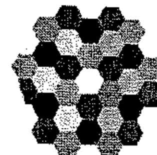
Land Registry
Head Office



Mr Mark Hatcher
The Bar Council
**DX240**
**LDE**

15 MAY 2012

Date
14 May 2012

Your Ref

Our Ref
COR/HO/PL

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Dear Mr Hatcher,

**Enlargement of leases – proposed change to Land Registry practice**

I wrote to some of our customers on 26 April about our intention to change practice where a lease is enlarged under section 153 of the Law of Property Act 1925 (LPA 1925). This new practice was due to come into effect on 11 June 2012.

A number of our customers have now raised questions about the legal basis for, and the practical effects of, this new practice, because it would allow the landlord's (or headlessor's) registered freehold title to continue alongside the tenant's newly enlarged freehold title. We have, therefore, decided to write to our principal stakeholders to explain in more detail the reasons for this proposed change, how we intend to apply it in practice, and invite comments **by 29 June 2012**. We will also be writing to individual customers who have so far contacted us in similar terms.

I should be grateful if would refer this letter to the appropriate colleague at the Bar Council if this is not your area.

**Background**

Until quite recently, the consequences of enlargement under s.153, LPA 1925 for the landlord's freehold reversion were rarely an issue for Land Registry, because the reversion was hardly ever registered. In those cases where the landlord's title is registered, our current practice is to close it. At the same time, we register the tenant as the proprietor of a new freehold title, with an entry stating that it is based upon enlargement under s.153, LPA 1925.

However, we are now seeing an increasing number of applications to register enlargements of recently granted registered leases where the landlord's title is also registered. This has prompted us to review our general approach to, and practice on, enlargement, which was developed under the previous Land Registration Act 1925, when the reversion was not normally registered.

From the point of view of Land Registry practice under the Land Registration Act 2002 ('LRA 2002'), the main issues on enlargement

under s.153, LPA 1925 are:

(a) Whether the landlord's registered reversionary title should be closed;

(b) The effect of any restrictions, registered charges and other incumbrances affecting the landlord's title;

(c) What entries (if any) should be carried forward from the landlord's reversionary title onto the tenant's newly enlarged freehold title.

In what follows, it is assumed that the title for the landlord's freehold reversion is registered and that the lease was registered and/or noted on the landlord's title prior to enlargement.

**Conclusions**

We have not found any clear authority on the questions of whether and, if so, how the landlord's reversion (a) continues to subsist (and if so whether it is acquired by the tenant), or (b) is extinguished, following enlargement of a lease under s.153, LPA 1925.

Given this uncertainty, we think it is safer to change our approach so that the registered title for the landlord's reversion is *not* closed. However, on completion of the application for registration of the enlargement, we would make appropriate entries on both the landlord's and the tenant's (newly enlarged) freehold titles so that it is clear enlargement has taken place.

Even if the reversion is extinguished, it seems that incumbrances on the landlord's registered title would survive enlargement, just as they do on escheat following disclaimer of a freehold estate[1] and on disclaimer of a lease. A chargee of the reversion may therefore have valid grounds for objection to an application for enlargement of a lease, if they are not bound by, or did not consent to the grant of, the lease.

**The effect of enlargement under s.153, LPA 1925**

*On the original lease*

S.153(1), LPA 1925 provides that upon enlargement, the 'term' of the former lease is enlarged into '*a* fee simple', not '*the* fee simple', in the land, and under s.153(7) the person in whom the term was previously vested acquires '*a* fee simple instead of the term'. So it appears that the former tenant unilaterally acquires a new fee simple estate, not the former landlord's fee simple, there being no reference to merger, conveyance or release by operation of law of the landlord's reversion, nor payment of compensation. We think the better view is that a new

[1] Scmlla Properties Ltd v Gesso Properties (BVI) Ltd [1995] B.C.C.793 and Hindcastle Ltd v Barbara Attenborough Associated Ltd and others [1996] 1 All ER 737.

freehold estate is vested in the former tenant following execution of the deed poll by operation of law under s.153(7).

This is in contrast to the position under the subsequent[2] statutory schemes for leasehold conversion in the Places of Worship (Enfranchisement) Act 1920 and for individual and collective enfranchisement under the Leasehold Reform Act 1967 and the Leasehold Reform, Housing and Urban Development Act 1993, which specifically provide for the tenant(s) to acquire the landlord's reversion, subject to payment of compensation.

Although the lease determines, s.153(8), LPA 1925 goes on to provide that:

> "(8) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged."

Legal commentators[3] are agreed that the detailed effect of section 153(8) remains obscure, and even then (with two notable exceptions[4]) only touch upon it as a possible device to make positive covenants run with the freehold land of the covenantor. Scammell's Land Covenants, at page 557,suggests:

> "The words of [s.153(8)] seem wide enough to extend to any obligations whether restrictive or positive. However, the words 'as the term would have been subject to' restricts the covenants and obligations which are carried forward to the fee simple to those which touched and concerned the demised land. These will be such covenants as to build, repair and insure.
>
> The result is that by the grant of a long lease and the subsequent execution of a deed of enlargement, the freehold is statutorily 'subject to all the covenants in the lease that touch and concern the land."

<u>*On the reversion*</u>

Whilst the nature and legal status of the landlord's reversion following enlargement is unclear, s.153 does not expressly provide that it is extinguished, although some legal commentators have said or

[2] S.153, LPA 1925 replaced and re-enacted the corresponding provisions in s.65, Conveyancing Act 1881 as amended by s.11, Conveyancing Act 1882.
[3] T.P.D. Taylor's article *'The Enlargement of Leasehold to Freehold'* in the *Conveyancer and Property Lawyer, vol 22(NS) (101),* at pages112 to 114; The Law Commission's 1984 Report *'Transfer of Land and the law of positive and restrictive covenants' (Law Com 127)*, at paragraph 3.41 and their 2008 Consultation paper *'Easements, covenants and profits a prendre, (Law Com 186)*, at paragraph 7.55; Ernest Scammell's *Land Covenants (1996),* at pages 557 to 558; *Megarry& Wade's The Law of Property (8th edition),* at paragraphs 18-095 and 32-023.
[4] T.P.D.Taylor and Scammell

suggested that it is[5].

S.153 does not say what happens to the reversion and in particular whether it survives as a legal estate (as a fee simple absolute in possession within s.1(1) (a), LPA 1925), a legal or equitable interest (within s.1(2) or (3)) or a bundle of rights or choses in action[6], or whether it is simply extinguished, and this has led to a continuing and longstanding legal debate on the effect of enlargement on the reversion.

T.P.D. Taylor's article *'The Enlargement of Leasehold to Freehold'* in the *Conveyancer and Property Lawyer, vol 22(NS) (101),* published in 1958, still appears to provide the only detailed legal analysis of the possible effect of s.153 on the landlord's reversion. Taylor suggests that the reversion to a lease can survive enlargement under s.153 by subinfeudation, despite the statute Quia Emptores 1290 which abolished it, but only on sale or grants of land in fee simple, so that the statute would not apply on enlargement.

This argument has recently been taken forward and developed by Edward Nugee Q.C. in his article *'The feudal system and the Land Registration Acts'* L.Q.R. 2008, 124(Oct), 586-607. Nugee argues that following enlargement, the reversion survives as a superior freehold estate or seignory, in the same way, he argues, as manorial rights do following enfranchisement of copyhold. At page 591, he says:

> "The position seems clear: there is nothing in s.153 or elsewhere in the LPA 1925 to bring the landlord's freehold estate to an end, and its continuance is necessary in order that the benefit of the covenants in the lease, to which the enlarged estate remains subject, should be annexed to it. [Foot note 21: LPA 1925 s.153(8) does not say who can enforce them; but it must be the former lessor, who must, it seems, have a continuing estate in fee simple to support his continuing right to enforce the covenants.]"

If the reversion continues as a seignory or superior estate in land, then, in the event of disclaimer of the tenant's newly enlarged freehold estate by a trustee in bankruptcy or liquidator, it would presumably escheat to the landlord or their successor in title as the mesne lord, not to the Crown.

Megarry & Wade, at paragraph 2-030, acknowledges that:

> "It remains possible...that in rare cases not covered by the statutory reforms [in the LPA 1925] recourse may have to be had to the feudal principles which still underlie our land law."

but then, at paragraph 18-094, in relation to enlargement under s.153 (and apparently contrary to Taylor's and Nugee's views), says:

[5] *Wolstenholm and Cherry* (12th edition), Volume 1, page 509 and *Megarry & Wade* (6th edition), paragraph 14-180.
[6] See *Scammell's Land Covenants*, page 558.

> "The lessor's reversion..., presumably disappears, for the existence of a fee simple absolute in possession excludes the possibility of any estate in reversion."

*Challis' Real Property* (3rd edition, 1911), at page 335, after considering the equivalent provision to s.153(8) in the Conveyancing Act 1881, suggested that it "might well afford a reason for holding that the reversion remains still on foot, notwithstanding the determination of the term."

Although s.1(5), LPA 1925 envisages that concurrent legal estates may subsist in the same land, some commentators[7] have pointed to the existence of a common law rule that only one legal fee simple can exist in the same piece of land at any given time.

Yet this common law rule seems doubtful. It is generally recognised[8] that a squatter has an independent concurrent fee simple absolute in possession from the moment he goes into adverse possession, and in relation to registered land, the Law Commission explicitly recognised that:

> "there could be more than one registered freehold title to registered land, just as there can be more than one legal fee simple where title is unregistered."[9]

This is now reflected in paragraph 9(1) of Schedule 6 to the LRA 2002, which expressly extinguishes the squatter's former title by virtue of adverse possession when they are registered as the new proprietor of the registered estate adversely possessed. An express provision such as this would seem superfluous and unlikely to be included by the draughtsman of the LRA 2002 if concurrent registered or unregistered legal estates cannot exist.

However, it has been suggested that even if the landlord's reversion survives enlargement, it must continue as an equitable freehold estate, because the landlord ceases to be 'in possession' as envisaged by s.1(1)(a), LPA 1925. But, we think it is arguable that the landlord also remains in possession, given the wide definition of 'rent' in s.205(xxiii) (if rent as permitted in s.153(1)(a)) was payable under the lease taken together with the uncertain meaning of s.153(8).

So far as we are aware (subject to the possible relevance of the decision in Panagopoulos and anor v Earl Cadogan and anor [2010] EWHC 422 (Ch), 38, discussed below) there is no clear legal authority for regarding the landlord's legal estate as being extinguished, or converted into an equitable freehold estate, following enlargement under s.153.

[7] See *Law Com 254*, paragraph 10.23 and *Challis Real Property* (3rd edition) (1911), at pages 334 to 335, dealing with the corresponding provision for enlargement in the Conveyancing Act 1881 (as quoted in *Taylor's* article at page 107).
[8] See, for example, the joint consultation by the Law Commission and Land Registry '*Land Registration for the twenty-first century A Conveyancing Revolution*' (*Law Com 271*) published in 2001, at paragraph 14.66.
[9] See the joint consultation by the Law Commission and Land Registry '*Land Registration for the twenty-first century A consultative Document' (Law Com 254)*, published in 1998, at paragraph 10.71(3).

*The Panagopoulos case*

Although the statutory scheme now contained in s.153, LPA 1925 for enlargement of long leases dates back to 1881[10], until 2010, there had been no judicial decision dealing with the effect of s.153 on the reversion.

The decision of Roth, J in Panagopoulus and anor v Earl Cadogan and anor [2010] EWHC 422 (Ch), 38, provides guidance on the effect of the enlargement of a lease under s.153 on the landlord's freehold reversion, at least in relation to s.19(1)(a)(i) of the Leasehold Reform, Housing and Urban Development Act 1993 ('the 1993 Act')[11]. Although, on the facts, Roth J decided that lease which had been granted by the landlord was not in fact capable of enlargement under s.153, LPA 1925, at paragraph 38, he went on to say:

> *"38. In case this matter should go further, I should add that if, contrary to my ruling, the Lease falls within section 153, I would have found that the grant of such a lease amounts to a "disposal severing [the freehold] interest" within the terms of section 19(1)(a)(i). Although section 153 provides a right to enlargement of a lease which meets its conditions to a freehold, the grant of such a lease is obviously not the same as the grant of a freehold. Nonetheless, such a lease can be converted into a freehold at any time by the unilateral act of the lessee. Accordingly, the grant of a lease that conforms to section 153 could provide the freeholder with a way of achieving a severance of the freehold notwithstanding section 19(1): such a lease could be granted and then the right to enlargement exercised once the property has been acquired by the nominee purchaser in the enfranchisement process. On balance, therefore, and having regard to the overall approach to construction that I set out above, I would consider that the exceptional case of the grant of a lease that conforms to section 153 should be regarded as a disposal "severing" the freeholder's interest under section 19(1)(a)(i)..."*

Whilst paragraph 38 of the judgement may be *obiter,* Roth J was clearly of the view that the grant of a lease over part of the landlord's property that is capable of enlargement under s.153, LPA 1925 can be treated as a disposal that severs the freeholder's interest in the property, at least for the purposes of the 1993 Act. This implies that following enlargement, the tenant steps into the shoes of the landlord, acquiring the landlord's fee simple estate, not a new independent fee simple.

But it is also clear that, in so finding, Roth J was adopting a certain "overall approach to construction" for the purposes of the 1993 Act, explained earlier in his judgement, at paragraph 18 and 19, where he said "considerations of practicality and convenience are important" in

[10] It was introduced by s.65 of the Conveyancing Act 1881.

[11] S.19(1), LRHUDA 1993 provides that the landlord cannot divide his freehold interest once the tenant's 'initial notice' under s.13 has been noted in the landlord's title, and provides that any transaction purporting to effect such a disposal is void.

order to carry out the court's duty "to construe the 1993 Act fairly and with a view, if possible, to making it effective to confer on tenants those advantages which Parliament must have intended them to enjoy."

It seems, therefore, that Roth J's comments at paragraph 38 need be read as a practical and convenient solution in the context of the particular mischief which s.19(1), 1993 Act is designed to meet: that the landlord might seek to hinder the tenants' claim by making partial disposals of his freehold reversion before the collective enfranchisement can be completed. These comments may not, therefore, have wider application outside the 1993 Act. (For example, it would not be possible under LRA 2002 to deal with the grant of a lease capable of enlargement under s.153, LPA 1925 as a transfer of part of the landlord's legal estate, even if that might be the practical result.)

At paragraph 38, Roth J went on to say:

> *"I only add that I did not find the case of <u>Bosomworth v Faber</u> (199[5]) 69 P & CR 288, of much assistance in considering this question, since that concerned the acquisition of easements by prescription and thus a wholly different context from the collective enfranchisement regime."*

Similarly, we do not think the <u>Bosomworth</u> case is authority for the proposition that, following enlargement under s.153, LPA 1925, the former tenant acquires the landlord's freehold reversion.

**Proposed change of practice**

*(a) In relation to the registered leasehold title*

Our practice in relation to the former tenant's leasehold title will not change. As now, we will complete an application to register the enlargement of a lease under s.153 by closing the original leasehold title under rule 79 of the Land Registration Rules 2003.

We will continue make the following entry in the property register for the newly enlarged freehold title:

> "The land...was formerly leasehold under a lease dated ...for...years from...at a rent of ....
>
> A Deed dated ... under the hand of ... declared that the term was enlarged into a fee simple. The registered title is accordingly subject to such matters in [section 65(4) of the Conveyancing Act 1881] *or* [section 153(8) of the Law of Property Act 1925] as affect it."

We will also continue to carry forward all the existing entries from the existing leasehold title, amended as appropriate (except details of the lease), onto the new freehold title, in accordance with s.153(8), LPA

1925. As before, we will not carry forward entries from the landlord's title (including any restrictions) that were not already entered on the former leasehold title, because s.153(8) only applies to such matters as the term would have been subject if it had not been enlarged.

Where there was a qualifying entry on the former leasehold title, because the consent of the landlord's registered chargee was not produced when the lease was registered we will register the new freehold with a qualified title. This is to reflect the same risk that the chargee might assert its paramount title as would have affected the term if the lease had not been enlarged.

*(b) In relation to the registered reversion.*

Rule 79 of the Land Registration Rules 2003 deals with the determination of registered estates under the LRA 2002. It provides as follows:

*79. — (1) An application to record in the register the determination of a registered estate must be accompanied by evidence to satisfy the registrar that the estate has determined.*

*(2) Subject to paragraph (3), if the registrar is satisfied that the estate has determined, he must close the registered title to the estate and cancel any notice in any other registered title relating to it.*

*(3) [This paragraph is not material as it deals with escheat.]*

Although the tenant's former leasehold title can closed under rule 79(2), we do not think the former landlord's registered freehold title can also be closed under this rule, because of the requirement in paragraph (2) for registrar to be satisfied that the former landlord's estate has determined. We do not think this requirement can be met given the uncertainty as to the nature and fate of this title following enlargement.

As we will not be closing the title for the registered freehold reversion, notice of the lease will remain in the register for this title, and the following new entry will now be made in the charges register or in the schedule of notices of leases:

> "The term created by the lease dated referred to [in the Charges Register] [above] has been enlarged into a fee simple under the power contained in s.153, Law of Property Act 1925.
>
> NOTE: Copy Deed of Enlargement filed."

It has been suggested that having two registered freehold titles in respect of the same land would cause confusion, for example as to who might have the right to grant leases, and increase the risk of fraud. Both titles would be revealed on searches of the index map, and we think the entries (set out above) that would be made on both

titles would be sufficient to inform a person inspecting either register that enlargement has occurred.

We hope this letter provides a sufficient explanation of our proposed change of practice in relation to applications to register the enlargement of a lease, where the landlord's freehold reversion is already registered.

We would welcome your comments by **29 June 2012,** and please contact us in the meantime if you wish us to clarify anything we have said or omitted from this letter.

Yours sincerely,

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