each e transfer and e-charge so that lenders can access them in an understandable format should the need arise? Recent fraud and negligence issues have highlighted a need for a clear tracing and recording process. We would also like to see signing delegations lodged with and retained by the Land Registry.

36. We note that the Land Registry states that access to the documents will be restricted by the system. However it is important that lenders (and presumably other clients) and intervening solicitors have access if needed. How will the Land Registry accommodate this? It is essential for lenders to know that if one set of solicitors fails to deal with the e-documents properly this can be dealt with by way of override by the Registry and/or intervening solicitors. Most importantly lenders need to know that the documents can be “intercepted”, dated and registered.

37. Timing – it is unclear from the consultation as to what the timetable for implementation is. “2011” is quite a broad spectrum. There will be a considerable amount of work arising from these changes if they proceed and Land Registry users need time to implement these changes. For example it is likely that the CML Lenders' Handbook will need amending. We have an agreement with the Law Society that solicitors would be given three months' notice of changes to this document. In addition the changes have to be discussed with the Law Society and the Council for Licensed Conveyancers so at least a further 6 weeks needs to be added to the process.

38. We suspect that the Law Society will need time to settle codes etc and in the absence of such codes we do not feel some of the proposals are workable.

39. It is also likely that lenders will need to make some amendment to their E-MDs.

40. What is the position where a transfer originally matches the e-transfer criteria but this changes? For example where an individual purchaser decides to purchase in the name of a company?

41. e-AP1 again how do we capture records that this has been done? Can an e- AP1 only be used where all the components are electronic?

42. We also note the proposal that third parties could be notified on completion of registration at the Land Registry – this would be a very helpful monitoring tool for lenders and, subject to cost, our members would welcome the implementation of a system that notifies the lender (or its nominated agents) on registration of a charge.

Q10 Do you have any other comments on this consultation?

43. None.

Contact

44. If you have any comments or queries on this response please contact Samantha Barnett – senior policy adviser – 0207 438 8929 or samantha.barnett@cml.org.uk.