



Applications for discharge without a DS1, END  
or ED



## Introduction

On the 18 December 2007 I wrote to a range of stakeholders explaining Land Registry's proposed change in policy relating to applications for discharge of a charge that are not accompanied by proof of satisfaction of the charge. That letter invited comments on the proposal. A number of replies were received to my letter and I am grateful to all who took the time and trouble to respond. Whilst some respondents could see benefits in the proposal it is fair to say that all expressed concerns. What does seem clear from the responses received is that the present process for discharging registered charges is not meeting the needs of anyone – conveyancers, lenders, Land Registry or the end consumer.

I have therefore arranged a meeting to be held on 16<sup>th</sup> July 2008 at Land Registry Head Office with representatives of the interested parties. I hope that at that meeting we will be able to

- reach a common understanding as to how the redemption process should work,
- identify the difficulties which prevent the process from working as it should in the interests of all parties, and
- agree an alternative solution that resolves those difficulties

If it is possible to find another way forward then of course Land Registry will be happy to proceed to adopt that, rather than implement the policy change outlined in my letter of 18 December.

I hope that the meeting on 16<sup>th</sup> July will find a solution that meets with general approval. If we are to stand any chance of achieving this it is important that we respect each other's points of view and avoid recriminations. I am reluctant, therefore, to engage in detailed further debate regarding the merits of Land Registry's original proposed policy change. However I think it important to acknowledge the concerns that were expressed in relation to the proposed policy change and to outline Land Registry's view on the issues raised. In the following parts of this paper I have tried to deal with all the points made in the replies to my letter. Where several parties raised similar but possibly not identical issues I have dealt with the point only once; if any respondent considers that I have not dealt with a specific issue that they raised then please feel free to contact me direct.

This document can be made available in alternative formats on request.

If you require an alternative format please contact Pascal Lalande on 020 7166 4428 or email

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A copy of this document has been sent to:

- The Law Society
- The Council for Licensed Conveyancers



- The Notaries Society
- The Council of Mortgage Lenders
- The Association of Property Support Lawyers
- The Finance and Leasing Association
- The Financial Services Authority
- The Solicitors' Regulation Authority
- The British Bankers' Association



## List of issues raised

1. The proposed policy change is intended to reduce requisitions simply so as to enable Land Registry to meet performance targets.
2. No difficulty arises if Land Registry stands over applications indefinitely pending receipt of proof of satisfaction of the charge.
3. Additional costs will arise for the buyer's conveyancer that will have to be passed on to the end consumer.
4. The new policy will result in delay in the proprietor being able to enter into subsequent dispositions.
5. A discharge, transfer and charge are three indivisible parts of one larger transaction and must be dealt with by Land Registry accordingly.
6. The new policy will cause conveyancers to breach provisions contained in the Council of Mortgage Lender's Handbook.
7. A seller's conveyancer will be reluctant to carry out the work necessary to secure proof of satisfaction of the charge if a period of time has elapsed since completion.
8. Conveyancers may no longer be prepared to give or accept undertakings.
9. Rule 55 of the Land Registration Rules 2003 precludes Land Registry from adopting the proposed policy change.
10. The proposed policy will result in poor practice in encouraging conveyancers to delay submitting applications.
11. The policy will allow further scope for opportunistic lender enforcement action.
12. The proposed new practice will expose sellers to action for breach of contract.
13. The proposed new practice will punish conveyancers (and their clients) for failings on the part of certain lenders.
14. The proposed new practice will increase the risk of mortgage fraud.
15. The proposed policy change will detrimentally affect lenders in respect of their capital adequacy requirements.
16. The proposed new policy provides no incentive for problem lenders to improve.
17. Land Registry should reverse the burden of proof so as to require lenders to evidence that they had not received the sum necessary to redeem the charge.



## **1. The proposed change in policy is intended to reduce requisitions simply so as to enable Land Registry to meet performance targets**

Land Registry is, as it should be, required to meet progressively improving performance targets agreed with the Lord Chancellor. By consistently meeting those targets for the past several years we have significantly enhanced the service we offer to all customers. This is evidenced by the high levels of satisfaction expressed by those who respond to our customer surveys. We are proud of these achievements. Meeting targets is never an end in itself and it is not true to say that we are proposing a change “simply” to meet performance targets. However, we are happy to acknowledge that the proposed change in policy is intended to contribute to further improvements in our service to customers.

Approximately 33% of all requisitions relating to registered estates are for evidence of discharge. In an average month, this will amount to over 65,000 requisitions. It is estimated that the cost to Land Registry of discharge requisitions is around £300,000 each month.

Land Registry is an executive agency and a trading fund required by statute to ensure that its income from fees covers all of its expenditure under normal operating conditions. Consequently, requisitions that increase costs prevent further reductions in Land Registry fees and ultimately result in greater cost to the end consumer (normally the house buying member of the public).

Aside from the cost of requisitions, the time taken to raise and deal with replies to requisitions obviously diverts staff resource that could otherwise be utilised in relation to applications that are not defective. In short, requisitions cost time and money and directly affect the fee that a consumer is required to pay and the speed of service that Land Registry is able to provide. They also result in a cost to conveyancers and to third parties such as lenders who are required to assist in addressing such requisitions. Accordingly, Land Registry is constantly looking to find ways to reduce the number of requisitions that it raises.

I accept entirely and make no apology for the fact that it is hoped that the new policy will reduce the number of requisitions raised and potentially allow a quicker service to be provided at a lower cost. But as I explained in my letter of 18 December, applications are at present being cancelled for lack of proof of satisfaction of a charge when a discharge application accompanies that application. I do not consider that the fact that the discharge application may not be in order should prevent the registration of those accompanying applications, provided those accompanying applications are independently capable of completion by registration. As I attempted to illustrate in my letter of 18 December, treating applications for a



discharge, transfer and charge collectively so that a problem with the discharge application may result in the cancellation of all three applications may create real difficulties for the transferee and new chargee – and this is a primary reason for the proposed change in policy. I set out below in this respect an extract from one of the responses that we received from a lender:

“Whilst there are issues here of concern to lenders I have to say that the Land Registry have a point in that their current practice carries a substantial risk of loss of priority to both a purchaser and a lender. Even if the instructed conveyancer realises the priority period will have expired if the application is cancelled it is a very common misconception that priority can be preserved by lodging repeated priority searches. That is not the case - we get so many cases where something has gone wrong with a Land Registry application where the conveyancer assures us everything is in order because they are protecting our interest by lodging repeated priority searches. In fact if another application is lodged and the search expires without a substantive application being lodged that application will gain priority, even if a further priority search has been lodged before expiry of the previous one. This only gives a new priority period and does not extend the existing one.”

## 2. No difficulty arises if as under current practice Land Registry stands over applications indefinitely pending production of proof of satisfaction of the charge

Rule 16(3) of the Land Registration Rules 2003 provides that if an application appears to the registrar to be substantially defective, he may reject it on delivery or he may cancel it at anytime thereafter. It is difficult to think of a clearer example of an application that is substantially defective than an application for discharge that is not accompanied by proof of satisfaction of the charge in question. Not to reject applications that are substantially defective would have a significant adverse impact upon both cost and speed of service (which as I explain above is not simply an issue for Land Registry).

Even under Land Registry’s existing policy, Land Registry will only not cancel applications where proof of satisfaction of a charge is not forthcoming if:

- a request is made for an extension of time;
- Land Registry is kept informed as to progress;
- it is shown that the applicant conveyancer is actively pursuing the matter; and
- it is shown that the lender is causing the delay.

Requests for further extensions of time beyond an initial 20 business day period are considered on their merits and depend largely on



whether there is any realistic prospect of the discharge being produced in a reasonable time. If this appears unlikely or the applicant conveyancer is not able to explain the reason for the delay or what is being done to obtain proof of satisfaction of the charge, the application is cancelled.

Land Registry does not routinely keep records for the number of applications cancelled as a result of a failure to produce proof of satisfaction of the charge. However, in the week for which local offices were asked to record this information (the week commencing 2 June 2008), 357 applications were recorded as having been cancelled because proof of satisfaction of the charge was not forthcoming. As we presently treat applications for discharge, transfer and charge as one “grouped” application, the actual number of applications cancelled will have been very much higher than 357. The considerable number of applications cancelled (under Land Registry’s current practice) as a result of a failure to produce proof of satisfaction of the charge is perhaps less surprising than it might initially seem. It frequently proves difficult in practice for a conveyancer to show that the lender is causing the delay as the lender may assert that insufficient funds have been sent to fully redeem the charge or that the seller’s conveyancer is, for example, under an obligation to provide a draft discharge in form DS1 that has not been supplied. The applicant’s conveyancer will normally be dependent upon the seller’s conveyancer providing the information to show that that it is the lender who is responsible for the delay.

### **3. Additional costs will arise for the buyer’s conveyancer that will have to be passed to the end consumer**

The charge made to the consumer is a matter for the conveyancer and his or her client.

However, no Land Registry fee is payable at present in relation to an application to discharge a registered charge.

It should be noted that there are costs involved to conveyancers in dealing with Land Registry requisitions. A conveyancer may have to spend considerable time in trying to comply with a requisition requiring proof of satisfaction of a discharge within the period permitted, particularly where the inability to comply with the requisition may threaten the priority of other applications made at the same time as the discharge application. It will not necessarily be cheaper for a conveyancer to deal with the lack of proof of satisfaction of the charge in response to requisitions than to make a further application to discharge the charge once proof of satisfaction has been obtained. Implementation of the proposal would substantially reduce correspondence between the conveyancer and



Land Registry, which must save time for the conveyancer. And provided that any transfer and/or charge that accompanied the discharge are completed by registration, no priority risk should arise from the initial rejection of the discharge application.

#### 4. The effect of the new policy will be to create delays in subsequent dealings with the property

The view has been expressed that the original charge that remains on the register will prevent dealings with the property unless and until that charge has been discharged.

This may be true in practice (although it will not of itself prevent the transferee from dealing with the land). However, under Land Registry's existing policy the charge would not of course be discharged until proof of satisfaction was provided and the new transferee would not be registered as proprietor at all until proof of satisfaction of the existing charge was produced. Accordingly, registration of the legal estate will under current practice be delayed and (unless the transferee can satisfy a purchaser that he is entitled to enter into a disposition as a person entitled to be registered) the ability of the transferee to deal with the land will be entirely dependent upon the provision by the seller of proof of satisfaction of the original charge. It is therefore difficult to see how the position of the transferee would be made more difficult in this respect through the proposed change in policy.

#### 5. A discharge transfer and charge are usually three indivisible parts of a larger transaction and should be treated accordingly as one application by Land Registry

Some respondents asserted that the three "processes" of discharge, transfer and charge are three indivisible parts of one larger transaction, each process dependent upon the other two taking place.

Whilst the three elements are intrinsically linked, in that the conveyancer's task is not complete until all have been effected, they constitute three separate and distinct applications to Land Registry

- an application for discharge of the existing charge to which rule 114 or rule 115 of the Land Registration Rules 2003 will apply;
- an application to complete the transfer by registration in accordance with section 27(2)(a) of the Land Registration Act 2002; and,
- an application to complete the new charge by registration in accordance with section 27(2)(f) of the Land Registration Act 2002.



As I explained in my letter of 18 December, I can see no legal basis for treating the separate applications collectively. It is in my view evident from, for example, rules 55(2) and (7) and 151 that applications that may be lodged at the same time, by the same conveyancer and under cover of the same form AP1 are (even where one applicant is dependent upon another application for registration) separate and distinct applications. I explain above why I do not consider that Land Registry should stand over substantially defective applications until the defect can be resolved. Given this, I can see no benefit to the customer in treating separate applications collectively (where not dependent upon another application) when cancellation of all three separate applications because the application in respect of the discharge is substantially defective may risk the applications to register the transfer and charge losing priority. Although the new charge is dependent on the transfer, an application to discharge a charge can never be dependent upon another application for the purpose of registration; no conflict of priority can arise between an application for discharge and another registration application .

## **6. The new policy will cause solicitors to be in breach of the requirements imposed under the Council of Mortgage Lender's Handbook**

It has been suggested that the proposed change in Land Registry policy may cause conveyancers to be in breach of three provisions contained in the CML Handbook. I deal below with each of the provisions identified:

“5.4.1 The title to the property must be good and marketable free of any restrictions, covenants, easements, charges or encumbrances which, at the time of completion, might be expected to materially adversely affect the value of the property or its future marketability (but excluding matters covered by indemnity insurance) and which may be accepted by us for mortgage purposes.”

This provision appears to relate to the matters affecting the property as at completion and not to the subsequent application to register the new charge or discharge the existing charge. Given that it will invariably only be possible to discharge registered charges affecting the property after completion, the provision in my view must be understood to require the conveyancer on completion to have entered into arrangements to ensure that any charges that do affect the property will be discharged. If my view is incorrect, then even under Land Registry's current practice a conveyancer will inevitably be in breach of this provision on almost each and every occasion that a charge is taken of a registered estate that is subject to an existing charge intended to be discharged. I cannot see how our proposed change in policy will cause a conveyancer to be in breach of this provision.



“5.8 On completion we require a fully enforceable first charge by way of legal mortgage over the property executed by all the owners of the legal estate. All existing charges must be redeemed on or before completion, unless we agree that an existing charge may be postponed to rank after our mortgage.”

Again it seems to me that this provision must relate to the obligation to ultimately obtain a first legal charge. In relation to a registered estate, the new mortgagee cannot of course obtain a first legal charge until any existing charge is discharged and the new charge completed by registration – which cannot happen, at present, on completion. I therefore again cannot see how our proposed change in policy will cause a conveyancer to be in breach of this provision

“14.1.1.1 You must register our charge as a first legal charge at the Land Registry”.

In my letter of 18 December, I explained that where there was an existing charge in the register, the new charge cannot take effect as a first legal charge until the existing charge is discharged, whether or not the new charge is completed by registration prior to the existing charge being discharged.

It has been pointed out by one respondent, however, that under the present arrangements the new charge will not usually be registered as a second legal charge, because it will not be registered until after the seller’s existing mortgage has been taken off the register. Consequently, until registered as a first charge it will take effect only as an equitable charge and never as a second charge. This appears to me to be correct. But the real issue in my view is whether it is more desirable to the lender for that new charge to remain unprotected as an equitable charge or to be completed by registration and to enjoy the protection then conferred by section 29 of the Land Registration Act 2002. As I pointed out in my previous letter, it appears that the obligation on the conveyancer acting for the new mortgagee to subsequently secure the discharge of the existing charge so that the new charge then becomes the first legal charge will remain.

It would fall to the individual lender to decide whether it would regard a charge temporarily taking effect as a second legal charge in these circumstances as constituting a failure to comply with the requirement set out at 14.1.1.1. Land Registry has no power to compel the CML to alter or clarify their requirements but I am happy to ask the CML to clarify their position in this respect.

What the proposed change in policy would in my view do is to help ensure that the new charge is ultimately registered as a first legal charge. Assuming that appropriate undertakings have been sought and given in relation to the existing charge, the discharge of that



existing charge should prove possible. The real risk to the new charge becoming a first legal charge would appear to be protection of an interest affecting the transferor's estate (for example, a notice or restriction in respect of a charging order on the transferor's interest) following cancellation of the discharge/transfer/charge applications..

**7. A seller's conveyancer will be reluctant to carry out the work necessary to enable discharge of a charge that has remained on the register if a considerable period of time has elapsed since completion of the sale.**

The simple answer to this would seem to be that a conveyancer who has given an undertaking must fulfil it, however reluctant they may be to do so. The charge will remain on the register until proof of satisfaction of the charge is provided whether the applications to register the transfer and new charge are cancelled, completed by registration or left pending. Provided an appropriate undertaking to discharge the charge has been obtained by the buyer's conveyancer, the seller's solicitor will have little option other than to take the steps necessary to provide proof of satisfaction of the charge in respect of which the undertaking has been given, or run the risk of action being taken to enforce the undertaking.

**8. Conveyancers may no longer be prepared to give or accept undertakings.**

It was suggested that Land Registry's proposal might exacerbate an existing problem. It is said that conveyancers, who are personally liable for an undertaking given in reliance on a redemption statement, are being placed at a financial risk by an increasing failure of mortgage lenders to stand behind their statements. Consequently conveyancers may become reluctant to give undertakings. The Law Society has already stated that it may be forced to advise solicitors not to provide an undertaking unless the lender is prepared to guarantee its redemption statement .

It is not immediately clear exactly how this problem would be exacerbated by the proposed change in Land Registry policy. I understand the difficulties that conveyancers face in relation to undertakings and no doubt there are sometimes good reasons why the redemption statements cannot be definitive. But Land Registry's proposed change in policy would not alter the liability of the seller's conveyancer nor would it increase the risk of an issue arising about the amount due to the lender. In the event that there is such a dispute then at least the transfer and charge applications would be completed, rather than being cancelled, even though the existing charge would stay on the register until the matter is resolved..



Land Registry clearly has no power to compel a lender to issue a definitive redemption statement.

## 9. Rule 55(7) of the Land Registration Rules 2003 does not allow Land Registry to make the proposed policy change.

Rule 55 of the Land Registration Rules 2003 governs the priority of applications where two or more applications relating to the same title are (under rule 15) taken as having been made at the same time. If the agreed order of priority has not been specified, but one application is dependent upon another, the registrar must assume, unless the contrary appears, that the applicants have specified that that the applications will have priority so as to give affect to the sequence of documents effecting the transactions. The classic example of such a dependent application is a charge from X to Z which is dependent upon a transfer from Y to X.

Although in a remortgage transaction the intention of the applicant is to “replace” one charge with another, the application to discharge the existing charge and that to register the new charge are clearly not dependent upon each other within the meaning of this rule. The continued existence of the old charge does not inhibit the owner’s powers to create a new charge nor should it prevent its registration.

If rule 55 did have this meaning then it is hard to see how a second charge or a transfer subject to a charge could ever be registered.

## 10. The policy change will encourage poor practice in that conveyancers will delay submitting an application until proof of satisfaction of the charge is to hand.

The decision as to when to submit applications will be for the conveyancer. But I agree that delaying submission of the applications would constitute poor practice where such delay might threaten the priority of the conveyancer’s client’s interest. As has been highlighted previously, simply making successive applications for official searches with priority will not necessarily protect the priority of the transfer and new charge whereas the registration of the transfer and new charge will ensure that they gain the priority protection described in sections 28 to 30 of the Land Registration Act 2002, even if temporarily subject to an existing charge that will remain on the register until proof of its satisfaction is obtained.



## 11. The policy will allow further scope for opportunistic lender enforcement action.

It has been suggested that provisions in the CML handbook have given rise to a new industry of enforcement by those intermediaries acting for lenders investigating whether such provisions have been satisfied. If the provisions have not been satisfied, it is claimed that funds are demanded from the conveyancer to “correct” the position. It is alleged that this problem frequently arises from delay in the provision of discharges by some lenders and that Land Registry’s proposed change in policy may make this worse, especially if action is taken as the registration of the new charge subject to the existing charge may constitute a breach of provision 14.1.1.1 of the CML Handbook (see above).

This is a matter for the Council of Mortgage Lenders, not Land Registry. It may wish to consider issuing guidance on this point if it thinks, as I do, that enforcement action where the new charge was registered as subject to the existing charge would not be appropriate, provided that the conveyancer acting on the new lender’s behalf has explained the position to the lender and has taken (and continues to take) all reasonable steps to secure proof of satisfaction of the old charge .

In any event the risk of enforcement action against the conveyancer will presumably be greater if the application for registration of the transfer and new charge is cancelled because of a problem with the discharge application.

## 12. Sellers will be exposed to action for breach of contract.

It has been suggested that, since all well drafted contracts for sale provide that the property is to sold free from any charges registered in the charges register, registration subject to an existing charge will expose sellers to potential actions for breach of contract.

I find this argument particularly difficult to follow. If such an action is possible then its cause must, presumably, arise immediately on completion of the transfer and continue until the discharge is effected. Registration of the transfer and the new charge cannot make the seller’s position any better or worse. That registration will however improve the position of the buyer and the new lender because their priority will be secured. The risk to all parties will be greater if the applications for registration of the transfer and new charge are cancelled as a result of a problem in obtaining proof of



satisfaction of the existing charge and another interest is registered with priority as a result.

**13. Conveyancers (and their clients) will be punished through the new policy for failings on the part of lenders who delay in providing proof of satisfaction of the charge and who are the ones that ought to be punished.**

As I explained in my letter of 18 December, the proposed policy change is intended to ensure that customers do not lose priority for their interests because of a problem in obtaining proof of satisfaction of a charge. Land Registry has no control over the time that a lender may take to produce evidence of satisfaction of the charge following receipt of the moneys necessary to redeem that charge.

The customer who is potentially at risk under the current policy is not the lender who may have proved dilatory in providing proof of satisfaction of the existing charge; it is the new lender (and/or transferee) who is seeking to register the transfer/charge. So potentially all lenders (and other customers) are at risk to the same extent under the current policy, irrespective of how quickly the applicant lender may itself provide proof of satisfaction of their redeemed charges.

I do accept, however, that the new policy does nothing of itself to require lenders who may be slow in providing proof of satisfaction of the redeemed charge to improve – see further below in this respect.

**14. The new policy will increase the risk of mortgage fraud.**

It has been stated that if Land Registry adopts the change in practice that I propose, it would be comparatively easy for a fraudster to make an application to register fictional discharges, a transfer into the fraudster's name and the creation of a new charge in favour of another lender.

I have to say that I also find this argument very difficult to follow. I do not see why the fact that an existing charge may temporarily remain on the register makes such a fraud any easier to perpetrate. In fact it appears to me that there is an obvious risk attached to the registered title remaining registered in the name of the seller through the cancellation of the application to register the transfer and new charge; for example, the registered proprietor might be able to obtain a further loan having transferred all of his equitable interest in the registered title through the transfer that has not been completed by registration. Still more importantly, the transferee and new chargee



may not receive any notice served by Land Registry in respect of a potentially fraudulent transaction, precisely because they will not have been registered as proprietors with appropriate addresses for service.

## 15. The new policy will detrimentally affect lenders' capital adequacy requirements

This concern has not been raised by any lender or by the CML. I do not claim any detailed knowledge of these requirements. It has been stated that under the proposed change in policy, the new lender would need to double its Capital Adequacy Weighting until the issue was rectified – the implication being that prior to the registration of the charge and whilst the charge took effect only as an unprotected equitable charge the Capital Adequacy Weighting would be less. I do not know whether or not this is correct. But, if there is such a requirement, it is hard to see why it does not apply under the current system. In the case of most sales and remortgages there is a period when the property is subject to both the old and the new mortgage, until the first lender receives the money due to it and discharges its security. However, I would of course welcome clarification from the CML or any other party as to precisely how the proposed change in policy might create a difficulty in this respect.

## 16. The new policy provides no incentive for problem lenders to improve

The CML and others have suggested that the proposal does nothing to encourage lenders who are slow in providing evidence of discharge to do anything to improve. I accept this is true. Land Registry has attempted for many years to try to persuade lenders to provide proof of satisfaction of a charge in a more timely fashion, with very little success.

I have explained previously why I do not consider that Land Registry can hold applications indefinitely whilst proof of satisfaction of a charge is sought. In the absence of an alternative workable way forward being found, my view remains that Land Registry should proceed to implement the proposed policy change detailed in my letter of 18 December. However, as I explained in my letter dated 25 April 2008, the purpose of the meeting to be held at Land Registry's Head Office on 16 July 2008 is to establish whether there is a better way forward. It appears, for example, that if all lenders were to agree to provide proof of satisfaction of the charge within 5 working days of receipt of the redemption moneys, there would not usually be any difficulty in the conveyancer submitting the proof of satisfaction of the existing charge with the application for discharge of that existing



charge and the applications to register the transfer and / or new charge.

17. Land Registry should reverse the burden of proof and serve notice so that the lender needs to show that they had grounds to object to the removal of the charge.

The body making this suggestion is of the view that where applications are made to discharge, transfer and charge and are not accompanied by a formal discharge, Land Registry should put the lender in question on notice that the charge will be removed unless grounds to object are shown within 14 business days – and if grounds are not shown within this period to then remove the charge without further notice to the lender. The proponent also envisages that objection would not be permitted provided that the redemption money specified in the redemption statement provided had been sent to the relevant chargee.

It is acknowledged by the proponent that primary legislation would be required to enable the introduction of such a system. I can certainly see no legal basis for Land Registry introducing such a system under the existing legislation. I think that there may be practical difficulties with such a proposal, even assuming that support for this could be found from all the relevant stakeholders and that the necessary changes to existing legislation could be made. However, as I say, the purpose of the meeting on 16 July is to consider whether there is an alternative workable way forward and I welcome comments on this proposal or suggestions for any other viable alternative approach.