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THE GENERAL CONDITIONS OF SALE (4TH EDITION 2020)

**Simon Murray, LLB, Chair,
General Conditions of Sale Sub-Committee**

This article discusses the background and journey to the creation of the new General Conditions of Sale and highlights the main changes which will need to be considered in advance of them becoming operational on 1st January 2021.

Introduction

General Conditions of Sale (“GCS”) are the basis upon which we operate our conveyancing in Northern Ireland and underpin the duties of a solicitor when acting for a vendor or purchaser.

There are five previous versions of the General Conditions of Sale. The first was introduced in 1948; the second in 1962 and the third in 1994. The third edition was first revised in 1995 and the second revision, which is what we are currently using, was introduced more than 20 years ago so this review was well overdue.

The fourth edition of the General Conditions of Sale (“GCS4”) is not a complete re-writing of the rule book and does not radically change the third edition. I believe the review of the current edition, and indeed the associated review of the suite of Home Charter Scheme documentation, dates back to the claim experience that arose on the back of the property boom and bust of 2005-2008. This led to an exponential increase in both conveyancing claims and insurance premiums. The majority of claims arose from poor conveyancing standards.

An additional reason that it was evident that the third edition of the GCS primarily referred to a system of conveyancing that did not really exist anymore. A system whereby the vendor’s solicitor furnished a detailed abstract of title, the contract was actually signed and accepted, and then after that the title deeds were furnished is no longer operational, yet the existing and previous GCS often refer to this type of system.

Furthermore, one of the driving forces behind the last changes and various Revisions was the growth, in the 80’s and 90’s of firms individual vendors and purchasers’ Riders or Special Conditions. This review is an attempt to try and stop this happening. The Courts have had great difficulties in dealing with these conflicts between the GCS and individual firms’ attempts to change the same.

The review process

The GCS Sub-Committee set up to do the review was made up of seven practitioners and Andrew Kirkpatrick, Head of Policy and Engagement at the Law Society. The members were selected from a wide range of practitioners. Meeting over a three-year period, each clause was thoroughly reviewed and dissected both line by line and often word by word.

What I found most surprising was how completely out of date the GCS have become. The process also highlighted that there were a number of bigger policy issues that needed to be discussed and considered, such as VAT on the purchase money, transfer of funds by either cheque or online, how we produce evidence of title, undertakings and the completion letter, and the issue of exchange of contracts rather than acceptance.

Halfway through the process we felt there was a need for a round table meeting which took place in July 2018. There were about 30 attendees and we discussed matters but a lot was not agreed. What was clear from this meeting is the difference in opinion between commercial conveyancing, developer and residential conveyancing. As a result of this we continued on with what is primarily the 4th edition of the GCS that is mainly for residential conveyancing transactions. It was agreed that commercial lawyers would produce their own Special Conditions and that the New Build documentation would be reviewed.

We did start to look at the completion letter and undertakings and, eventually, after some further consultations, in an effort to reduce the number of undertakings, we decided we would introduce a new completion letter and protocol.

We went through a consultation period and were pleased with the level of submissions, many of which were acted on in the production of the final version that we now have.

The nature of conveyancing frontloading

It became evident to us, during the process, that, for whatever reason, conveyancing has changed in nature over the last number of years. We no longer sign the contract early in the process, but very late. There may be advantages to this system as it reduces the number of Special Conditions, but there are many disadvantages, and these are much greater. It means that there is much more delay in reaching a binding contract, but more importantly, you now so often receive a contract a few days before completion or even on the day of completion. This is not a good practice, for ourselves, for our clients, both vendor and purchaser and led to the concept of “frontloading”.

What this means is that we are trying to get to the stage in a sale where all the necessary documents are obtained by the vendor’s solicitor as early as possible, so contracts can be signed in good time before the completion date. In order to achieve a properly frontloaded system we need everyone to buy into this, including all the estate agents, lenders and surveyors.

A Memorandum of Understanding has been published in conjunction with RICS and NAEA and is the start of the process of engagement with other stakeholders in the conveyancing system. This deals with issues such as ensuring that a property doesn’t go on the market until the vendor can confirm that a solicitor has been appointed. We are hoping to introduce a system where the estate agent, when putting the property on the market completes with the vendor a list of basic questions about the property and sends this to the vendor’s solicitor. This will cover issues such as alterations to the property, whether the property has a septic tank and where the title deeds are.

So how does 4th Edition affect frontloading? It now means that the vendors’ solicitor is going to be at a greater risk if they do not produce the documents clearly listed in this Condition such as Property Certificates and Searches. These documents should not hold up the process.

From 1st January 2021 if you don't get the documents required to the purchaser early you will be at a disadvantage.

There has been a growth in the practice of a number of firms in delaying in applying particularly for Property Certificates. Often their letter states "it is our Firm's practice not to apply for Property Certificates and Searches until you tell us..."

- (a) Your clients have got a satisfactory mortgage offer
- (b) And or a satisfactory Survey
- (c) And or their Sales Contract has been accepted."

I often find that payment for the Property Certificates and Searches is not paid by the Vendor but subbed by the firm and its overdraft with the Bank. This is not a good practice and the vendors themselves need to pay the approximate £200. It also shows a firms' commitment to the sale. It can be frustrating that in some cases transactions abort and the Property Certificates and Searches may become out of date. However, in accordance with GCS we need to apply early in the process for these documents in particular to flush out any difficulties that may arise at an early stage rather than a stage close to completion. The delay in getting particularly the Regional Property Certificate is actually causing us all great frustration. Therefore, this needs to be applied for quickly, so that the delay in this one document does not result in the transaction aborting.

So, when is the right time to apply for Property Certificates? It should be after the property has been agreed, when you have the title deeds and have received a payment from the vendor for the outlay.

Searches can be obtained quickly and should still be obtained at the early stage. I have recently noticed an issue with the Statutory Charges Register Search and some Notices have been served under art. 11 of the Private Streets legislation in respect of works that haven't been done by the developer. This is one of the reasons why I apply for the Searches early in the transaction.

I recently had a transaction where the vendor's solicitor delayed in doing anything. There was delay in producing the title, getting Replies, applying for the Property Certificates and Searches. The purchaser patiently waited for weeks and then months. Finally, the Regional Property Certificate arrived with an entry stating that the sewer traversed the property. At that stage the purchaser just lost patience and had found another property and withdrew their offer. From Sale Agreed to that point was more than three months. That approach I don't think is acceptable and for that firm I believe it is very risky.

Memorandum of Sale

There are some changes to the Memorandum of Sale at the front of the GCS contract:

Clause 1.2. The use of an email address

We are currently in a transition between paper and online, not only in the Land Registry maps but in important documentation. I often send the accepted contract, by email, fax, DX and post. It may seem excessive, but we all need to consider what is the safest way to delivery something as important as the acceptance of the contract.

The Sub-Committee felt that each firm should decide when completing the contract whether or not they should show their email address. In clause 1.2 reference is made to the transmission of email and the date and time of receipt.

The Memorandum also incorporates a new Confirmatory Declaration to confirm that if the Replies to Pre-Contract Enquiries (which in the new frontloading world you will all have done and furnished) were repeated, at the date of signing the contract, then those Replies would be unchanged.

Replies to Pre-Contract Enquiries

The Replies to the Pre-Contract Enquiries are a very significant part of the conveyance. It was felt that this would give us the opportunity when discussing the contract with the client, to go back through the Replies, to make sure that they are all correct and there has been no misrepresentations.

It also provides an opportunity to cover off any changes that may be needed from when the Replies were completed. For example, a neighbour's Planning notification that may have arrived after the Replies were completed. This replaces the Post Completion Requisitions and means that when signing the contract the vendor signs the Declaration on the Memorandum in your presence after you have re-checked the Replies at that time.

Condition 2

This clause has been extensively re-drafted and there is a much longer list of documents, particularly for properties which involve Management Companies.

Once the Property Certificates and Searches and other documents have been furnished, prior to the contract being signed, then under General Condition 2.4 the contract is deemed to be unconditional in respect of those documents and other documents furnished prior to the contract being signed. This is different from the previous position, where there was time after the signature of the contract for various requisitions. This change I believe reflects practice as it now stands.

The principle is if you have seen the document, the Property Certificate of Search, then you are fixed with the contents and if you advise your client to sign the contract having seen it then you cannot complain after the fact.

Formation of the Contract

Clause 5.1 deals with the provisions around the formation of the contract, which is now permitted by email. This does not mean that we are adopting an exchange of contracts as they have in England. It remains that our contracts are formed by an offer and acceptance and the General Conditions reflect this.

Ground rents

Probably the most significant change after General Condition 2 is in relation to Ground Rents as dealt with in clause 8. The clause as it stands means that the issue of Ground Rent is

dealt with contractually at completion between the vendor and purchaser. If the Ground Rent has not been paid up to the date or the receipt produced then there will be deduction from the purchase price of the sum equivalent to 6 years Ground Rent or a sum equivalent to the amount payable since the last due date from which the Ground Rent Receipt is available if this is less than six years.

The aim is to deal with Ground Rent once and for all at completion between the vendor and purchaser, rather than with Ground Rent Indemnity Forms and an undertaking from the solicitor, which is unnecessarily complicated and also leaves you with small balances in your client's account. It is intended to focus on small Ground Rents that are not collected.

Preparation of the Assurance

This is dealt with in Clause 12. There were concerns from a Risk Management point of view that deeds are not being provided early enough to the vendor's solicitor to have them executed in advance of completion which means that the vendor's solicitor is in a difficult position regarding the completion undertaking to furnish the executed Assurance when they do not actually have it to hand. The drafting of this clause 12 now has the effect that the draft Assurance should be provided to the vendor's solicitor along with the signed contract as a matter of course. This should help to minimise the risk of any breach of undertakings and also reflects what the vast majority of us are now doing in practice.

If you are checking a set of title documents that are complicated you should at this stage make notes on the draft Assurance and possibly on your CFR application. This will avoid you having to check the title two or three times and will also assist you in a transaction where the title deed does require some time to draft that you are well prepared to do this quickly.

Occupation before completion

There are occasions when both the vendor and purchaser used the mechanism of a Caretakers Agreement. Clause 15 has been updated and amended, resulting in the practice that we should not need to draft and sign a separate Caretakers Agreement. It is best to use instead clause 15 in cases where issues are necessary to be agreed on in order to provide for occupation before completion. This is intended to make the whole conveyancing process much more efficient and save valuable time in drafting and having a signed separate Agreement which are invariably done almost by definition at the last minute.

Loan clause

The consultation exercise which we carried out on the GCS did generate some comments around the removal of the Loan Clause from the 3rd Edition 2nd Revision. We decided to remove the Loan Clause since generally the practice now is that the contract will not be accepted if it is Subject to Mortgage. If you do have a mortgage offer you don't need to make the contract Subject to Mortgage.

However, if there are particular circumstances where the contract needs to be Subject to Mortgage, for example you are trying to move the contracts or there is an unusual set of circumstances, then this can be inserted as a Special Condition. We felt that the insertion of the Loan Clause in every contract as a matter of course was not particularly helpful.

Conclusion

This is rather a brief summary of what I believe are the major changes which need to be considered before January 2021. I would encourage you all to start being much more proactive at the commencement of a transaction, getting the vendor or purchaser's instructions, acting upon the same, obtaining the deeds, applying for Searches and Property Certificates where need be, getting redemption figures, doing the Replies, when acting for Purchasers try and stress the importance of them obtaining the Survey early, dealing with any issues that arise from the Survey either for yourselves or for them and processing their mortgage application. The processing of the mortgage application is becoming more relevant as Lenders are beginning to wobble in the current pandemic.

Finally I would ask you when reviewing the documents please resist the urge to prepare your own Firm's Special Conditions. They are not Special Conditions, they are your attempts to try and unfairly re-write the Rule Book. Don't waste your time on doing this as I don't believe it is needed.

THE CORONAVIRUS SPECIAL CONDITIONS

Andrew Kirkpatrick, LLB¹

In this article, the author considers the coronavirus special conditions which the Society published in June 2020, highlighting some of the key terms and also addressing some of the misconceptions which may be held by some practitioners.

A copy of the conditions can be accessed by clicking [here](#).

The background to the production of the conditions was that during the early stages of lockdown, solicitors were drafting their own provisions to deal with potential delays arising from either the vendor or the purchaser contracting coronavirus and being unable to meet an agreed completion date through being required to self-isolate. The Society's Conveyancing & Property Committee noted that there was quite a wide variation in the drafting of individual clauses by solicitors and considered that it would be of benefit to have a standard set for use by all solicitors for domestic property primarily as a risk management tool.

The drafting was completed within a very short period of time and I would like to place on record my thanks to the members of the Conveyancing & Property Committee who made my life much easier with their assistance in the drafting. I would note that the Law Society of England and Wales also published their own version of the conditions to assist practitioners in their jurisdiction.

The conditions are drafted to align with the Department for Communities Guidance on the Housing Market and the Society has been in close contact with the Department throughout the year to ensure that there is a consistent message on how the market is to operate. What is clear is that the pandemic is not going away any time soon and I would certainly anticipate that the conditions will need to be used until summer 2021 at the very earliest. A poll was conducted during the Society's recent Conveyancing Conference which reported that 14% of the nearly 500 attendees had invoked the conditions in a transaction so they are having a practical benefit.

Turning now to the drafting of the conditions; they are not intended to be prescriptive and solicitors can amend them as required for each transaction. However, they are a solid starting point for all domestic property transactions. At clause 1.3 there are 13 categories to consider in relation to the definition of a coronavirus event. Again, the solicitor may wish to exclude some of these categories in the drafting but it does give a framework for the types of event that would trigger the conditions. The conditions cover a wide variety of circumstances including difficulties with any of the bodies involved in the conveyancing process such as building control, property certificates, Land Registry, surveyors and banks.

The new completion date under the draft, if a new date cannot be agreed, is 30 working days after the date of the notice of the coronavirus event. There is a long stop date of three months within the draft and again, these provisions can be amended if required.

¹ Head of Policy and Engagement, Law Society of Northern Ireland

I would stress that the intention of the conditions is not to permit purchasers to pull out of transactions for spurious reasons. The intention is to facilitate a short delay to permit transactions to complete safely for all parties. If a vendor client has concerns about a purchaser attempting to use the conditions to pull out of the transaction without good reason then they may wish to think about inserting a requirement that evidence of a positive coronavirus test is provided by the purchaser.

The conditions are aimed at avoiding a fresh swathe of actions for breach of contract similar to that which hit the profession after the property crash in 2007/8. Solicitors will also be aware of the difficulties that there have been in issuing proceedings for breach of contract given the position of the courts this year so I personally cannot see the logic in insisting on a completion date which your client knows will not be met with protracted and potentially expensive litigation to follow. This is particularly the case given that the market is still rising so the vendor's loss is therefore questionable in any event. It is hoped that the market will remain stable at least until the end of the SDLT breaks next March and there is certainly no expectation of a crash similar to 2007/8.

The Society would ask that solicitors take a collegiate approach to the use of the conditions to ensure that there is no repeat of the claims that were witnessed after the property crash.

I am aware that some developers' solicitors have refused to use the conditions. The majority of developers' solicitors are now using them however there are still some that are not. I would advise that those solicitors start using them as they assist in providing a defence against any negligence claim in the event that the transaction goes wrong. The risk for the developer is that there is an outbreak on site and that the site has to close for a period of time and a completion date may be missed. This has happened in a number of sites recently. This is unfortunately going to be the way of things for the foreseeable future and all parties need to adopt a sufficiently flexible approach.

Similarly, if there is an outbreak in a solicitor's office and it has to shut for a period of time, it may not be logistically possible to complete the transaction. At that point the client will want to know why they are being sued for breach of contract rather than having been able to avail of the opportunity for a delayed completion instead.

I have spoken with a number of developers' solicitors who do not use the conditions and their view has been that they can rely on the doctrine of frustration and force majeure if required. However, at the outset of lockdown, the Society took Counsel's opinion on the issue and the advice was very clear that frustration and force majeure would not work in the current circumstances.²

In closing I would say that the pandemic is not going away any time soon. With the increased use of track and trace, there is going to be an increasing number of people who are affected and who will need to self-isolate. This will have a knock-on effect for domestic property transactions. This is particularly the case in a chain of transactions and the ability for all parties in the chain to delay completion for a short period will be very important.

I would therefore urge all members to use the conditions. They are there for the protection of your client and also for the protection of your professional indemnity insurance.

² Stevenson: Shutdown, frustration and property contract. Folio 2020 (1), 23

APARTMENT DEVELOPMENTS – THE VEXED QUESTION THAT WILL NOT GO AWAY

Ruth Craig, LLB¹

Ruth Craig shares her personal opinion on the need for a lease rather than considering the possibility of creating freehold apartment developments.

Over my years teaching conveyancing practice one of the issues which constantly recurs is that of purchases in apartment developments; usually in the context of owners who discover that they are in developments which are no longer functioning properly (or at all) or who are finding it difficult to sell. The Law Society has made valiant attempts to improve the situation through CPD but the same problems seem to occur now as were coming to light ten or twenty years ago.

I have the privilege of being a member of a sub-committee which the Law Society has created to examine this area of practice. One of the matters we are looking at is whether a template lease could be drafted which might avoid some of the worst difficulties currently encountered. At the moment a first draft is being considered by the Law Society so it would be inappropriate to discuss this any further at this stage.

In my opinion it is not possible to create an apartment development in which the apartments have been conveyed in fee simple which will allow for the continued, long term enforcement of the covenants usually required in such a development. Having a developer hold the development in trust for himself, the apartment owners and the management company is extremely useful, especially if the developer goes into liquidation, and this provision should be included in the lease, but I would respectfully suggest that on its own it is not adequate protection if the apartments are sold in freehold.

Prior to the enactment of the Property (NI) Order 1997, the fundamental obstacle to creating an effective freehold apartment development was the principle that one could not enforce positive freehold covenants against successors in title of the original covenantor.

This was changed by the Property Order (which applies only to conveyances made after its enactment). The Order allows for the enforcement by and against the owners of freehold title in relation to covenants specifically included in the Order.

However, apartment developments were excluded from the main thrust of the Property Order which largely prohibited the granting of new leases of dwellings for more than 50 years; the Land Law Working Group's Report on which the legislation was based considered that, in the short term, it would be inappropriate to have apartment developments in which some units were held under long lease and some were held in freehold.

¹ Solicitor and Senior Lecturer, Institute of Professional Legal Studies, Queens' University Belfast

The Working Group did envisage a long term solution of apartments owned in freehold but **only** if these were part of a commonhold scheme the out-workings of which would be dictated by statute. It did not feel that its proposed provision for the enforcement of freehold covenants by successors in title of the original parties (which is largely reflected in art. 34 of the Property Order) would be sufficient on its own to ensure the smooth running of apartment developments.

As we know, the Working Group's proposals for commonhold schemes were not enacted and there is no indication that this will happen in the near to medium future.

So, would it be possible to create a development of freehold apartments where obligations could be enforced by and against the various parties over the long term?

Here we have to start by examining art. 34 of the Property Order; the article makes it clear that covenants in a conveyance are enforceable by and against the parties to the original deed; the concept of privity of contract is not affected. It then sets out the type of freehold covenants which can be enforced, "...by the owner for the time being of the land benefited by the covenant against the owner for the time being of the land burdened by it-"; these are the **only** types of covenant which will burden and benefit successors in title:

- (a) covenants in respect of the maintenance, repair or renewal of party walls or fences or the preservation of boundaries;*
- (b) covenants to do, or to pay for or contribute to the cost of, works on, or to permit works to be done on, or for access to be had to, or for any activity to be pursued on, the land of the covenantor for the benefit of land of the covenantee or other land;*
- (c) covenants to do, or to pay for or contribute to the cost of, works on land of the covenantee or other land where the works benefit the land of the covenantor;*
- (d) covenants to reinstate in the event of damage or destruction;*
- (e) covenants for the protection of amenities or services or for compliance with a statutory provision (or a requirement under it), including —*
 - (i) covenants (however expressed) not to use the land of the covenantor for specified purposes or otherwise than for the purposes of a private dwelling;*
 - (ii) covenants against causing nuisance, annoyance, damage or inconvenience;*
 - (iii) covenants against interfering with facilities;*
 - (iv) covenants prohibiting, regulating or restricting building works or the erection of any structure, or the planting, cutting or removal of vegetation (including grass, trees and shrubs) or requiring the tending of such vegetation;*
- (f) covenants in relation to a body corporate formed for the management of land, and, accordingly, covenants of those kinds cease to be enforceable —*
 - (i) by a person when he ceases to be owner of the land benefited by the covenant;*
or

- (ii) *save in respect of the transfer of membership of a body corporate such as is mentioned in sub-paragraph (f), against a person when he ceases to be owner of the land burdened by the covenant...*

Article 34(a) covers the repair/maintenance of party walls and fences and the “...preservation of boundaries...” generally but its wording suggests that it was intended to deal with houses rather than apartments; there is no mention of the repair of horizontal boundaries such as floors and ceilings.

(b) and (c), taken together, cover covenants to do, pay for or contribute towards the cost of works:

on the covenantor’s land for the benefit of the covenantee’s land or other land; and;

on the covenantee’s land or other land for the benefit of the covenantor’s land.

If one is being particularly pedantic, this would not cover obligations to contribute towards the cost of works done to another apartment or common areas which did not benefit the covenantor’s apartment although one could argue that the general maintenance of the whole development is of indirect benefit to all apartment owners. However, the real difficulty with these sub-articles is the meaning of “works”. If one reads the Working Group’s explanation of identical provisions in its draft legislation covering the survival of covenants post redemption of ground rent, it is clear that “works” were envisaged as covering works of building and repair. The examples the Working Group included for this were “...road or sewerage works or repairs to a sea wall...”

I would respectfully suggest that it would be a really significant departure from this traditional understanding of “works” to extend this to obligations to contribute towards all the other services, such as cleaning, gardening, decorating etc, which are needed in a typical apartment development; and, as we shall see, sub-articles (d) and (e) do not cover these type of services either.

Sub-article (d) is self-explanatory – it deals with re-instatement in the event of damage/destruction.

Sub-article (e) deals with the “...**protection** of amenities or services or compliance with statutory provisions...”. The Working Group’s draft legislation covered only the protection of amenities and did not mention services. However, the specific examples set out at (e) (i) to (iv) cover the same areas: user covenants, covenants prohibiting acts which would be a nuisance/annoyance etc, covenants prohibiting interfering with facilities and covenants prohibiting/regulating building works and landscaping. Again I would suggest that it would be a major extension of this sub-article to cover covenants to do with the payment of service charge.

This only leaves sub-article (f). This covers “covenants in relation to a body corporate formed for the management of land”. Could this be interpreted as covering all the usual covenants entered into by and in favour of a residents’ management company? It is interesting to note that this was not included by the Working Group in its draft legislation so it has to be examined without the benefit of its explanatory documents.

To begin with we should look at art. 34 itself to see whether this can shed any light. Well, the only specific reference to the type of covenant envisaged is in the words, "...save in respect of the transfer of membership of a body corporate such as is mentioned in sub-paragraph...". This would suggest that the types of covenant covered in (f) are those to do with the **running** of the management company rather than its obligations to perform services and the apartment owners' obligations to pay for these. This narrow interpretation could be incorrect but the only way this can be conclusively established is by bringing the matter to court. Inevitably, this would be after a freehold apartment development had been set up and once difficulties had been encountered with the behaviour of a management company or an apartment owner. This seems rather a large risk to run.

There is also the question of insurance. Even if one were satisfied that the provision of insurance by the management company and the payment for same by the apartment owners was covered by art. 34 (f), this leaves one with the problem that many, if not most, insurance companies will not insure on behalf of a party which does not own the relevant lands; so unless and until the developer transfers his title to the common parts of the apartment development to the management company, the company will have real difficulties in taking out appropriate insurance (anecdotally, I understand at least some insurance companies take this attitude even if the developer holds the development lands on trust for the management company and the apartment owners). When dealing with a lease, this can be avoided by the developer/lessor covenanting to provide insurance and the apartment owners covenanting to contribute their share of the cost to him. If successors of either party fails in their obligation, the doctrine of privity of estate allows successors of the party benefitting to take action to enforce the relevant covenant. However, if the apartments have a freehold title there is nothing in art. 34 that allows successors in title to enforce covenants concerning insurance; the only hope would be in a wide interpretation of sub-article (f) in relation to the management company.

If arts. 34 (4) (a) to (f) may not provide adequate protection does art. 34 (6) provide assistance? This states: "Where there is a development, paragraphs (4) and (5) apply as if (if it is not the case) the covenants made by parcel owners with the developer had been made also with other parcel owners to the extent that those covenants are capable of reciprocally benefitting and burdening the parcels of the various parcel owners..."

In essence this sub-article allows any apartment owner to enforce any covenant made by another apartment owner with the developer as if that covenant had been made with him. This is the case if the covenant is capable of reciprocally benefitting and burdening the relevant parcels (so a covenant of purely personal benefit to the developer would not be covered by this provision, nor would one that was not reciprocal). The other requirement is that the parcels be within a "development"; this is defined in sub-article (7) as being where;

- there is land which is or is intended to be divided into two or more parcels in fee simple by the developer to the parcel owners; and
- there is an intention by the developer and the parcel owners to create covenants which are reciprocal between the parcel owners; and
- that intention can be shown expressly or by implication.

This provision could obviously apply to an apartment development but the only advantage it provides is that apartment owners might be able to sue each other for breach of a relevant covenant rather than having to involve the developer. It does not affect the type of covenant

which is capable of enforcement by and against successors in title. Nor would it affect the apartment owners' relationship with the management company.

In conclusion, prior to the enactment of the Property Order there was no safe way of creating a "freehold" apartment development as there was no way in which positive covenants could continue to be enforced long term.

The effect of art. 34 of the Property Order does change this in that both positive and restrictive covenants covered by art. 34(4) can be enforced by and against successors in title to the original parties to a conveyance. However, it was never the intention of the Working Group that this would apply to apartment developments unless supported by legislation creating commonholds; this has not happened.

To assume that art. 34(4) on its own provides enough protection for freehold apartment developments requires a considerable act of faith which, in the end, can only be vindicated when the various possible interpretations of the legislation have been decided on by the courts; and even if the courts found in favour of the broadest interpretation in each of the areas already discussed, I can see no practical advantages at all to the possibilities available under a well drafted lease.

FUNERALS AND CORONAVIRUS IN NORTHERN IRELAND: NEW LEGAL RULES, NEW SOCIAL NORMS

Professor Heather Conway*

In this article the author examines the impact of public health restrictions on post-death arrangements for funerals and cremations.

Introduction

The coronavirus pandemic (or SARS-CoV-2, to give the current virus its proper name) has done more than radically alter our way of life; it has fundamentally changed our way of death as well. Increased mortality rates are a sad but inevitable reality, even if the total number of COVID-19 deaths in Northern Ireland has been much lower than initially predicted (at least in the first wave).¹ This will inevitably increase the volume of estate administration work in the months ahead, coming on the back of an increased demand for will-making services in the spring of 2020 as the pandemic triggered a rush of clients wanting to make new wills or update existing ones. As with any death, however, there is the more immediate task of dealing with the deceased's remains. Major changes have been imposed on funerals, in a country where the ritualistic and community elements of this last act for the dead are ingrained in our socio-cultural psyche.

In pandemics the emphasis shifts to public health, with measures intended to curb virus spread while ensuring that the system does not become overwhelmed and that the dead can still be buried or cremated with respect. The Coronavirus Act 2020 introduced a range of sweeping powers, designed to allow devolved administrations and local authorities throughout the UK to respond to the pandemic as pressures on the system increased.² Accompanied by what were originally the Health Protection (Coronavirus, Restrictions) Regulations (Northern Ireland) 2020,³ this new legal framework had a major impact on key aspects of the deceased management process - most notably death certifications, and how funerals are conducted.⁴

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¹ On 19th March 2020, Health Minister Robin Swann predicted that 14,000-15,000 people in Northern Ireland might die from COVID-19, in a worst case scenario "of biblical proportions"- "Coronavirus: First Death Confirmed in NI", BBC News Online, 19 March 2020 accessed at <https://www.bbc.co.uk/news/uk-northern-ireland-51958241>.

² This included measures around the transport, storage and 'disposal' of the dead, to ensure that the system did not buckle under the strain (as for example, in Bergamo, Italy where bodies had to be dispatched to other crematoria in the region when the city's own crematorium was struggling to cope). Preparatory steps in Northern Ireland included the conversion of part of Holywood's Kinnegar army base site into a temporary morgue- "Coronavirus: County Down Army Base to be Used as a Mortuary", BBC News Online, 26 March 2020 accessed at <https://www.bbc.co.uk/news/uk-northern-ireland-52055727>.

³ As measures with a limited lifespan, these were subsequently repealed and replaced. At the time of writing, the principal regulations are the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020- though these have also been subject to a swathe of revisions and amendments. The most up-to-date information can be found on the Northern Ireland Department of Health website at <https://www.health-ni.gov.uk/publications/health-protection-coronavirus-restrictions-no2-regulations-northern-ireland-2020>.

⁴ Intended to deal with the severe and imminent threat to public health by the spread of COVID-19, the emergency provisions took effect alongside existing public health legislation in NI (e.g. Public Health (NI) Act 1967) but with certain modifications. For example, s 48 and Sch 18 of the 2020 Act inserted a new Part 1A into the 1967 Act, with powers for the Department of Health to implement measures to help delay or prevent the spread of COVID-19.

Intended as time-limited measures, and accompanied by repeated government advice on curbing virus spread (i.e. hand-washing, social distancing and working from home), the core elements of the response strategy have remained in place as the end of the first wave of the pandemic has yielded to the inevitable second wave. Explaining these rules to bereaved families may be a task that is falling on funeral directors, but it's important to know the key features should any urgent legal queries arise.⁵ This article attempts to do that, but with one important caveat: the picture is constantly changing as infection rates increase, and the Northern Ireland Executive modifies restrictions. Checking the latest measures is therefore essential; and while all of Northern Ireland is currently subject to the same measures, local restrictions are another complicating factor if designated areas are (again) singled out for additional restrictions, which might also impact on funeral arrangements for deaths in that area.

I. Registration of Deaths; Cremation Certificates

While deaths should still be registered within five days (unless the death was reported to the coroner), COVID-19 restrictions have closed registration offices to members of the public. Emergency measures allow the essential documents to be submitted, and deaths to be registered, electronically.

Section 18 of the 2020 Act introduces these temporary modifications, while Sch 13, Pt 3 details specific changes to both the Births and Deaths Registration (NI) Order 1976 and the Civil Registration Regulations (NI) 2012. A Medical Certificate of Cause of Death ("MCCD") can be sent electronically to the General Register Office for Northern Ireland ("GRONI") by the registered medical practitioner.⁶ The legislation dispenses with the requirement that he/she sign the register (a text signature will suffice during the emergency period), though the medical practitioner must still provide a detailed and clear assessment of the cause of death and all necessary supporting information must be included. GRONI will forward the MCCD to the registration office which covers the deceased's home address. The information supplied should include details of the deceased's next-of-kin and the funeral director (if known), and a Certificate for Burial or Cremation can be issued to the funeral director once the process has been completed and the death registered.

However, one of the biggest changes under the legislation relates to who can sign the MCCD where the deceased died of natural causes.⁷ This can be the medical practitioner ('X') who treated the deceased within 28 days of death, or another doctor in the same hospital or GP practice where X is unable to sign the certificate (e.g. because X is self-isolating, or due to staff shortages). Where the deceased was not seen by a medical practitioner within 28 days of death, the MCCD can be signed by a doctor who can state to the best of their knowledge and belief that the deceased died of natural causes (e.g. by reviewing the deceased's medical notes). These are significant changes to the standard legal requirements, though all suspicious or unexplained deaths must still be notified to the coroner.

⁵ The Department of Health has provided detailed guidance for funeral directors, which is an excellent point of reference beyond that profession. See "Guidance for handling the infection risks when caring for the deceased and managing funerals during the period of restrictions effective from 16th October 2020" (hereafter referred to as 'Funeral Directors' Guidance') and available at <https://www.health-ni.gov.uk/sites/default/files/publications/health/interim-guidance-for-funeral-directors.pdf>.

⁶ The same procedure applies to a Certificate of Still-Birth, where the certificate of cause can also be given by a registered midwife under Sch 13, Pt 3, paras 18-20.

⁷ Sch 13, Pt 3, paras 23-26.

The emergency measures also impact on the standard cremation documents and streamline the process where the decision is taken to cremate the deceased. Section 21 of the Coronavirus Act 2020 amends the Cremation (Belfast) Regulations (NI) 1961 to map the changes to the MCCD procedures onto the cremation forms. It also removes the need for a confirmatory medical certificate from a second registered medical practitioner before cremation can take place. As regards 'Form B' (confirmatory medical certificate and authority to cremate), where the statutory requirement to "see and identify" the body cannot be met because e.g. the funeral director has already placed the deceased's remains in a body bag, Form B can still be completed by the relevant medical profession and funeral director using a video consultation via Zoom or WhatsApp.⁸ Again, these are major departures from pre-COVID procedure, that are driven by the pandemic and almost certainly time-limited.

II. Funerals

Funerals are important social rituals, especially here in Northern Ireland. They mark the life of the deceased, and allow family and friends to come together to mourn their loss, while drawing social support from members of the community who gather to pay their respects. All this usually occurs within 72 hours of death. However, the emergency legislation has had a significant impact on the way in which funerals are conducted here, for both COVID-19 and non-virus deaths. There is (surprisingly) no legal requirement to hold a funeral here, nor is there any defined legal right to have one (though one arguably exists as a fundamental, natural right). The thing to bear in mind is that funerals are now subject to a series of legal restrictions, driven by the monomaniacal focus on COVID-19; and these restrictions will trump everything else, from ingrained socio-cultural practices around funerals to specific religious rites that are deemed incompatible with what is euphemistically described as the 'new normal'.

1. Initial Restrictions

As part of the lockdown measures introduced on Monday 23rd March, funerals could still go ahead to prevent the system from 'backing up' and allow bereaved relatives to bury or cremate their dead, but with attendance limited to 'immediate' family. The intent was to make social distancing easier and curb transmission of the virus, protecting not only the small numbers of mourners but also funeral directors and others key members of the deathcare industry (e.g. crematoria and cemetery staff, funeral celebrants) who also play a vital role in these challenging times. The actual legal restrictions were set out in the Health Protection (Coronavirus, Restrictions) Regulations (NI) 2020.⁹ These Regulations listed funerals as an exception to the restrictions on movement that prevent us from leaving our homes "without reasonable excuse",¹⁰ and were a permitted exception to the prohibition on gatherings of more than two people in a public place.¹¹ More specifically, attendance at funerals was confined to "(i) a member of the [deceased] person's household, (ii) a close family member, or (iii) if no-one within sub-paragraphs (i) or (ii) is attending, a friend".¹² And while the regulations

⁸ See Funeral Directors' Guidance, pp 13-14. The consultation must take place in 'real time'; certifying on the basis of a video recording of the deceased is not permissible

⁹ Because of the urgency of the situation, these regulations (and subsequent amending regulations) were passed without a draft having been laid before, and approved by a resolution of, the Assembly pursuant to the powers set out in s 25Q of the Public Health (NI) Act 1967.

¹⁰ Regulations 5(1) and 5(2).

¹¹ Regulation 6(c).

¹² Regulation 5(2)(g).

did not impose a numbers limit, repeated government advice in Northern Ireland stated a maximum of 10 people in attendance (excluding funeral directors, and people officiating at the service).¹³ For those families who decided on cremation, the rules were even harsher given that City of Belfast Crematorium imposed a strict ban on anyone attending cremations from 23rd March.¹⁴

2. COVID-Safe Funerals

As the first wave passed and restrictions were eased, the rules around funerals changed slightly. The original Regulations were replaced by the Health Protection (Coronavirus, Restrictions) (No. 2) Regulations (Northern Ireland) 2020 ('the principal regulations'), and restrictions on funerals were initially set out in the Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 4) Regulations (Northern Ireland) 2020. As the R number,¹⁵ hospitalisations and COVID deaths all began to climb steadily again in the autumn, the rules were amended again on 16th October 2020, in restrictions imposed across Northern Ireland by the Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 9) Regulations (Northern Ireland) 2020. Intended to last for a period of four weeks, these were effectively extended for a further 2 weeks by the Health Protection (Coronavirus, Restrictions) (No. 2) (Amendment No. 15) Regulations (Northern Ireland) 2020.¹⁶

Putting the minutiae of the rules to one side, the core themes of limited attendees and social distancing still dominate. Regulation 5 of the principal Regulations (as amended) sets out restrictions on gatherings, but exempts funerals from this under reg. 5(3). Similar measures are found in reg. 6 which deals with restrictions on gatherings in private dwellings, but exempts funerals under reg 6(6)(a) which refers to a "funeral or an event associated with a funeral"- as long as all the individuals involved are members of linked households (i.e. two households linked with each other, by the agreement of the adults in each household)¹⁷ and with a maximum of 10 people permitted inside to view the body¹⁸ or pay their respects at any time. Mingling of multiple households and visitors at wakes is not permitted; post-funeral gatherings are also banned; and regs 5(6) and 6(6) require those attending or those operating or organising the funeral to comply with Department of Health guidance. Sch 2, para 3(1) of the principal regulations (as amended) prohibits overnight stays at places other than where the person or their linked household is living 'without a reasonable excuse', though para 3(2) (c) lists one such example as attending "a funeral of a member of the person's household, a close family member or a friend."

As for the funeral itself, Sch 2, para 4 restricts funerals to a maximum of 25 people. However, much depends on the size of the venue and what it can accommodate, so different places of worship, premises, funeral homes etc. will decide numbers based on the need to ensure

¹³ <https://www.nidirect.gov.uk/articles/coronavirus-covid-19-guidance-bereaved-about-funeral-arrangements>.

¹⁴ As the only cremation facility in Northern Ireland, this attracted criticism- see e.g. "Ban on Mourners at Belfast Crematorium Continues", Belfast Telegraph, 20 April 2020. However, the ban was based on the need to protect crematorium staff, and funeral directors etc. against the potential spread of COVID-19, while ensuring that the crematorium could still operate at capacity.

¹⁵ Secondary infections triggered by any one person.

¹⁶ Supplementary advice and current government guidance can be found online: see <https://www.nidirect.gov.uk/articles/coronavirus-covid-19-regulations-guidance-what-restrictions-mean-you#toc-11> for what is (usually) the most up-to-date information and relevant links. Additional bereavement sources are available at <https://www.publikealth.hscni.net/publications/covid-19-bereavement-resources>.

¹⁷ Sch 2, para 4 of the principal regulations as amended.

¹⁸ Though if the death was COVID-related, the remains should not be taken to a private dwelling- Funeral Directors' Guidance, p 15.

compliance with social distancing requirements. The same legal restriction applies to committal of the body, with no more than 25 people allowed to gather at the graveside; and while City of Belfast Crematorium has been open to mourners since 10 August, only 25 people can gather outside the crematorium or at a graveside for burial (entry into the building is prohibited). Numbers limits aside, social distancing requirements must be maintained while travelling to and from, and while attending, all funerals and committals; face coverings should also be worn when entering and leaving a place of worship, and throughout any service in a funeral home.¹⁹ Persons who have tested positive for COVID-19 or who are displaying symptoms should not attend, though those who are self-isolating as a precaution can be there- but only if they are asymptomatic, and adhere to strict social distancing and wear a face mask at all times.

In some ways, funerals have become invite-only events, and bereaved families will have to make difficult decisions around who goes. The original statutory rules did not define 'close family member', and the current regulations are not prescriptive about who can or cannot attend beyond restricting numbers and the rules on overnight stays, as noted above. On the one hand, this seems a sensible approach: individual families take many different forms, and attempting a 'one-size-fits-all' definition would be problematic. However, all sorts of situations and family dynamics can complicate decisions on who can and who cannot attend, and it is easy to envisage the anguish (and potential conflict!) that this has created since the unwelcome arrival of COVID-19. Legally, of course, the person who controls the funeral arrangements is still the person with the duty of 'disposal' and associated right to possession of the deceased's remains for this purpose: i.e. the executor of the deceased's will in testate deaths, or the highest ranking next-of-kin for intestacy purposes.²⁰ (If anyone has had to give legal advice on this during the pandemic, I would be very interested in hearing more!)

III. Coping with the Present; Looking to the Future

On the bureaucratic side, whether electronic submission of forms and streamlining of processes becomes the 'new norm' remains to be seen. As with many enforced changes during lockdown, there are pros and cons to this new way of working; but it is a useful time for the legal profession (and law reformers) to reflect on what changes might improve the practice of law in the longer-term.

Dealing with the dead is a much more emotive issue. Funerals, as we know them here in Northern Ireland, are another of our social rituals that we must - regrettably, but necessarily - radically alter in the short-term. Of course, the emotional impact on the living is horrendous, and has already been acknowledged by bereavement charities and deathcare professionals.²¹ Closed coffins prevent families from seeing a loved one who may have died alone in hospital or a care home, and who is now isolated in death as well; and the wider social support that funerals provide - especially here, where large funerals are commonplace - is also lost when funerals are restricted to such small numbers. There is no wake, no viewing the deceased (for confirmed or suspected COVID deaths), no comforting hugs or handshakes at funerals,

¹⁹ Sch 2, para 9 of the principal regulations (as amended) and see generally the Health Protection (Coronavirus, Wearing of Face Coverings) Regulations (Northern Ireland) 2020. Since funeral homes are not places of worship, masks must be worn throughout any service held there.

²⁰ H Conway, "Decision-Making and the Dead: Who Decides the Funeral Arrangements when Families Disagree" (2014) 34 Child and Family Law Update 22.

²¹ See e.g. "Coronavirus: No Wake, No Funeral, Just Prayers in a Cemetery", BBC News Online, 1st April 2020 accessed at <https://www.bbc.co.uk/news/uk-northern-ireland-52106863>.

no post-funeral gathering: all such ingrained parts of our social fabric, and things that are a key part of the grieving process for those who have lost loved ones. The emphasis may be on protecting public health, but that particular narrative is one that seems solely obsessed with physical health and preventing the spread of COVID-19, when mental health and emotional well-being (along with other physical illnesses) is being completely ignored.

The legislation makes it clear that the key changes outlined here will last for the duration of the emergency period, though we have no idea how long this will be. Repeated advice is that restrictions on gatherings and social distancing will be with us for some time, so we should probably accept that it may be many months before funerals return to what they were before. For now, COVID-friendly funerals are the legally mandated new social norm.

THE ART OF THE TITLE REPORT

Catherine Heyes LLB¹

In this article the author outlines all the required considerations for a Report on Title and why it should be a bespoke, rather than prescribed, document to reflect the uniqueness of each residential conveyance

The recent launch of the new Home Charter Scheme documents by the Law Society will have prompted all conveyancing practitioners to start thinking about updating the precedent documents in their own offices, both recommended and prescribed, that have been used day-in day-out for the past number of years in connection with all sales and purchases, in readiness for the launch of the new Scheme in January 2021. Alongside that, many of us may see a timely opportunity to look again at the other 'standard' letters and documents also used frequently, which may not have had the benefit of a review and overhaul for a number of years. For a lot of practitioners, that will include some form of letter or document used as a starting point to provide a purchaser with a report on title.

The new Home Charter Scheme Retainer Letter now contains a number of important exclusions which aim to clarify the extent of the duty being undertaken by the conveyancing solicitor, such as stating that we do not provide tax advice, financial advice, advice regarding surveys and advice regarding flooding. Insofar as we have not already adapted our individual retainer letters, and potentially title reports as well, to clarify this, the issuing of these new recommended forms now provides us with this opportunity, and their inclusion in the recommended Home Charter Scheme documents can only serve to achieve this uniformity of messaging across the profession as a whole.

The new Home Charter Scheme may well influence some of the ways in which we report on title to our clients, but what it does not do is set out a particular form of Title Report, either recommended or prescribed, which we should all be using in every case. The Home Charter Scheme exists to provide all clients with a quality standard from their solicitor in conveyancing transactions. Could it include an accepted Report on Title document, in a standard form, providing all purchasers with an absolute reassurance that the title deeds of their new property are in perfect condition? If only it was that simple!

It is possible that, at some point, such a document could be produced. This would mirror what has been achieved by the introduction of the pro forma Certificate of Title negotiated and agreed between the Law Society and the various lending institutions, and now used in all transactions with our lender clients. Both Lender and Purchaser want the title to the property to be good and marketable, and both expect us to carry out all the checks which that entails on their behalf. The Lender's Certificate of Title provides a useful summary of what those checks are, and is useful for the uniformity it brings in clarifying what lenders should expect

¹ Solicitor, Peter Bowles and Co. Solicitors

from us acting on their behalf (and also, crucially, clarifying what we are not qualified to deal with). Its completion could also assist us in providing clarification of what checks we have carried out for the benefit of a purchaser client should a query be raised about this in future. After all, the checks referenced have a dual purpose in being for the benefit of the buyer as well, and indeed will be carried out as a matter of course even where there is no Lender and no Lender's Certificate of Title to sign.

But the Preamble to the Lender's Certificate of Title is a reminder that the job of a conveyancer is not just so clear cut. The obligation to interpret the certificate in conjunction with the UK Finance Lenders' Handbook (where the lender is instructing on the basis of the handbook) and/or the specific instructions of the lender, remains. A quick look through the Handbook will throw up plenty of examples of scenarios in which certain matters relating to the title of the property are to be reported to the Lender and their further instructions sought, and these do widen the scope of the retainer quite considerably (for example where there is an absentee/insolvent landlord - not uncommon in Northern Ireland with our long leasehold system, any 'apparent problems' with a management company - this is suitably vague). In each such case we are required to 'provide a concise summary of the legal risks and your recommendation on how we should protect our interest'. We will all be familiar with the lengthy wait for a lender's response to such a report (as our purchaser client lives with their belongings packed into boxes around them, and a completion date we had no involvement in setting ticks ever closer), ending invariably with a letter advising us that the lender is happy to proceed 'as long as you are satisfied that our interests are fully protected'. Applying this to the possibility of a Purchaser's standard Report on Title, it is easy to see how such a standard document could end up being so caveated, adapted and expanded upon that the initial existence of the standard proforma document becomes almost meaningless.

Added to this, we must be cognisant of the fact that our professional relationship with our purchaser clients is not entirely the same as that with our commercial lender clients. Our purchaser clients want to know that we have checked the title deeds and associated documentation that comes along with a purchase, that we have told them of anything they need to know from a practical perspective, and that they will be able to sell or mortgage the property in the future. They do not want to know the minutiae of how we have done this. I can see a certain appeal in providing a purchaser client with a document similar to the Lender's Certificate of Title (running to 12 pages or thereabouts), leaving our client in no doubt as to how much work we have done on their behalf, and perhaps ultimately serving to educate the house-buying public about the existence of this work, as unfortunately the time spent and skill applied by the conveyancing solicitor is still largely undervalued and ignored.

The real risk here is that this could end up muddying the waters, thus obscuring those relevant parts of the title report that we do need to ensure are brought to a purchaser's attention and properly considered by them. Will the purchaser buying a house with a large garden, with the intention of building a further property there to sell on, miss the clause in their lease prohibiting construction of more than one property on the land because they have been waylaid by considering the list of searches and property certificates that we have obtained and considered in connection with their purchase? Would the existence of a standard Report on Title, bringing comfort to all conveyancers that the advice they are given is of a defined standard, as applied across the jurisdiction as a whole, actually end up creating a different version of a problem it aimed to solve?

The Solicitors' Practice Regulations 1987 require us to report to a purchaser client '*when title is received to provide client with details of premises, easements, onerous covenants etc, and to enclose copy map of premises*' and to '*investigate the title with due professional*

skill.² Every property in Northern Ireland is different, as are every one of the people who want to buy them. The application of our 'due professional skill', as required by the Regulations, brings with it the knowledge that our advice to each of those clients will be different. I have heard many conveyancers express the opinion that conveyancing is an art, not a science. An agreed form of Report on Title may give the appearance of a satisfying end result, but painting by numbers removes the ability of the artist to produce the individual work they were commissioned to create.

In the absence of a standardised Report on Title, it is up to us to decide on what form the advice we give to our clients should best take. A purchaser's Report on Title should contain certain elements in every case. Part II of Schedule 1 – Regulation 8A of the Solicitors' Practice Regulations 1987 referenced above specifically mentions one actual document only – the map of the premises. In that same clause, 'details' of the premises could reasonably be expected to include information appearing in the title deeds of the property that are relevant to the new owner's use and enjoyment of the property they are buying, and this is frequently where the buyer will find details of 'onerous covenants' as well.

Of course, what is an 'onerous covenant' could well be subjective. For example, the commonly seen covenant 'not to keep poultry and pigeons' is objectively not an especially onerous obligation, but it will be for that client who plans to have a chicken coop in their back garden. We are not in a position to make a call ourselves as to what is important to each individual, and as such providing a copy of the deed, or at least a copy list of the covenants, is advisable. At the same time, providing a copy of the deed itself without any supplemental information or advice still risks being deemed insufficient in the event of it containing anything potentially prejudicial to the purchaser which is not picked up on by them. Whilst we cannot reasonably be expected to repeat ad nauseum what is already listed out in the deed in our Title Report, a purchaser should be directed to the relevant part of the deed, and the importance of their being aware of the obligations they are assuming should be emphasised. It is worth singling out anything which may reasonably be expected to be onerous as well, rather than relying on the fact that we have advised the purchaser to read it for themselves.

This is very apparent in the continuing debate about leasehold reform ongoing in England and Wales. Following a consultation exercise³, Government plans to legislate to implement reforms to the leasehold system. This has arisen in part because of concerns that some existing homeowners are finding themselves unable to sell their homes, perhaps due to very high, and ever increasing, ground rents being payable, or to restrictive covenants which require the owner to ask permission of the freeholder, and pay them a healthy fee, to make alterations to their home. The proposed reforms are largely focused on ensuring that homes cannot be sold this way in future, however this saga may yet have implications for solicitors who acted in the purchase of those properties already purchased. One such homeowner has launched legal action against the conveyancing solicitor who advised her when she purchased the property⁴, on the basis that '*the full implications of the seemingly 'innocent looking agreement' were never explained to her by her solicitor*'. The solicitor instructed to deal with her claim agrees that '*a lease is a very complex document which needs to be carefully and simply explained to clients*'. While judgment is yet to be given in this case, the pending legal action does serve as a warning that providing a copy of a deed, with no accompanying explanation or advice, is

² Solicitors Practice Regulations 1987, Schedule 1 Regulation 8A Part II Para (l)

³ 'Implementing Reforms to the Leasehold System in England – A Consultation' carried out by the Ministry of Housing, Communities & Local Government.

⁴ <https://www.simpsonmillar.co.uk/media/campaigners-legal-action-vs-conveyancing-firm-in-leasehold-scandal/>

open to challenge by a purchaser client who feels they did not understand what was involved in purchasing their home, and has suffered as a result.

Beyond the map and the deed, a vast amount of other documentation will be provided to us in the course of a purchase. How much of this should be provided to the client will, to use a familiar phrase, come down to the facts and circumstances of a particular case. To take a couple of what would be numerous examples, where there is a management company a purchaser will have an interest in seeing minutes of meetings held and service charge accounts, containing important information affecting their occupation of the property post completion, and may well contain information that would ultimately affect their decision to buy or not. Where live planning permissions appear on the Regional Property Certificate, which may have the potential to affect a client's enjoyment of a property they move into, these should be drawn to their attention. In any such case it will be a matter of professional judgement to decide what should be specifically flagged, all the while being mindful of not producing a title report which simply repeats every piece of information which has come into our possession.

In doing so, though, there is a balancing act to be struck between providing too much information, and making what are essentially subjective judgments on what is important knowledge and what is not. In a recent case⁵ the High Court in England held that a solicitor was in breach of his duty to his client for not having advised her of a neighbouring High School planning application in his report on title. The solicitor argued that his statement that his enquiries had revealed '*nothing prejudicial adversely affecting the property*' was accurate, in that the multiple planning applications revealed by one of the searches obtained did not relate to the property being purchased itself, and that it was '*not their duty to carry out investigations into the nature of any of the various planning applications or to ask the purchaser for instructions whether or not to do so*'. This argument was rejected and it was held that '*the duty to communicate matters actually known to a solicitor is to communicate information that may be material, thereby setting the threshold for information to be communicated at an intentionally low level*'. This is worth bearing in mind when providing advice: it is not up to us to tell a client what is important to them and what is not, but it is up to us to alert them to such matters and make sure that they are aware that these are things they need to consider, and ultimately decide on for themselves.

In this respect the Report on Title can also usefully limit the scope of a solicitor's retainer insofar as it relates to the purchase of a particular property – where an inspection of the title reveals anything that may warrant further investigation. A negligence claim launched by the purchaser of a house in Kensington, London in 2012⁶ against her former solicitors alleged that the firm had been negligent in not warning her that she would be unsuccessful in obtaining the planning permission for a change to residential use that she was seeking. Negligence was denied by the solicitors, and the claim was recently, and swiftly, dismissed by the High Court, with no liability attributed to the solicitors in question. However, the claimant's written submission to the court, which stated that had she been properly advised by the firm, '*she would either have aborted her purchase of the property straight away or she would have obtained specialist planning advice and then aborted her purchase of the property*'.⁷ does illustrate how the simple fact of directing a client to a different, suitably qualified, professional to seek further advice can neatly clarify the scope and limit of our duty to that client at the

⁵ *Orientfield Holdings Ltd v Bird & Bird LLP* [2015] EWHC 1963 (Ch)

⁶ *Lisle-Mainwaring v Charles Russell Speechlys LLP* [2020] EWHC 2616 (Ch)

⁷ Today's Conveyancer' 7th October 2020

same time. (This purchaser also opted to repaint the Kensington townhouse with red and white candy stripes, to the annoyance of her neighbours. There is happily no suggestion that her solicitor should also have told her that this was inadvisable).

Having settled on the content of the Title Report, the timing of its submission to the purchaser is another important consideration. The Solicitors' Practice Regulations 1987 provide that, where a map of the premises is available, a client should be provided with a copy at the earliest possible opportunity for information purposes and to enable the client to comment on the boundaries of the property⁸. In an ideal world we would all agree that the earlier we can provide a client with full advices about the property they are buying, as opposed to just a copy of the map, the better. To do this, we need to be able to complete our review of title deeds, replies to pre-contract enquiries, property certificates, and searches, as early in the process as possible – we will all be familiar with the stress that comes with a title issue coming to light at the 11th hour. Furthermore, this can only assist us in showing that we have fulfilled our professional duty to our client, in that we have provided them with the information they need in a timely fashion, leaving them time to consider it properly and, where necessary, make their own further enquiries, rather than being put under pressure to achieve an imminent completion date without the luxury of taking time for proper reflection. The recent work done by the Law Society in agreeing a Memorandum of Understanding with RICS and NAEA, which sets out in detail the role of all parties involved in expediting the conveyancing process, along with the frontloading of that process envisioned by the new Home Charter Scheme General Conditions of Sale, will hopefully ensure that we can provide a complete title report in all cases at the earliest opportunity, minimising both the stress and the risk.

The other advantage of being in a position to provide a title report sooner rather than later is that it allows time for the report to be provided to the client in writing. This is not necessarily to say that the report must be in writing, in some cases a detailed discussion with the purchaser about some or all aspects of the title may be more appropriate. The advantage, of course, of a written Report on Title is that it means there can be no dispute about what the client was told by his solicitor. A 2013 case heard in the Court of Appeal in England⁹ illustrates this, in which a purchaser's case was that she had not been advised of a relevant restrictive covenant by her solicitor. The solicitor in question argued that while 'he had no memory of advising her about them: his case was that he would have done so because that is what he would normally have done'. The lack of a written attendance note, however, led to the trial judge ultimately finding that that he did not advise his client about them, and so breached the duty expected of him as a reasonably competent conveyancing solicitor. A comprehensive attendance note of the discussion may well have led to a different conclusion. However, a recent decision handed down by the High Court in Belfast¹⁰ found that verbal advice given to a purchaser, as evidenced by a contemporaneous attendance note, still should have been followed up with written advice. The Judge in that case recognised the fact that title defects had been discussed with the purchaser at a meeting, however as *'this was the first time she had been made aware of the difficulty which is a complex legal one'*, the purpose of subsequent written advice would have been to ensure that the purchaser fully understood the import of the advice given at the meeting. Furthermore, the judge considered that Regulation 8(A) Part II(d) of the Solicitors' Practice Regulations 1987 – *'a solicitor shall report to the client from time to time as may be required and, in particular, report to the client when title is received with*

⁸ Schedule 1 Regulation 8A Part II Para (g)

⁹ *Joyce v Darby & Darby* [2014] EWCA Civ 677

¹⁰ *Hickland (James Andrew) as personal representative of the estate of Margaret Jean Farren (Deceased) v McKeone (Cormac) Formerly practicing as McKeone and Company Solicitors.*

details of premises, easements, onerous covenants etc and to enclose copy map of premises' contained 'a clear inference' that this report should be in writing.

With so many aspects of the Report on Title to consider, it is easy to understand why the Home Charter Scheme has not produced a prescriptive form for common use, and in fact it is very possible that the absence of a standard Report on Title is what ultimately ensures the 'quality standard' which the Home Charter Scheme guarantees. Part of the art of conveyancing is considering the unique needs of a client when buying a unique property, which means bespoke will always top off the peg.

CONVEYANCING IN THE ICEFIELD

Philip Armstrong LLB¹

In this article, Philip Armstrong shares his views on the need for the profession to positively manage each conveyancing process undertaken during the current pressurised climate faced by conveyancing practitioners.

As an active (certainly from a Northern Ireland solicitor context) user of LinkedIn, I have come to realise that whilst we conveyancing practitioners in this jurisdiction (rightly) highlight the somewhat idiosyncratic nature of our conveyancing processes, we have much more in common with our colleagues across this island and Great Britain than the divergences of practice and procedure which distinguish us. A recent post that I published about the pressures of working in a conveyancing department during the current Covid-19 crisis has forcibly brought that home to me.

In short, if the anecdotal evidence of the nearly 8,000 people who engaged with my post is taken as in any way indicative of how the UK and Ireland conveyancing profession feels at the moment, it's clear that there is a growing recognition across the profession of the need to support one another as we seek to manage the inherent risks.

It will come as no surprise to a reader of Folio that after an initial period during lockdown of hard but sustainable work, since the property market 'reopened' in June of this year, conveyancing practitioners have been under the most intolerable pressure, and I don't think it would be excessive to say that in a lot of cases, many individuals and departments are teetering on the point of physical and emotional collapse.

I am wholly unqualified to offer any therapeutic assistance in that regard, other than to recognise these unfortunate symptoms in myself and my colleagues in my firm; not, I hasten to add, just the solicitors, but everyone in our residential conveyancing department.

What really worries me, however, is how we somehow reconcile the pressure to complete transactions with our attitude to risk. As a profession, we have been here before in 2007, and this resulted in a bruising experience for the profession, both financially and in terms of reputational loss. As an industry, we conveyancers are currently under intense pressure to complete cases in circumstances where it really does appear that the clients and estate agents who shout the loudest or threaten the most widespread social media evisceration actually prevail against the expertise, experience, and what I have previously termed "digestive reasoning" of the most reputable, solid and prudent practitioner. You know what I mean. The cases where you just know in your gut that there's a red flag and you shouldn't be completing. Over the years and thousands of completions of residential home moves, we've all seen cases where we just know in our gut that something is wrong, but the solicitor is still put under pressure to complete – often by another stakeholder in the process who, unlike

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the solicitor, ultimately carries no responsibility for the decision made. On occasion, solicitors have completed.

As a profession, I think it's fair to say that our attitude to risk has become more attuned over the past decade. With increased regulation, much of what we do and how we do it is rooted firmly in managing risk. Client Due Diligence, Anti Money Laundering and Counter Terrorist Financing, considering proof of funds and source of wealth – all of these feature prominently on in our conveyancing files, and I have definitely noted that the cautious approach applied to these matters is now – pleasingly – extending to actual conveyancing considerations in the files as well. From an admittedly modest starting point after the last property crash, there has been much to commend the Northern Ireland conveyancing landscape to the insurance industry who underwrite our Master Policy. Against that background of improvement, I do believe that we are potentially back in the icefield again, in danger of potential collision with something that could sink our ship. It is so obvious as to be insulting to observe that being forced to make countless decisions under pressure when we just know that they're going come back to haunt us, does have the potential to do just that. If such scenarios arise, they will be expensive, and does impact the entire profession, not just you and your firm. The insurance market for professionals in many disciplines has hardened due to Covid-19 and Brexit, and there may be little tolerance for practitioners (perhaps even industries) who even under the current pressures, don't manage the risks. It didn't work in 2007, and will absolutely, definitely, unquestionably not work in 2020.

And that leads me to my final point. Every case that you and I as a conveyancing solicitor transact matters. Every single one. Unlike in 2007 and despite the pressures we are under, we **must not** allow ourselves or our colleagues to be bullied or cajoled to take the 50/50 chance, or shave the corner, or choose to ignore the borderline issue and we decide not to trouble the lender with it (though the UK Finance Lenders' Handbook says you must), or decide not to obtain the title indemnity policy because we missed it earlier and it's too embarrassing to tell the client now. Making poor decisions in such circumstances that we'd never normally make - every one of those may come back to haunt not just ourselves, but our colleagues as well.

As conveyancing solicitors, we are having a horrible time at present, and that's likely to continue until April 2021 if the Stamp Duty holiday remains unchanged. It is criminally unfair that delays outside our control which are not our fault (lenders, local authorities, regional units etc) invariably become our problem. What we must ensure however, that the work we have done as a conveyancing profession over the past 15 years to get our house in order, is not undone by the unreasonable expectations of misinformed home movers, fuelled at times by other stakeholders in the process who should know better. As a final observation, writing this four weeks exactly after my post on LinkedIn to which I referred at the outset, take heart in the fact that you are not alone. The engagement with my post demonstrates that every residential conveyancing practitioner in the country is straining under the same pressure as you are, and at this time, I am optimistic that our profession will pull together and co-operate in supporting each other through these bizarre times when our conveyancing revenue is positive, but the overall experience is anything but. We can navigate our way safely through the icefield – together.

DISCHARGE OF MORTGAGES

Charles O'Neill¹

“Someone asked me recently about a law that made the satisfaction of unregistered mortgages easier. I suppose that the law comes into a category of those little pieces of legislation that can be oftentimes forgotten but that are very useful in practice. The law in this case was the Property (Discharge of Mortgage by Receipt) (NI) Order 1983.”

Prior to 1983 only building society mortgages could be vacated by a vacating receipt. This was under the Building Societies Act (NI) 1967. Other mortgages had to be discharged by another method such as a reconveyance, re-assignment, surrender, release or transfer, depending on how the mortgage itself was created.

The Property (Discharge of Mortgage by Receipt) (NI) Order 1983 applies to any mortgage of unregistered land whenever it was made but only applies to mortgages made before the commencement of the legislation in so far as the discharge is effected after that date.² It does not apply to the discharge of a charge of registered land.³

The benefit of the Property (Discharge of Mortgage by Receipt) (NI) Order 1983⁴ is that where a receipt is endorsed on, or written at the foot of, or is annexed to a mortgage for all monies thereby secured and is executed by the mortgagee then the receipt operates:

- as a discharge of the mortgaged property from all principal money and interest secured by and from all claims under the mortgage;
- as a termination of the mortgage and of the mortgagee's estate in the mortgaged property; and
- vests in the mortgagor the estate of the mortgagee in the mortgaged property.

It should be remembered that this does not affect the right of any person to require a reconveyance, re-assignment, surrender, release or transfer to be executed in lieu of a receipt.⁵ It would be unusual circumstances where a mortgagor would require this to happen. The one instance where such a deed is required is if there is a partial discharge of the land from the mortgage. In such cases the mortgagee has to execute a release of part of the land from the mortgage.

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² The Property (Discharge of Mortgage by Receipt) (NI) Order 1983 came into force on the expiration of two months from 18 May 1983.

³ Art 3(8).

⁴ Art 3(1).

⁵ Art 3(2).

There is a prescribed form for the vacating receipt in the Schedule to the legislation. This is reproduced in Appendix 1. If the mortgage is comprised of more than one deed, then the receipt has to be endorsed on, written at the foot of, or annexed to each of the mortgage deeds, and should refer to all the deeds whereby the mortgaged money is secured (giving the serial number of each such deed registered in the Registry of Deeds).⁶

This mechanism of using a vacating receipt may be used even if the mortgagee is not the original mortgagee. In such circumstances, the receipt has to refer to the manner in which the present mortgagee derives title under the original mortgagee and where the title is derived under any deed registered in the Registry of Deeds, give the serial number of each such deed in the Registry of Deeds.⁷

There are certain rules outlined in the legislation which relate to how the document is to be witnessed.⁸

Helpfully, in the definitions section⁹ of the legislation a mortgagee is defined as including any person deriving title under the original mortgagee. Similarly, a mortgagor means the person for the time being entitled to the equity of redemption and includes any person deriving title under the original mortgagor or entitled to redeem a mortgage according to his estate in the mortgaged property.

There are some limitations to the operation of the Property (Discharge of Mortgage by Receipt) (NI) Order 1983 in that it does not apply to mortgages to which section 33 of the Co-operative and Community Benefit Societies Act (NI) 1969, section 57A of the Friendly Societies Act 1974 or article 34 of the Credit Unions (NI) Order 1985 applies. Also, subject to paragraph 2(7) of Schedule 4 to the Building Societies Act 1986, it does not include a mortgage to which that paragraph 2 applies.

The discharge of charges of registered land is dealt with in a different way under section 49 of the Land Registration Act 1970 in that the Registrar will, with the concurrence of the registered owner of the charge or on proof in the prescribed manner, note the satisfaction of the charge or the release of any part of registered land from the charge. The receipt of the registered owner of a charge shall be sufficient proof of the satisfaction of the charge and a release shall be sufficient proof of the release of any part of the land subject to the charge.¹⁰

⁶ Art 3(4).

⁷ Art 3(5).

⁸ Art 3(6).

⁹ Art 3(10).

¹⁰ See Moir and Moir, *Moir on Land Registration* (SLS Legal Publications Limited, 2011), p304 for the detail and forms in connection with the receipt by a registered owner of a charge and the release of part land charged from a charge respectively.

Appendix 1

Form of receipt on discharge of a mortgage

M., of [etc.] hereby acknowledges receipt of all moneys [or the balance remaining owing in respect of moneys] secured by the within [or above] [or annexed] written deed.

Dated thisday of20.....

M [signature or seal of mortgagee]

M. signed this receipt of discharge in our [or my] presence.

W [signatures of witnesses] [or witness] [address and occupation or description of witnesses [or addresss and description as a solicitor of witness].

1. The mortgage is comprised of the following deed or deeds.

Date	Description	Serial number in Registry of Deeds

2. The mortgagee executing the receipt is the original mortgagee.

OR

The mortgagee executing the receipt derives title under the original mortgagee as follows- [here state the manner in which title is derived, listing all relevant instruments].

Date	Description	Serial number in Registry of Deeds

A LETTER FROM SADIE

Brian Walker, Walker McDonald

Dear Mr Walker,

I was driving past your office this morning when I saw you dragging one of those awful suitcases on wheels into your car. This reminded me to write to you to thank you for your birthday card for my eighty second birthday. You have been a great help recently about the ownership of the house.

A couple of months ago I went to see you because my sister who is also a Widow had given her house to her son who is a clergyman in England. She had one short visit to her Solicitor and it was all done in a week. She said that her son was not told in case her daughter in law would get her thrown out.

Of course, I didn't really believe all of that since she has some days when she is a little confused. After all she is a whole year older than I am. You explained that you had to go through a complete process. You told me that because of my age I would have to see a doctor to confirm I knew what I was doing. I never met such a stupid doctor. He couldn't do long division in his head and he didn't know who the Prime Minister was. Anyway, he must have sent you some wee letter which you said you would keep with the deeds.

I told you to put my house in my son's name. You explained that I would have to tell him and you would have to get proof of identity. He is my only son and my late husband always said he should have the house. You explained that he could have some tax problems about capital gains tax and stamp duty. I know you wrote to him about all this because you wanted to keep him right. You did say something about him suing you but I didn't understand this.

Then there was the house insurance. The broker had to be told. I thought the building insurance was all he needed but you said you were worried that the big trees at the back of the house might damage the house next door and so he must have public liability. He wasn't very happy because he loves this online stuff and he thought all he had to do was to get the cheapest quote.

You insisted that the deed would say I had a right of residence for as long as I wanted and then you wrote to both of us about which of us would be responsible for any major repairs. I must say I thought that was just you being too fussy until you told me about your client who had a leaky roof and the family fell out about who had to pay for it. I think you must be getting old because you told me several times that many years ago a family fell out several years after the transfer and a Judge said a Solicitor shouldn't act for both parties. It was only when he read your notes of a number of attendances that he was satisfied that you had done all you were supposed to do. Maybe that was why you sent me to that stupid doctor.

Anyway, I am glad it is sorted and I enclose a cheque for your fees and all those things called searches and property certificates. By the way I could have told you my son wasn't bankrupt. You didn't need to do a search but I won't argue.

Make sure you keep the will and the attorney thing in your strongroom.

Yours Sincerely
Sadie

FOLIO INTERNATIONAL

Charles O'Neill¹

In this edition of Folio International we look at a recent development in the law of residential tenancies in England, that is to say the introduction of the Homes (Fitness for Human Habitation) Act 2018 (the Homes Act). This legislation clarifies the obligations on landlords to ensure that the property is safe at the start of the tenancy and throughout the term.

This legislation does not impose new obligations on landlords, rather it strengthens protection for tenants by making it an implied obligation that the property is fit for human habitation, thus giving the tenant a remedy against the landlord.²

The Homes Act amends the Landlord and Tenant Act 1985, inserting section 9A³ which states that there is an implied covenant by a landlord that a dwelling is (a) fit for human habitation at the time the lease is granted or otherwise created or, if later, at the beginning of the term of the lease and (b) that it will remain fit for human habitation during the term of the lease.

This implied covenant does not require the lessor;⁴

- to carry out works or repairs for which the lessee is liable by virtue of
 - the duty of the tenant to use the premises in a tenant-like manner, or
 - an express covenant of the lessee of substantially the same effect as that duty;
- to rebuild or reinstate the dwelling in the case of destruction or damage by fire, storm, flood or other inevitable accident;
- to keep in repair or maintain anything which the tenant is entitled to remove from the dwelling;
- to carry out works or repairs which, if carried out, would put the landlord in breach of any obligation imposed by any enactment (whenever passed or made);
- to carry out works or repairs requiring the consent of a superior landlord or other third party in circumstances where consent has not been obtained following reasonable endeavours to obtain it.

There is also no liability in respect of the dwelling being unfit if the unfitness is wholly or mainly attributable to the tenant's own breach of covenant, or if there is an exclusion or modification made by a County Court under section 12 of the Homes Act.

¹ LLB, MBA, Solicitor

² Ministry of Housing, Communities and Local Government, Guide for landlords: Homes (Fitness for Human Habitation) Act 2018, (MHCLG, March 2019).

³ S 9A(1) of the Landlord and Tenant Act 1985.

⁴ S 9A(2) of the Landlord and Tenant Act 1985.

Right of entry

The Homes Act also contains an implied covenant by lessee that the lessor or a person authorised in writing by the lessor may enter the dwelling to view its condition and state of repair⁵ at reasonable times of the day and on at least 24 hours' notice to the occupier of the dwelling.

The Homes Act applies to;

- tenancies for a term shorter than 7 years that are granted on or after 20 March 2019 (tenancies longer than 7 years that can be terminated by the landlord before the expiry of 7 years shall be treated as if the tenancy was for less than 7 years)
- new secure, assured and introductory tenancies (on or after 20 March 2019)
- tenancies renewed for a fixed term (on or after 20 March 2019)
- from 20 March 2020 the Act applies to all periodic tenancies. This is all tenancies that started before 20 March 2019.⁶

However, the Homes Act does not apply to licencees rather than tenants.

Contracting out of the provisions

Any provision of any lease or any agreement relating to a lease (where made before or after the grant or creation of the lease) is void to the extent that it purports to exclude or limit the obligations of the lessor under the implied covenant or to authorise any forfeiture or impose on the lessee any penalty, disability or obligation in the event of the lessee enforcing or relying on the obligation.⁷ If during court proceedings it is alleged that the landlord is in breach of the obligations re the implied covenant the court may order specific performance of the obligation (regardless of any equitable rule restricting scope of that remedy).⁸

The fitness for human habitation test itself

The fitness for human habitation test is set out in the Landlord and Tenant Act 1985 as amended by the Homes Act. *In determining ... whether a house or dwelling is unfit for human habitation, regard shall be had to its condition in respect of the following matters—*

- Repair,
- stability,
- freedom from damp,
- internal arrangement,
- natural lighting,
- ventilation,
- water supply,

⁵ S 9A(7) of the Landlord and Tenant Act 1985.

⁶ Ministry of Housing, Communities and Local Government, Guide for landlords: Homes (Fitness for Human Habitation Act 2018, (MHCLG, March 2019).

⁷ S 9A(4) of the Landlord and Tenant Act 1985.

⁸ S 9A(5) of the Landlord and Tenant Act 1985.

- drainage and sanitary conveniences,
- facilities for preparation and cooking of food and for the disposal of waste water'
- in relation to a dwelling in England, any prescribed hazard;

and the house or dwelling shall be regarded as unfit for human habitation if, and only if, it is so far defective in one or more of those matters that it is not reasonably suitable for occupation in that condition.

“Prescribed hazard” means any *matter or circumstance* amounting to a hazard for the time being prescribed in regulations made under section 2 of the Housing Act 2004. This refers to the housing health and safety rating system which is in place in England.

Right of the tenant to enforce the implied covenant

If a landlord fails to comply with the implied covenant the tenant may have the right to take court action against the landlord for breach of contract. If the court decides that the landlord has not provided their tenant with a home that is fit for habitation, then the court can:

- make the landlord pay compensation to their tenant,
- make the landlord do the necessary works to improve the property

Conclusion

The law in England now gives tenants in both the private sector and the social sector the ability to take action against their landlord in respect of a breach of an implied covenant that the property is fit for human habitation both at the start of the tenancy and remaining fit throughout.

WE ARE HELPING OTHER CUSTOMERS

Michael Flanigan, Solicitor

They say that over a lifetime the average person will have slept for 30 years. My version is that over their average working life a conveyancing solicitor will have spent a year and a half waiting for the phone to be answered. That statistic is destined to increase.

Being asked to wait for the phone to be answered used to be a moment of peace and quiet. Now it means being forced to listen to the latest Classical Hits or some original composition chosen by the bank or building society, probably with the assistance of a focus group.

One particular bank's orchestral opus, is deserving of some deeper analysis. The first movement is a lively tarantella played with brio and verve. One imagines the bank's employees dancing a traditional peasant dance in celebration after bringing in a rich harvest. The second movement is more sober than the first while continuing the theme established in the first movement. Just when you think you are about to enter the final movement; you find that you are cleverly brought back to the first movement again.

Some others, notably in the insurance industry, have a tendency to use supposedly inoffensive jazz played by a four piece combo. This music plays on a strange continuous loop which never changes and never progresses. The only other place that this music exists is as the soundtrack to documentaries about cheese-making that played in cinemas in the 70's before the feature film.

Chief among the offenders is the Inland Revenue. In fairness, they do give you a number of public warnings. We are experiencing a higher than usual volume of calls; you may have to wait longer than usual; we are busy helping other customers. What they don't say is please don't ring because we will never answer this phone. I am convinced that all calls to the Inland Revenue are diverted to a red phone box on a single track road in the Outer Hebrides where it just rings.

I also have no idea why banks and lenders, think that the phrase "we are helping other customers" is worth saying or is of any comfort. It is in fact the opposite. I don't want you to help other customers, I want you to help me. When a person finally does answer the phone, it is something akin to speed dating. Even though I am inwardly fuming at having been left on hold, I have about 15 seconds to make this person like me and therefore agree to get me the information that I need, because I never want to have to ring them again.

Solicitors can also let you hold on the phone. Gone are the days when all you were asked to listen to was a few seconds of Eine Kleine Nachtmusik played on a xylophone. Now quite often you are invited to listen to a full advert in a generic commercial radio voice extolling the many virtues of the solicitor that you are just about to have a row with.

But with advances in technology those minutes on hold that a client has to endure before getting through to their solicitor could be used in more inventive ways. This would involve selected music sending a subtle subliminal message. For example, a dedicated probate

practice might use Mozart's Requiem to set a suitably somber tone. If you have a case where the client is concerned about delay, you may wish to put them on hold listening to Chairman of the Board's "Give me just a little more time". In the alternative, if you think the client is at risk of transferring altogether, you may have no choice but to put on David Souls' "Don't give up on us baby" before taking the call. It just depends on your target audience.

Sorry, must go, Barclays have just picked up.

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