



PROPERTY NOTEPAD

JANUARY 2010

1 DISCHARGE OF MORTGAGES: 'END' TO END

With effect from 3 January 2010 lenders will no longer be able to discharge registered charges using the Land Registry's electronic notification of discharge (END) system. However, the Land Registry advises that any ENDS transmitted before that date will be held on the system pending receipt of the paper applications.

This is part of the Land Registry's switch from the Land Registry Direct service to the newer Land Registry portal, which is intended to provide a single point of entry to all electronic services. Using the new portal system, lenders will be able to discharge mortgages using an 'e-DS1' (electronic notice of discharge of a registered charge).

The new e-DS1 will be a single application for a discharge, not requiring the conveyancer to submit a separate paper application in addition, unlike the current END system.

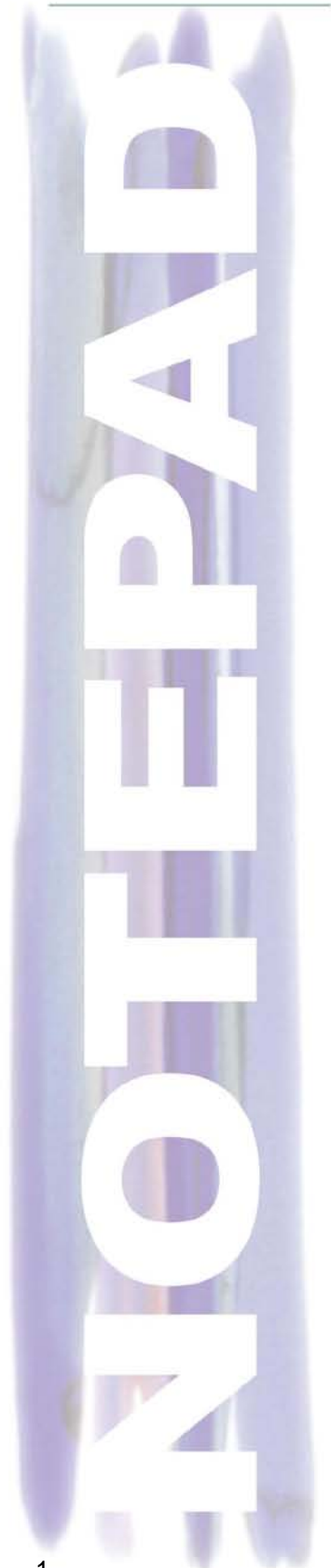
2. CONNECTION TO PUBLIC SEWERS

In the case of *Barratt Homes Ltd v Dwr Cymru Cyfyngedig* (Welsh Water) (2009) the Supreme Court upheld the Court of Appeal's decision that a sewerage undertaker cannot refuse permission for a developer to connect into a public sewer on the grounds that the developer's preferred and intended location is deemed unsatisfactory.

Under section 106(4) of the Water Industry Act 1991, a sewerage undertaker can only refuse permission if it appears that the **mode of construction or condition** of the private drain or sewer is not to a standard reasonably required by the undertaker, or is such that the proposed connection would be **prejudicial to** the sewerage system. (OFWAT had ruled some years previously that it was not reasonable to refuse a connection solely on the grounds of lack of capacity in a public sewer, and additional flow into the public sewer could only justify refusal in very specific circumstances, e.g. if a high pressure flow could damage the public sewer.)

The Supreme Court said that the provisions of the Water Act were also to be considered in light of the general requirement to obtain planning permission, and so there was an assumption that permission for a development would generally be refused unless the sewerage undertaker's requirements could be met. However, in this instance the planning authority had, for reasons which were unclear, prematurely discharged (at Barratt Homes' request) the planning condition relating to drainage. Otherwise the dispute might have been avoided.

This case clarifies to some extent developers' statutory rights under the Water Act, but perhaps more importantly highlights the importance of close consultation at the pre-planning stage between developers, planning and water authorities as to proposed connection points, to reduce the risk of subsequent and costly delays and disputes.





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3. ZURICH CEASES OFFERING BUILDING GUARANTEES

Zurich Insurance plc has announced that, following an internal review, Zurich Building Guarantee has withdrawn from the new home warranty and building control markets. This took effect on 30 September 2009 but was not widely publicised at the time. It will honour its existing commitments but is not taking on any new business.

Zurich was one of the main providers in the market for new home warranty products, alongside other market leaders such as NHBC and Premier Guarantee. Zurich has blamed the decline in the UK house-building market and the economic downturn for its decision, with this area no longer representing a viable market for the company.

Residential property developers will no longer be able to obtain the Zurich Building Guarantee for new sites. Buyers of a new residential property (or a property which has been converted) where a Zurich guarantee is already on offer should be able to obtain a policy and certificates in the usual way as and when buildings are started and completed. One of Zurich's competitors, Premier Guarantee, has announced that it will waive its own registration fees for any developers moving across to them from Zurich Building Guarantee.

4. VIRTUAL ASSIGNMENT BY A CORPORATE TENANT

In *Clarence House Limited v National Westminster Bank Plc (2009)*, the Court of Appeal examined whether a tenant, Nat West, by entering into a 'virtual assignment' of its lease to New Liberty Property Holdings Ltd (Liberty), had breached the alienation covenant in its lease (i.e. prohibiting assignment or parting with or sharing possession of the premises). In this case Nat West had not obtained the permission of its landlord, Clarence House Limited, for its arrangement.

A 'virtual assignment' is where all economic benefits and burdens of a lease (including any management responsibilities the tenant has) are transferred to a third party, but without a formal assignment of the lease, and where the virtual assignee does not take up occupancy. It is often used by large corporate tenants for operational reasons. In this case Liberty collected the rents from an under tenant, William M. Mercer Ltd, as the agent for Nat West, and paid the head lease rents directly to the head landlord. Nat West was no longer, therefore, in occupation, collecting rent or paying rent.

Unsurprisingly, many head landlords are not comfortable with these sorts of arrangements, as they will not usually be consulted in advance. They can result in confusion and uncertainty as to the status and potential liability of both the named tenant and its virtual assignee, and a tenant's cash flow and solvency can of course be adversely affected if it no longer handles its own under lease rents. The Court of Appeal decided that Nat West had not legally assigned its leasehold interest, but more crucially that it had not actually *parted with possession* of the property. There was therefore no breach of its lease covenants. The legal concept of possession is key to this case.

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It differs from that of occupation, as it revolves instead around (a) the legal right to possess a property and exclude others from it, as opposed to merely occupying it from time to time, and (b) to collect rents and income from the property. As Liberty were given the right to collect the under lease rents, the Court recognised Liberty's status as an agent of Nat West, as opposed to that of a landlord, having a absolute right to retain those rents for its own use.

As a result of this decision, tenants involved in such arrangements will benefit from this clarification and it may encourage some to enter into similar arrangements if it makes operational sense to do so. Landlords are likely to remain uncomfortable with these, but may take some comfort from the clarification that their named tenant remains fully liable under the lease covenants. Landlords may also now consider adding more specific prohibitions to future leases, although they should first consider and discuss with their advisers the possible effect on marketability and rental value.

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