ROUND TABLE

ANOTHER **LEAP** FORWARD

With new legislation, and new digital ways of working to contend with, how should Scotland's conveyancers view the future? This was explored at a recent round table organised by the Journal and First Title

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Are Scottish property lawyers ready for the 2012 Land Registration Act, which comes into force on 8 December? That was the first question addressed at the Journal's property round table, sponsored by First Title.

Not panicking, but looking for reassurance over how to deal with the nuts and bolts, appeared to be the answer. And once people have done a few transactions under the new procedure, they will quickly get used to it.

"I think until someone on the due date gets an advance notice and sees it implemented, it will all be theoretical", observed Ross MacKay, convener of the Law Society of Scotland's Property Law Committee. "I suspect within a matter of months if not weeks it will become adopted practice and we will carry on as we have been."

"One advantage will be people will have plenty of practice", Professor Kenneth Reid of Edinburgh University pointed out. "It's one of those changes where there is no delay – it will happen on the morning of 8 December. And from then on, any registrations will all be the same, so I would guess after a short time we will be used to it."

Sheenagh Adams, Keeper of the Registers, pointed out that with Registers' new reports portal due to go live in late October, some aspects will happen before the designated date, with reports being commissioned for transactions post that date. She added: "I've seen the system for advance notices – it looks good, and companies dealing with solicitors will find it very easy to use."

How is the commercial sector viewing it? "Again it's the practical side of things that we're very much focusing on", Ann Stewart of Shepherd & Wedderburn reported. "There will be a little bit of transition, while we get used to things, but it's going to be fine. Advance notices are good things, so let's everybody embrace them. I find when I give workshops and talk to people about it, I get all the 'But what if' questions, and yes, we'll have to think about these from time to time, but in the vast majority of cases it's going to be a simple case of: we used to do that and now we do this."

With the new electronic forms, she pointed out, practitioners will be automatically guided to which questions they need to answer given their preceding responses. "That is going to simplify some of our procedures – a lot of users struggle with filling out the current application forms."

> "You have to be quite clear that it's a purely administrative change which has no effect on the underlying contract and property law, and that should be clear"

"Practitioners, certainly the ones I'm speaking to, are aware of the Act, but they're looking for idiots' guides", Glasgow solicitor Paul Carnan suggested. "Can the Society give them something? The Keeper's FAQs [see www.ros.gov.uk/2012act/faqs.html] are fantastic, but they want something headed up from the President, saying this is what you do. Are you going to provide that?"

"No", MacKay replied. "We've looked through all this, and we've fed into the Keeper's FAQs, so I think with very few exceptions what the Keeper has published is with our approval and input."

The main thing the Society is working on, he explained, is the missives clause dealing with advance notices – together with an all-Scotland Combined Standard Clauses, currently being agreed between the various local areas that have their own standard clauses, which it is hoped will be out by the end of this year.

"Not by 8 December?" queried Professor George Gretton. "Surely it needs to be in advance of that."

"It should be, and that's what we want to do," MacKay replied, "but it may be that for a short period we will have to provide a model clause for advance notices and say to practitioners, put in a simple one line clause saying that wherever there is a reference to the 1979 Act in the existing standard conditions it shall mean a reference to the 2012 Act and you will be expected to proceed under the requirements of the 2012 Act."

The clause will be based on the Property Standardisation Group offer to sell: see www.psglegal.co.uk/offer_to_sell.php, and Journal, September 2014, 36.

The question was put to the Property Law Committee whether earlier missives, perhaps containing an option agreement, with a potential post-8 December settlement date, might be at risk of a frustration argument if they contain obligations rendered obsolete by the 2012 Act – but the round table gave short shrift to any such notion.

"That would be the law becoming an ass", Professor Stewart Brymer retorted. "It should never be raised. It's a nonsense."

Ann Stewart agreed. "You have to be quite clear that it's a purely administrative change which has no effect on the underlying contract law and property law, and that should be clear and nobody should be doing any silliness of that sort."

Gretton asked whether there would still be insurance cover for "classic" letters of obligation. There would, MacKay confirmed. "It has been agreed that for at least the next year until November 2015, there is no change to the Master Policy. The only real exception we've identified where you would still need a letter of obligation in the classic sense would be for an unregistered lease [and standard securities for sasine titles, Stewart pointed out] – in a lease of less than 20 years you're not going to get a registered document and

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therefore you still want a clear search, so there may well be a provision for that. But we will let it bed in for a year and then revisit it and see whether we need any specific change."

He added that there would probably be no change needed to the CML Handbook, which has no specific reference to the 1979 Act.

Sep rep – is it history?

Lenders and how to live with them inevitably featured strongly in the discussion, along with whether "sep rep" – the separate representation of mortgage borrowers and lenders – remained an issue. (It has subsided as a topic, but has not gone away, was the consensus.)

"From a purist point of view I think we should have sep rep", Carnan stated, expressing himself surprised at last year's SGM decision to reject the rule. With acting for both purchaser and seller now being regarded as "anathema", he added: "I think maybe 10-15 years from now it will be seen that the lender's interest and the purchaser's interest cannot possibly be the same."

"They are diametrically opposed", Brymer agreed. "I think the debate we had over sep rep became very emotional and was fuelled by fear, but a number of sole practitioners have contacted me and said "I wish sep rep had gone the way that the Society recommended", or "I voted against change, but I wish I hadn't."

Richard Street of Aberdein Considine took a different line, having opposed the change. "We do act in sep rep cases for three lenders at the moment, and it's actually becoming more difficult. Lenders are taking longer to issue instructions because they are not staffed properly, but also other practitioners are busier, so your correspondence with the purchaser's solicitor becomes elongated: they take longer to respond. And that from my personal perspective is always going to be the practical problem with sep rep, in that as soon as you involve another lawyer, the process gets that bit longer."

"I think that was always the issue identified during the debate, the practical one of who was going to deal with this", MacKay commented. "I had a strong representation made to me from a large firm which acts for lenders, saying they didn't want the work, frankly, because it doesn't pay: it's more hassle and aggravation than you realise."

"That's partly because the system doesn't work", Brymer countered. "They are not engaged on a standard certificate of title, standard disclosure, so we're trying to make a system that is out of sync, operate. It never was going to be able to operate properly."

What are the prospects for change? The CML did after all promise discussions on changes to its handbook if sep rep was defeated. It appears that the Society has got the lenders to look at the subject of standardised documents, but it "hasn't really gone anywhere very fast", MacKay admitted – partly due to the CML bureaucracy involved, and the cost to lenders any time their systems or documents have to change.

> "Because there are pockets of old-fashioned practices, we can't operate a smooth streamlined process from start to finish. There are bits that just don't join up"

Non-disclosure by solicitors in relation to the Handbook's anti-fraud requirements is not going to change, but is certainly costing the profession at present – the Master Policy premium "would come down by about a third, if you could have stripped out all the Handbook claims of the last four or five years", MacKay informed us. Is there an end in sight? Perhaps a diminution at least, due to the recovery in the property market and the passage of time since most of the problem transactions.

While disclaiming an interest in sep rep itself, the Keeper raised another lender-related issue – the failure to record discharges quickly enough. "We've speeded up our processes, and a very high proportion of our work is turned round now within two days, so what's happening is we're issuing land certificates that have the security for the previous owner on it. That happened to me earlier this year when we bought a flat in Edinburgh, and that's not good, the purchasing solicitor having to try and explain that to the client. And then that's obviously work for us because they have to update that certificate."

MacKay indeed confirmed that some practitioners are now complaining that the Keeper is too quick to return deeds – especially if you have a lender that will not sign the discharge prior to redemption. But it appears also that some firms have a practice of sitting on discharges if it would be more economical to register them on some future event, something all those present disapproved of.

The potential of Lender Exchange

Lenders also came in for some stick over their refusal for the most part to communicate digitally – RBS Group was named as an honourable exception. As Stewart put it, "Here we are as lawyers, about to get digital signatures and our electronic practising certificates and we're enabled in terms of electronic conveyancing and all the rest of it, and yet because there are pockets of old-fashioned practices, we can't operate a smooth streamlined process from start to finish. Instead it's a bit like driving over Edinburgh cobbles in an old jalopy – very bumpy – because there are bits that just don't join up."

But when MacKay and Carnan raised the issue in a meeting earlier this year, they had the response: "You'd be dealing with some junior member of staff in the processing team – they won't be able to answer your emails. We have to control the correspondence coming in to us so that we can deal with it properly."

"That really is not very efficient in the 21st century", MacKay observed, contrasting the fully digital Norwegian system he recently saw demonstrated.

"The interesting thing there," Brymer added, "is that it is the banks that have driven it, and when we looked more into it we

WHAT ROLE FOR TITLE INSURANCE?

Client protection, public protection. Is it possible to devise a failsafe system? The question was asked against the background of the review being carried out for the Society by Sheriff Principal Bowen, following the publicity given to the cases of Sinclair Brebner in Aberdeen, and the residents of Happy Valley Road in West Lothian, who appear to have no remedy having been left with a bad title.

Can title insurance provide an answer? Generally, yes, according to Ian Borders of First Title. He instanced a case where a developer had concerns about a site and took out cover, and about three years after the houses were sold on, trustees appeared and claimed the land.

"It's a no fault policy, title insurance", he explained. "Once we checked that the client was covered, the net result was that we dealt with the claim fairly quickly and there was a significant payment to the true owner in order to transfer such title as they had to our insured under the policy."

"Is it common for housebuilders to take out policies?" Brymer asked.

"Absolutely, that would be bread and butter work for us", Borders replied.

"Yes, I think that's why the developers come to us at the outset," his colleague Liana Di Ciacca (pictured right) added, "because if they're building a residential development of 200 houses, they are worried that they are going to have a large number of solicitors looking at these titles, so although the developer is comfortable with the title, they think things will go through quicker if there are no queries on title."

Checks such as the Keeper's development plan approval process can help reduce the risk factor, and insurers will also take into account the due diligence carried out – it may simply be that a specific issue has been identified with the title, and insurers will then take "a pragmatic approach", Borders confirmed in response to a question from George Gretton.

"Or it could be that they are buying a particular piece of land from an administrator, where there is no warrandice being given; they possibly have specific defects cover but in addition it's like a wrapper round the title that effectively their client, our insured, is going to have a good marketable title to the piece of land. It's a one off premium that effectively then covers that insured during their entire period of ownership. And for a specific defect that's identified by the lawyer, that's covered off in perpetuity, so it covers all successors in title, mortgagees, lessees, all for a single premium."

Liana Di Ciacca, Senior Underwriter, First Title

Sometimes no amount of due diligence would uncover certain defects, and not just in cases of fraud. Indeed it seems that solicitors and/or their clients often take a commercial view as to whether title enquiries are worth the effort, as Brymer learned to his surprise.

"Where I've seen this form of indemnity title insurance being used most in the last 12 months has been in commercial property transactions," he observed, "and I really had to pinch myself when I saw how much title insurance was being done – I come from the old school, unfortunately, or fortunately, of there's a job to be done, examine the title and go through it. There is a phenomenal amount of bulk commercial property work being done, title insured."

"The point that has to be taken into account is whether to spend weeks and weeks trying to get to the bottom of an issue, or will we just identify that there's an issue and consider getting insurance to cover it," Stewart noted, "and I think we are finding more and more that in the range of options that you give a client, title indemnity insurance is one you've got to mention.

She added, and Reid and Gretton accepted, that provisions in the Title Conditions Act, especially s 53 which has now been referred to the Scottish Law Commission, create great uncertainty, which will not be resolved in the short term.

While the existing consumer protections of the Master Policy and Guarantee Fund should be enough, there are still cracks through which the occasional unfortunate individual may fall. And going forward, under the 2012 Act there will be more cases than previously where the rights of the party in possession of property will be to compensation from the Keeper, rather than protection of their title – adding to the onus on solicitors for purchasers to do a proper examination of title, or consider title insurance as a viable alternative.

saw that the banks also own the real estate brokers. It's the banks that have the power and it's the banks that said we want the system to be smart."

Does the recently formed Lender Exchange offer any potential for improving matters? Maybe, Brymer suggested, if it becomes a portal for communication. Lenders, it appears, are just waking up to the Society's smartcard and the potential it offers, and Brymer was keen that the Society should have as much practitioner input as possible to inform its further discussions with Lender Exchange.

That might help resolve issues such as that reported by Street, who has to go through 18 application processes (providing the same information each time) if he wants each of Aberdein Considine's branches to be on the Lender Exchange panel. "It's just a nightmare, but it's a necessary evil if you want to do the work", he complained.

MacKay admitted that the Society still has a concern over the level of detail some of the lenders are asking for, especially where it can itself provide the essential information.

Brymer reported that some practitioners still think that Lender Exchange is just another way for lenders to cull their panels. However for Carnan, who joined in order to get on to the panels of the two lenders (Lloyds Banking Group and Santander) that account for 80-85% of lending, "The fear is they've got all your details and if I'm found wanting in any respect, suddenly I'll be off all the panels, not just one. But that's the way of the world."

Future positive

Taking a broader view of the future for conveyancing, our group struck a positive tone.

"Knock the lenders into line and I think all will be fine!" Street responded. "No, in all honesty I think the changes happening at the end of this year with the Land Register will bed in fairly quickly. I think if the property market continues to improve or at least stay at the same level as now, there will be a bigger investment by law firms in residential conveyancing again, and hopefully an improvement in the quality of conveyancing. Also the things we have discussed at the Society's Future of Conveyancing Working Group are all positive: the standardised missives, the online dealing room, and if the Lender Exchange actually does move forward in terms of interaction with lenders rather than just being individual loan instructions with everybody taking their own view."

Brymer agreed that the working party, which MacKay chairs, deserved a mention. "For all the years that I've worked in and around the committee structure of the Society, I have not been involved with a group of people that has been so committed to see change", he affirmed. "One of the interesting things we're looking at is whether we have a badge to do with quality of conveyancing, or should we have minimum standards – that's all out for debate at the moment.

Where we've got to is that we've come up with a Property Charter, certain minimum standards while taking into account that we don't want to set the bar too high from the point of view of negligence."

He added: "I'm with Richard: with all the changes that are going on at the moment I think we should see an exciting future for conveyancing, but that requires conveyancers to come out from the shadows and say I'm actually proud of what I do."

Carnan agreed: "It's to harness all these changes and it's the smartcard and saying: 'I am a Scottish conveyancer, and not just a facilitator, a project manager. I am a trusted adviser; come to me because I can give you all these protections.'

"We have that digital signature, and that is the opportunity that we have got to harness", Brymer emphasised. "Because all the other things are outwith our control."

MacKay returned to the point that "As we said from day one, there is no God-given right for lawyers to be involved in the house purchase and sale process. There are jurisdictions like Norway where they are not involved at all. So you start with that fact and what you try to do is effectively persuade the body public that actually it is a good thing to have a lawyer involved in that process. Now even with the 2012 Act a lot of our system is traditional. But you have to keep reminding yourself, why am I being permitted to do this job, and so what we are doing is standards, IT issues, standardisation, to make what we do that bit better, and build ourselves into the process for the foreseeable future. But as I say it is a political issue, and we shouldn't lose sight of that."

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To what extent should the Society be involved? The consensus was that initiatives like the Property Charter, as with standard missives, are better built from the ground up, working initially with the Edinburgh and Glasgow Conveyancers Forums. "The hope would be that as with the Combined Standard Clauses, if we can get something approved here it can go over to Glasgow, up to Aberdeen and before you know it everyone is doing the same thing", as MacKay put it.

Referring to Denmark, where the Society of Property Lawyers, a voluntary body, has succeeded in establishing itself as the voice of the consumer (admittedly it set up a complaints procedure where there was none before, with the assistance of the Danish Consumer Council), Brymer asked: "Is it fanciful to think that you could create an organisation that is membership based, and do it very quickly rather than trying to start it from scratch? I think the conveyancing forums have been a great success and the profession trust what comes from them. That's why we're doing the standard clauses, the charter, because it's come from a solid base."