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To the Law Commission

Response to the Law Commission's Consultation Paper on Chancel repair liability and registration

This is a response to the Law Commission's Consultation Paper on Chancel repair liability and registration Chancel repair liability and registration – Law Commission, provided on behalf of the City of London Law Society ("CLLS") Land Law Committee.

About the City of London Law Society

The CLLS represents over 22,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to a variety of consultations on issues of importance to its members through its 22 specialist committees. This response to the Consultation has been prepared by the CLLS Land Law Committee. The current members of the Land Law Committee are listed at https://clls.org/committees/land.html.

Response

The CLLS Land Law Committee ("Committee") is delighted to respond to the Law Commission's consultation on Chancel repair liability and registration Chancel repair liability and registration – Law Commission. The Committee congratulates the Law Commission on the quality of the consultation document and its considered proposals to seek to resolve an issue that continues to result in many purchasers undertaking chancel repair searches or paying for insurance, adding to the costs of conveyancing transactions.

The Committee sets out below some thoughts on the proposals in the consultation and would be very happy to discuss its thinking with the Law Commission.

It is a good idea that the Law Commission is seeking to address the continuing concern about chancel repair liability (CRL). Even though it ceased to be an interest with overriding status back in 2013, many conveyancers continue to carry out chancel repair searches which sometimes produce equivocal results leading to insurance being taken out (or insurance is taken out without a prior search). There has been a debate for many years about whether it is justifiable to take out this insurance almost as a standard process on certain types of transactions when pay-outs are rare. The consultation paper doesn't highlight the pay-out record on CRL insurance policies.

Paragraph 8.3 of the consultation paper refers to a 2017 survey from the Conveyancing Association with 129 responses which suggested that conveyancers undertake a CRL search in relation to roughly 25% of purchases of land and that CRL insurance is taken out without a prior search ("non-search insurance") in roughly 30% of cases (full results in Appendix 2 of the paper). Stakeholders in the insurance industry have told the Law Commission that the five largest insurers who provide CRL insurance issue in the region of 150,000 policies each year with total premiums of about £2,250,000 a year (and this does not take into account polices offered by smaller providers). The Law Commission acknowledge that this data is quite old and seek more up-to-date information. It would be useful to know whether most of the CRL insurance policies are obtained on standard residential transactions (which we suspect to be the case) rather than commercial transactions.

In a way the risks and legal complexity highlighted by the consultation paper may make it more likely that insurance may be taken out. As the paper acknowledges, it has been generally assumed (until now) that CRL is registrable (by entry of a notice) under the Land Registration Act 2002 ("the LRA 2002") and that a purchaser of registered land is not bound by an unregistered CRL and it was thought that parochial church councils needed to protect their rights to CRL by 13 October 2013 or lose them on a sale of registered land. And HM Land Registry's Practice Guide 66, on former overriding interests, states that if a notice relating to CRL (and other manorial rights) was not recorded against registered land, "a person who acquires the registered estate for valuable consideration by way of a registrable disposition after 12 October 2013 [would] take free from that interest". In paragraph 6.39, the Law Commission note that their legal analysis of the nature of CRL in this consultation paper is new; they are not aware of any other published analysis that suggests CRL is not an interest in land.

The consultation paper mentions the *Chivers* case, a decision of the High Court from 1955: Chivers & Sons Ltd v Air Ministry. According to Chivers, a person becomes a lay rector (and therefore subject to CRL) simply by acquiring a parcel of land that belonged to a lay rectory. Chivers may have been wrongly decided, but the common understanding of the current law is that CRL transfers automatically with the ownership of particular areas of land.

The Law Commission proposes to clarify that a purchaser of registered land will only be bound by a CRL if it is noted against the title to the land. The Committee questions whether such a change to land registration legislation would prevent the purchaser from having the CRL liability. The consultation paper states that the general law has been modified by the law governing land registration and that the LRA 2002 is the principal statute that governs registered land in England and Wales. But as the consultation admits, it is arguable that CRL is not registrable under or affected by the LRA 2002, so why would a change to the LRA make a difference to whether the purchaser is liable? That was why the Law Society a number of years ago was interested in the proposals in effect to abolish CRL (separate to any specific land registration implications). In paragraph 6.1 of the consultation paper the Law Commission state that they are not considering whether CRL should be reformed or abolished.

The Law Commission note in paragraph 6.30 the uncertainty about the nature of CRL and whether it constitutes an interest in land, but state that regardless of whether CRL in technical legal terms currently constitutes an interest in land, they think that it would be possible to amend the LRA 2002 so that it is clear that a purchaser of registered land is not bound by CRL unless it is recorded in the register at the time of the purchase. The Committee notes the Commission's position, but for the reason mentioned in the previous paragraph, the Committee would like some further assurance from the Commission as to why this would be effective when the LRA 2002 approach was not.

The concern is touched on in Interpretation 1 on page 178 of the consultation paper. The Law Commission state that a person who acquires land that belongs to a rectory does not become subject to CRL unless they acquire the rectory. A person does not acquire a rectory automatically when they acquire rectorial land, although what would be involved in a transfer of a rectory today is not entirely clear. This Law Commission statement is helpful and it would seem that the risk here is remote since most purchasers will not intentionally be buying a rectory. That may provide enough assurance to rely on the Law Commission's proposed solution and for conveyancers to focus on whether CRL is noted against the title, rather than other CRL due diligence or solutions.

A possible consequence of the Law Commission's proposal is that more applications will be made to note CRL against registered titles and these may be spotted late on when obtaining Land Registry priority searches which can create problems in completing the transactions. Perhaps this is an unavoidable consequence of the proposal. It can also be said that beneficiaries would have registered in 2013 if they were going to do it.

As mentioned, the Committee would be very interested in discussing this further with the Law Commission.

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Land Law Committee

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