

EXAMPLE CLAUSES TO COVER THE REGISTRATION GAP ISSUE

Introduction and Summary

The issues arising from the "Registration Gap" are becoming more of a problem as long Land Registry delays continue. Set out below are examples of two alternative approaches to deal with the problem in a sale and purchase contract relating to registered land. Both examples are reasonably balanced. Example One covers the position where the Seller is prepared to appoint the Buyer as its agent and Example Two is a shorter simpler clause which covers the position where the Seller is not prepared to appoint the Buyer as its agent, but instead agrees to act in co-operation with the Buyer.

The problem of Example Two for the Buyer is that it carries risk in terms of potential delays and problems with future management matters, since in various circumstances the Buyer is relying on the Seller to respond promptly to its request.

The examples and drafting notes are intended to be thought-provoking, rather than necessarily a reflection of market practice among all law firms. It is acknowledged that there are wider agency provisions, but the breadth of such provisions may be unacceptable to a seller.

The examples are likely to require amendment for the particular circumstances of the transaction and the contract in which they are used including defined terms. Consider carefully how the drafting in the examples interacts with the other provisions of the contract and any Standard Conditions incorporated in the contract. Example One specifically carves out tenancy renewals and interim rent proceedings, rent review and arrears (for which most contracts will already have specific drafting), but includes cross-references to the relevant provisions in the contract.

Please consider the drafting notes in this document when using the examples. The notes specifically refer to provisions in Example One, but some of the notes may also be relevant for Example Two.

This document was put together by a working group including representatives from the Law Society's Conveyancing and Land Law Committee, the City of London Law Society's Land Law Committee, the Property Litigation Association, the Property Bar Association, law firms and barristers.

December 2024

Example One: The Seller appoints the Buyer to act as the Seller's agent

1. SELLER TO ASSIST BUYER UNTIL BUYER REGISTERED

Application of this clause

1.1 This clause 1 applies from the date of actual completion until the Buyer is registered at the Land Registry as the registered proprietor of the Property. This clause 1 is without prejudice to the basis on which, as a matter of law, the Seller holds the legal title to the Property for the Buyer, pending the Buyer's registration at the Land Registry as the registered proprietor of the Property.

1.2 This clause 1 applies to all matters relating to any Tenancy¹, [the Lease²] or the Property except for:

1.2.1 tenancy renewal or interim rent proceedings for a Tenancy that are dealt with in clause [tenancy renewals³];

1.2.2 any rent review under a Tenancy which is outstanding at the date of completion that is dealt with in clause [pending rent reviews⁴]; [and]

1.2.3 arrears for a Tenancy that are dealt with in clause [arrears⁵] [.][]; and

1.2.4 ⁶] any other matters which the parties agree to exclude.

Notices

1.3 [Subject to clause 1.4, t][T]he Seller irrevocably⁷ appoints the Buyer as its agent to sign in the Seller's name and to serve or provide:

1.3.1 any break notice to be served by the landlord under a Tenancy and, where relevant, any notice under section 25 or section 26(6) of the Landlord and Tenant Act 1954 (LTA); and

1.3.2 any other notice whether to be served under or in relation to a Tenancy [or the Lease] or otherwise in connection with the Property, or any consent or certificate required by a restriction on a registered title where the Seller (as the registered proprietor of the

¹ "Tenancy" here refers to occupational tenancies.

² "Lease" refers to where the title includes a leasehold title.

³ Refer to appropriate clause in sale contract dealing with tenancy renewals and interim rent proceedings for occupational tenancies.

⁴ Refer to appropriate clause in sale contract dealing with outstanding rent reviews in occupational tenancies.

⁵ Refer to appropriate clause in sale contract dealing with arrears for occupational tenancies.

⁶ If the contract includes bespoke drafting relating to a specific management or other issue, check that the provisions of this clause do not conflict with the bespoke drafting which may include provisions governing the conduct of the particular issue during the registration gap. Where this is the case, this clause should be disapplied in relation to the issue by referring to the issue in the list of 'exclusions' in clause 1.2.4.

⁷ The appointment, even though expressed to be irrevocable, is vulnerable if the seller dies, becomes insolvent or is wound up. The only definitive way to be able to rely on the agency arrangement is for the seller to grant to the buyer a security power of attorney under section 4 of the Powers of Attorney Act 1971 which will protect the appointment of the buyer from the effect of the seller's death, incapacity, insolvency, winding up or dissolution. If the seller so agrees, it is likely to require that such a power is only used where the seller incurs no liability. Such a power is not included in the drafting since it is not commonly encountered on transactions because it is usually commercially unacceptable. If a power is used and included in the contract, the contract needs to be a deed.

Property) is the beneficiary of the restriction, and which the Buyer cannot as a matter of law sign and serve or provide until the Buyer is the registered proprietor of the Property.

1.4 [The appointment of the Buyer in clause 1.3 does not extend to any break notice or any notice under section 25 of the LTA under or in relation to a Tenancy which has an outstanding rent review at the date of completion of this contract, unless the review has been agreed or determined before service of the notice⁸.]

1.5 The Buyer shall promptly provide the Seller with a copy of any notice served pursuant to clause 1.3.

Surrenders

1.6 Subject to:

1.6.1 the Buyer's Solicitors providing an undertaking to pay the reasonable and proper costs of the Seller's Solicitors;

1.6.2 the Seller's only obligation in the deed of surrender being to accept the surrender; [and]

1.6.3 the provision of engrossments of the deed of surrender to the Seller's Solicitors⁹ [and

1.6.4 clause 1.7],

the Seller shall execute the engrossments of the deed of surrender and return the same to the Buyer's Solicitors within [10 Business Days] of having received the engrossments from the Buyer's Solicitors, released to the Buyer's Solicitors for completion¹⁰.

1.7 [The obligation on the Seller in clause 1.6 does not extend to execution of a deed of surrender:

1.7.1 where a Tenancy has an outstanding rent review at the date of completion of this contract, unless the review has been agreed or determined before completion of the deed of surrender¹¹; or

1.7.2 where completion of the deed of surrender would waive or otherwise release the Seller's entitlement to Arrears under a Tenancy, unless the Buyer pays the Seller an amount equal to such arrears before completion of the deed of surrender.]

1.8 The Seller shall not be liable to take any step in respect of the surrender of any Tenancy other than the steps in clause 1.6.¹²

Seller's Proceedings relating to a Tenancy [or the Lease] or involving a third party

1.9 In clause 1.10 "**Seller's Proceedings**" means any proceedings (including expert determination and proceedings for injunctive relief):

1.9.1 commenced between the date of this contract and the date of actual completion; and

⁸ Consider whether this clause is appropriate in the context of the potential rental uplift on review.

⁹ If the seller will require engrossments in a particular format (for example, electronic copies to execute via electronic signature), expressly provide for this here.

¹⁰ Acting for a buyer, if there are any other items – such as (where the seller is an overseas entity) an opinion letter – which the tenant may require as part of any transaction, ensure that an obligation for these to be provided is included.

¹¹ Consider whether this clause is appropriate in the context of the potential rental uplift on review.

¹² See drafting note (3) on surrenders for the use of powers of attorney.

- 1.9.2 commenced by or against the Seller; and
- 1.9.3 relating to any Tenancy [or the Lease] or involving a third party relating to the Property, which have not been finally disposed of on or before the date of actual completion.

1.10 In relation to any Seller's Proceedings the Seller shall:

- 1.10.1 keep the Buyer updated as to the progress of the Seller's Proceedings and promptly provide the Buyer with copies of all documentation, statements of case, court orders, witness statements, expert reports, other details of claim and relevant correspondence relating to the Seller's Proceedings;
- 1.10.2 subject to clause 1.10.3, in conducting the Seller's Proceedings have regard to any proper representations made in writing by the Buyer to the Seller; and
- 1.10.3 if the Buyer is entitled in law to bring or defend the Seller's Proceedings and so requests in writing within one month of the date of actual completion, apply to the court, arbitrator, expert or other determining body as appropriate to substitute the Buyer as a party to the Seller's Proceedings in place of the Seller¹³. If such a request is not received within one month of the date of actual completion then:
 - (a) the obligation on the Seller in clause 1.10.2 will cease to apply and the Seller may conduct the Seller's Proceedings in any manner it chooses; and
 - (b) where the Seller's Proceedings were commenced by the Seller, the Seller will be permitted (but not obliged) to terminate the Seller's Proceedings at any time.¹⁴

General

1.11 After actual completion the Seller:

- 1.11.1 shall notify the Buyer as soon as reasonably practicable of any notice served on the Seller or any proceedings commenced by any party against the Seller in relation to any Tenancy, [the Lease] or the Property and provide the Buyer with a copy of the notice or the proceedings; and
- 1.11.2 (except as otherwise provided in this contract) shall not serve, commence or respond to any notice or proceedings in relation to any Tenancy, [the Lease] or the Property without the Buyer's written consent, such consent not to be unreasonably withheld or delayed, but may serve, commence or respond to such notice or proceedings without the Buyer's consent, where such service, commencement or response is required in order for the Seller to comply with a mandatory time limit and the Buyer has failed to respond in a timely manner to the Seller's request for the Buyer's consent.

Other notices and proceedings

1.12 Except as otherwise provided in this contract, where after actual completion there is a requirement to serve, commence or respond to any notice or proceedings in relation to any Tenancy, [the Lease]

¹³ It is possible that the seller may need to remain as a party to the seller's proceedings so that both the buyer and seller are parties and, if so, the drafting should be amended accordingly.

¹⁴ The implementation of this clause will need careful consideration as (i) for the clause to be effective there must be a cause of action transferred with the property which the buyer can benefit from and (ii) any statute out of which a claim arises will need careful review as in some statutory proceedings only the legal owner (i.e the registered proprietor) can bring or defend proceedings.

or the Property in the name of the registered proprietor of the Property to comply with a mandatory time limit, the Buyer may serve, commence or respond to such notice or proceedings in the Seller's name, subject to obtaining the Seller's written consent, such consent not to be unreasonably withheld or delayed. Such consent is not required where the Seller has failed to respond in a timely manner to the Buyer's request for the Seller's consent.

Indemnity

1.13 The Buyer shall indemnify the Seller against any liability, expenses, claims, costs (including, without limitation, those of any solicitor or professional adviser on a full indemnity basis), damages and losses suffered or incurred by the Seller arising out of or in connection with:

1.13.1 the appointment of the Buyer as agent of the Seller;

1.13.2 the Seller complying with the provisions of and undertaking any action required or permitted by this clause 1; or

1.13.3 any act of or omission or breach by the Buyer under or arising from this clause 1.

[Notice of winding up

1.14 The Seller shall notify the Buyer as soon as it is aware that it will be wound up or otherwise suffer an insolvency event, or be struck off the register of companies.]

2. PROTECTION FOR SELLER DURING REGISTRATION GAP

The Buyer shall indemnify the Seller against any liability, expenses, claims, costs, damages and losses, which directly or indirectly attach or are attributed to the Seller, or are otherwise reasonably and properly incurred by the Seller, as registered proprietor of the Property notwithstanding completion of the transfer to the Buyer, from actual completion until the Buyer is registered at the Land Registry as the registered proprietor of the Property.

Example Two

1. The Seller's co-operation with the Buyer during the Registration Gap¹⁵

- 1.1 The Buyer shall register the Transfer¹⁶ at the Land Registry as soon as reasonably practicable after actual completion. Promptly following the Land Registry notifying the Buyer of completion of the registration the Buyer shall provide to the Seller an official copy of the entries on the register showing the Buyer as the registered proprietor of the Property.
- 1.2 From the date of actual completion until the Buyer is registered at the Land Registry as the registered proprietor of the Property, the Seller:
- 1.2.1 shall, except as otherwise provided in this contract, not exercise any rights under any Tenancy¹⁷[or the Lease¹⁸] or take any action in relation to such Tenancy [or Lease] (including, but not limited to, the service of notices and the commencement of proceedings) without the Buyer's prior written consent; and
- 1.2.2 shall, as soon as reasonably practicable, notify the Buyer of any notices served on the Seller or proceedings commenced against the Seller relating to any Tenancy [or the Lease] or otherwise relating to the Property or any part or parts of it; and
- 1.2.3 shall at the Buyer's request and cost promptly sign such notices or counter-notices, applications or responses (whether statutory or otherwise) or such other documents as the Buyer may reasonably require in connection with the Property or any Tenancy [or the Lease] and which the Buyer cannot itself sign by reason of the fact that the Buyer is not at the relevant time the registered proprietor of the Property at the Land Registry; and
- 1.2.4 shall at the Buyer's request and cost promptly take any such other action as the Buyer may reasonably require in respect of the Property or any Tenancy [or the Lease] and which action the Buyer cannot itself take by reason of the fact that the Buyer is not at the relevant time the registered proprietor of the Property at the Land Registry [; and
- 1.2.5 shall notify the Buyer as soon as it is aware that it will be wound up or otherwise suffer an insolvency event, or be struck off the register of companies],
- Provided always that subject to the Seller providing the Buyer with an estimate of its costs referred to in complying with this clause 1.2, the Seller may require the Buyer to pay the Seller's estimated costs in complying with this clause 1.2 in advance (or procure an undertaking for the same from solicitors appointed by the Buyer at the relevant time).
- 1.3 The Buyer shall indemnify the Seller against any liability, expenses, costs, damages and losses arising in respect of any action, proceedings or claim which arises directly or indirectly as a result of any act or default of the Buyer in relation to any application for consent or by reason of the Seller's compliance with any requirement or direction of the Buyer under clause 1.2.

¹⁵ This example clause is drafted in general terms referring to notices which the Buyer cannot sign and actions the Buyer cannot take by reason of the fact that they are not yet registered as proprietor of the Property at the Land Registry. This clause may be used where the Seller is not prepared to appoint the Buyer as its agent, but instead agrees to act in co-operation with the Buyer. The problem of this example for the Buyer is that it carries risk in terms of potential delays and problems with future management matters, since in various circumstances the Buyer is relying on the Seller to respond promptly to its request.

¹⁶ Check whether this definition is used elsewhere in the contract, for the transfer of the Property to the Buyer.

¹⁷ "Tenancy" here refers to occupational tenancies.

¹⁸ "Lease" refers to where the title includes a leasehold title.

- 1.4 This clause 1 is without prejudice to the basis on which, as a matter of law, the Seller holds the legal title to the Property for the Buyer, pending the Buyer's registration at the Land Registry as the registered proprietor of the Property.
- 1.5 The Buyer shall indemnify the Seller against any liability, expenses, claims, costs, damages and losses, which directly or indirectly attach or are attributed to the Seller, or are otherwise reasonably and properly incurred by the Seller, as registered proprietor of the Property notwithstanding completion of the Transfer, from actual completion until the Buyer is registered at the Land Registry as the registered proprietor of the Property.

Drafting notes

These notes specifically apply to Example One, but some of the notes will be relevant for Example Two.

Clause 1: Seller to assist buyer until buyer registered: A buyer may need to take action in connection with a property and the tenancies it is subject to during the period between completion of the transfer and its registration at the Land Registry (ie. during the ‘registration gap’).

However, because the buyer does not become the legal owner until registration of the transfer (albeit legal title is back-dated to the date of the application for registration – see section 74 of the Land Registration Act 2002) it cannot undertake all of these actions itself. There are some actions which it needs the seller (the legal owner) to do. Until the buyer is the legal owner, it cannot:

- serve a break notice;
- serve a notice pursuant to the Landlord and Tenant Act 1954 (LTA) (this includes a section 25 notice and a section 26(6) counter-notice);
- accept a surrender; or
- issue or conduct certain proceedings.

As the length of time taken by the Land Registry to process applications continues to increase, buyer clients will be concerned to ensure that sale contracts permit them to request – and obtain – appropriate assistance from their seller.

A seller’s general concerns with doing anything post-completion are management time and hassle, costs and (potential) liability, and whilst it may not want to give the buyer a general right to undertake anything as agent for the seller, or to call on the seller to do anything the buyer might request, a seller ought generally to be prepared to offer (at first draft) the buyer the ability to undertake, or to request that the seller undertake, some of the specific things mentioned above (where these arise). The importance of the clause to a buyer will depend on:

- the number of tenancies a property is subject to (is it a shopping centre with a hundred occupational leases or a single let office block?);
- the extent of the common parts (is there roof space, car park and other shared external communal facilities, or simply the envelope of an office block?);
- the likelihood of any ‘actions’ in connection with those tenancies being required during the registration gap (are there any upcoming break rights, has any tenant indicated a wish to surrender, does the buyer wish to negotiate any such surrender?);
- the position of the Land Registry application to be made following completion (will the transfer be a transfer of whole or part, and are there pending applications at the Land Registry for, inter alia, registrations of occupational leases?); and
- is the seller a large institutional client with a substantial management team or is it a single asset owner that is disposing of it to leave the UK real estate market?

Clause 1 is intended to be a starting point for a multi-let property so may require amendment depending on the nature of the specific transaction.

(1) Clauses 1.1 and 1.2: Clauses 1.1 and 1.2 set out that clause 1 applies:

- until the buyer becomes registered proprietor at the Land Registry; **and**

- to all matters under any lease (where the title to the property includes a lease), the occupational tenancies and the Property in general (and note that this extends to matters involving third parties, rather than just the landlord/tenant relationship) except for:
 - (1) tenancy renewal and interim rent proceedings for occupational tenancies;
 - (2) rent reviews outstanding at completion under occupational tenancies; and
 - (3) arrears for occupational tenancies.

As the seller (as well as the buyer) has an interest in the ‘outcome’ of those issues, the seller taking steps in the registration gap in relation to them is usually dealt with under separate clauses specifically dealing with those issues.

Clause 1.1 also makes it clear that clause 1 is without prejudice to the basis on which, as a matter of law, the seller holds the legal title to the property for the buyer, pending the buyer’s registration at the Land Registry as the registered proprietor of the property.

Clauses 1.3 to 1.12 contain the provisions requiring seller’s assistance.

(2) Clauses 1.3, 1.4 and 1.5: Notices: Clause 1.3 provides for the seller irrevocably to appoint the buyer as its agent to sign the relevant notices etc in the seller’s name. The appointment, even though expressed to be irrevocable, is vulnerable if the seller dies, becomes insolvent or is wound up. The only definitive way to be able to rely on the agency arrangement is for the seller to grant to the buyer a security power of attorney under section 4 of the Powers of Attorney Act 1971 which will protect the appointment of the buyer from the effect of the seller’s death, incapacity, insolvency, winding up or dissolution. However, such a power is not included in the drafting, since it is not commonly encountered on transactions because it is usually commercially unacceptable. See further notes on powers of attorney in section (3) on surrenders.

The buyer may need to serve a variety of notices relating to the occupational tenancies, or the headlease where applicable, during the registration gap. These notices fall into two categories: (1) those that may only be served by the legal owner of the property (ie. during the registration gap, by the seller), and (2) those which do not have to be served by the legal owner – the buyer will be able to serve these notices in its own name immediately following completion of the transfer (ie. before it is registered as proprietor at the Land Registry).

The buyer’s concern will be the former, and it will require an ‘assistance’ provision from the seller in relation to any notice which has to be served by the legal owner. There are two such types of notice:

- **landlord’s break notices and section 25 notices and other notices:** *Brown & Root Technology Ltd v Sun Alliance and London Assurance Co Ltd [2001] Ch 733 (CA)*, *Stodday Land Ltd v Pye [2016] EWHC 2454 (Ch)* and *Sackville UK Property Select II (GP) No.1 Limited v Robertson Taylor Insurance Brokers Limited [2018] EWHC 122 (Ch)* confirm that a break notice must be served by the owner of the legal estate. Accordingly in clause 1.3.1 the seller appoints the buyer as its agent to serve any break notice under any occupational tenancy in the name of the seller. This agency arrangement covers the buyer signing and serving the notice. The buyer is required to provide the seller with a copy of any notice served.

Clause 1.3.1 also refers to service of a section 25 notice under the LTA, which may also be required where there is a contractual landlord’s break notice or even where there is no such break notice; and to a section 26(6) notice under the Act. Notices under Part II of the LTA must be served by the legal owner of the property. A contracting out warning notice must be done by the party who will be the landlord.

The appointment does not extend to the service of a break notice or a section 25 notice where there is an outstanding rent review, unless the review has been agreed or determined before service of the notice.

Other notices are dealt with in clause 1.3.2, relating not only to the occupational tenancies, but also the headlease and other property related matters.

By way of guidance where a buyer does raise any concern about a specific type of notice, the analysis relating to each type of notice (and why clause 1 does not specifically refer to it) is set out below:

- **section 146 notice:** the requirement for a landlord (in certain circumstances) to serve a notice as a pre-cursor to exercising a right of re-entry under a lease is prescribed by section 146 of the Law of Property Act 1925 (LPA). The LPA provides for the notice to be served by a “lessor”. This term is defined to include “*an original or derivative under-lessor, and the persons deriving title under a lessor; also a person making such grant as aforesaid and the persons deriving title under him*”. Arguably a buyer does not derive title “*under*” the seller, but through it; as regards the registration gap this is not however the point at issue. There would be no dispute as to the buyer’s right, once it has become registered proprietor at the Land Registry, to serve a section 146 notice: this is because section 141(1) of the LPA provides that “*the benefit of every covenant or provision [in a lease] shall go with the reversionary interest in the land, or in any part thereof, immediately expectant on the term granted by the lease*” and section 141(2) goes on to provide that “*any...rent, covenant or provision shall be capable of being recovered, received, enforced...by the person from time to time entitled*” (and sections 3 and 4 of the Landlord and Tenant (Covenants) Act 1995 (L&T(C)A) provide for the transmission of the benefit of covenants (including the right of re-entry) under ‘new’ leases). The pertinent issue during the registration gap is whether a “lessor” (for the purposes of section 146) is restricted to the legal owner of the property.

The definition in the LPA does not contain such an express restriction and case law (*Scribes West Ltd v Resla Anstalt [2004] EWCA Civ 1744*) has held that section 141 is *not* limited to a party with a legal interest (section (9) below contains further information on the judgment). Under section 141 an assignee of a reversion whose title has not yet been registered is entitled to forfeit for arrears: such a party by extension should be able to serve a section 146 notice under an ‘old’ lease. Under the L&T(C)A an “assignment” includes an equitable assignment; the right of re-entry under a new lease passes to an unregistered buyer (section 4 L&T(C)A), and by extension such an unregistered buyer should be able to serve a section 146 notice under a ‘new’ lease.

Extending the analysis further, other provisions of the LPA do specifically refer to the owner of a “legal estate” or an “equitable interest” or to an “estate owner”; these terms are not however employed in section 146. A buyer should therefore be able to serve a section 146 notice in its own name during the registration gap. This is not beyond doubt however and the safer course of action may be to make use of the registration gap provisions.¹⁹

The above drafting and drafting notes must be read subject to the proper construction of the terms of the lease itself.

Clause 1.3.2 also covers the buyer signing in the seller’s name and providing any consent or certificate required by a restriction on a registered title where the seller (as the registered proprietor of the property) is

¹⁹ Certain notices such as section 17 notice, pre-emption notice and a notice to redesignate the area over which an easement is enjoyed, are not specifically referred to in the drafting, since it is considered that the Buyer should not need the Seller’s assistance in relation to those matters.

the beneficiary of the restriction, and which the buyer cannot as a matter of law sign and provide until it is the registered proprietor of the Property.

(3) Clauses 1.6 to 1.8: Surrenders and powers of attorney: the surrender of a lease must be made by the person currently entitled to the residue of the term of the lease, to the person currently entitled to the immediate reversion, between whom there is privity of estate. That is, the surrender must be made to the legal owner of the property. As such, a buyer cannot accept a surrender during the registration gap; in practice both the buyer and the seller should accept the surrender.

Clause 1.6 requires the seller to sign a deed of surrender, but only where the seller's sole obligation under the deed is to accept the surrender. In optional clause 1.7, the seller is not obliged to execute the deed of surrender:

- where an occupational tenancy has an outstanding rent review at the date of completion of the contract, unless the review has been agreed or determined before completion of the deed of surrender; or
- where completion of the deed of surrender would waive or otherwise release the seller's entitlement to arrears under an occupational tenancy, unless the buyer pays the seller an amount equal to those arrears.

To complete a surrender, the buyer is reliant on the seller completing an action – ie. executing the document. Some buyers may not be willing to accept this position – particularly if a specific surrender is being contemplated at the time of exchange - and an alternative (and more buyer-friendly option) is for the seller to agree that the buyer may sign the deed of surrender on behalf of the seller. In order to do this, the seller would need to grant the buyer a power of attorney (which could include a “security power of attorney” for which see below), authorising the signing of the deed of surrender (a simple agency arrangement allowing the buyer to sign in the name of the seller would be insufficient). Where an agent is being given the power to execute a deed on behalf of a principal, the power must itself be executed as a deed (*Powell v London & Provincial Bank (1893) 2 Ch 555*). As such, any power of attorney could not be contained within the sale contract itself (unless the contract is signed as a deed but recognising that the parties may not wish to send the contract to the Land Registry), but would need to be annexed to the contract as an agreed form power of attorney, to be provided by the seller on completion.

If a power is to be granted, careful consideration should be given to the form of the power. Will it authorise the buyer to sign a deed of surrender in *any* form? If there are provisions which a seller would not wish to see in the deed (and, as above, the principal concern would be a release of a tenant which ‘cuts across’ any other right of the seller), this must be provided for in the terms of the power.

Surrenders are not the only documents where a power of attorney might be requested. In particular, for development situations, there may be a requirement to enter into a number of documents that do not or may not fall within owner's powers under sections 23 and 24 of the Land Registration Act 2002, such as planning agreements, deeds of release or deeds of covenant. There may be benefits for both the buyer and the seller in that situation for there to be a power of attorney, including reduced inconvenience for the seller from not itself having to execute the documents.

From the buyer's perspective, a security power of attorney under section 4 of the Powers of Attorney Act 1971 granted by the seller to the buyer has the benefit of protecting the buyer from the effect of the seller's death, incapacity, insolvency, winding up or dissolution.

However, a power of attorney (whether by way of security or otherwise) is not included in the drafting, since it is not commonly encountered on transactions because it is usually commercially unacceptable.

Accordingly, the drafting employed in clause 1 is essentially limited to the seller's obligation to execute a deed of surrender; it does not oblige the seller to execute any agreement to surrender. This is on the basis that a buyer (alone) can execute an agreement to surrender and agree within it a contractual obligation to procure that the seller executes the deed of surrender. However, the surrendering tenant may require the seller to be a party to the agreement and a buyer may, in case that were to happen, want the ability to require the seller to sign the document. Therefore, if necessary, the clause can be widened to include an obligation to sign an agreement, subject to the same caveats as apply to the deed of surrender. If the lease is protected by sections 24-28 of the LTA, the buyer may also want to make it clear in the drafting that it can serve the relevant warning notice for the agreement to surrender in the seller's name as the seller's agent.

(4) Clauses 1.9 and 1.10: Proceedings under the Tenancies [or the Lease] or involving third parties relating to the Property: there are a myriad of potential "proceedings" to be considered in a "seller to assist" clause. Proceedings could exist prior to exchange of the contract, could be brought in the period between exchange and completion and could be brought in the period between actual completion and registration of the transfer. Proceedings could involve an occupational tenant, or the head landlord (if any), or a third party relating to the Property, and proceedings could be brought *by* or *against* the owner of the property.

The scope of clause 1.9 is narrow – it deals with the conduct (during the registration gap) of proceedings commenced during the period between exchange and actual completion *by* the seller against a tenant, a landlord or a third party relating to the Property; or *against* the seller by a tenant, a landlord or a third party relating to the Property, where those proceedings have not been finally disposed of on or before actual completion.

The narrow scope is deliberate: an analysis of the various possible types of proceedings (which is set out below) confirms that the combination of clause 1.9 and other clauses in the contract should provide the buyer with sufficient protection in relation to proceedings.

(Each section below applies to both proceedings involving a *tenant*, or the head landlord (if any) (ie. the landlord/tenant relationship) or a *third party* relating to the Property.)

Proceedings issued before exchange

Proceedings issued by or against the seller before exchange of the contract: these proceedings will be revealed by replies to the Commercial Property Standard Enquiries (CPSEs). A specific bespoke clause covering the parties' rights and obligations as to the conduct of such proceedings (including during the registration gap) would usually be included in the contract. As such, clause 1.10 does not contain any express provision in relation to these proceedings.

Proceedings issued between exchange and completion

Proceedings issued by the seller between exchange and completion: if the seller requires to commence proceedings against an occupational tenant between exchange and completion, then 'standard' drafting would provide that the seller would need the buyer's consent to commence the proceedings. If more seller-friendly drafting is agreed such that the seller does not need to obtain the buyer's consent to commence the proceedings, then the existence of the proceedings would be revealed by any updated replies to CPSEs provided prior to completion.

Most buyer clients will require a 'say' in any proceedings which are still ongoing at the date of actual completion and clause 1.10 requires the seller to keep the buyer updated as to progress and to conduct the proceedings having regard to any proper written representations made by the buyer.

The buyer is given one month from actual completion in which to decide whether it wishes to be party to the proceedings in place of the seller - if the buyer makes such a request in writing and is entitled in law to bring the seller's proceedings, the seller will substitute the buyer as a party to the proceedings in place of the seller; if such a request is not received within one month of actual completion, the seller is then able to conduct the proceedings free from the obligation to take into account the buyer's representations and the seller can (but is not obliged to) terminate the proceedings. A seller is likely to wish to retain this right to terminate where a buyer does not wish to be substituted into the proceedings.

Proceedings issued against the seller between exchange and completion: 'standard' drafting in a sale contract will often provide that the seller is required to manage the property in accordance with the principles of good estate management: this would extend to the seller's defence of any proceedings relating to the occupational tenancies or the head lease (if any), commenced against it during the period between exchange and completion, but arguably would not extend to any proceedings issued by a third party (eg. an adjoining owner) against the seller.

Whether a buyer should have a 'say', during the registration gap, in any proceedings issued *against* the seller between exchange and completion is perhaps slightly more tricky than in relation to proceedings issued *by* the seller during the same period. The former involves alleged wrongdoing by the seller during its period of ownership and a seller may not wish to be obliged to take account of any representations made by the buyer when defending itself. Many buyers will however feel that, as the new owner of the property, they have a commercial interest in the conduct of proceedings which involve (as a counterparty) an entity in relation to which the buyer is now landlord, tenant, or adjoining owner.

The compromise employed by clause 1.10 is that the seller is required to keep the buyer informed of progress and to conduct the proceedings, having regard to any proper written representations made by the buyer. If the buyer so requests in writing within one month of actual completion and is entitled in law to defend the seller's proceedings (albeit this may be unlikely), the seller will apply to the court etc to substitute the buyer as a party to the proceedings in place of the seller; if such a request is not received, then the seller is able to conduct the proceedings free from the obligation to take into account the buyer's representations.

Proceedings issued after completion (in clause 1.11)

- **Proceedings issued by the buyer or the seller after actual completion:** the main proceedings which will be of concern to a buyer during this period will be those under the LTA: this is because until it becomes the registered proprietor (and legal owner), the buyer cannot commence such proceedings in its own name. Such proceedings are, however, not dealt with under clause 1.11, because they are usually dealt with under the separate tenancy renewal provision in the contract.

If a buyer wishes to commence proceedings against a tenant for any other matter under an occupational tenancy (eg. enforcement of a user covenant or an action for breach of an alienation covenant), or proceedings against a third party (eg. adjoining owners or squatters), where there is no requirement for the buyer to be the legal owner, it may commence such proceedings during the registration gap without assistance from the seller. As such, there are no provisions requiring the

seller to commence proceedings on behalf of the buyer, to be joined as a party to any such proceedings or to provide any assistance to the buyer with any such proceedings.

In clause 1.11 the seller agrees not to serve, commence or respond to any notice or proceedings (and this would apply in relation to the occupational tenancies, or the headlease (if any), as well as to third parties relating to the property) without the buyer's written consent (such consent not to be unreasonably withheld or delayed). Such consent is not required where there is a mandatory time limit and the buyer has failed to respond in a timely manner to the seller's request for consent.

Proceedings issued against the buyer or the seller after actual completion: the seller will not serve, commence or respond to any such proceedings in relation to any occupational tenancy, the headlease (if any) or the property without the buyer's written consent (such consent not to be unreasonably withheld or delayed). As above, such consent is not required where there is a mandatory time limit and the buyer has failed to respond in a timely manner to the seller's request for consent.

- Where proceedings are commenced post-completion by a tenant or a third party against the buyer, the seller will have no role in these (except perhaps as a witness, and that is not a registration gap issue) and accordingly the clause is silent as to this scenario.

(5) Clause 1.12: The buyer is entitled following actual completion to serve, commence or respond to any notice or proceedings in the seller's name to comply with a mandatory time limit, but this is subject to obtaining the seller's written consent (such consent not to be unreasonably withheld or delayed) and such consent is not required where the seller has failed to respond in a timely manner to the buyer's request for consent.

(6) Clause 1.13: The buyer indemnifies the seller against any losses etc arising from the agency arrangement, any action that the seller is required to take under the clause, or any act, omission or breach of the buyer under the clause.

(7) Clause 1.14: This optional clause requires the seller to notify the buyer as soon as it is aware that it will be wound up or otherwise suffer an insolvency event or be struck off the register of companies. The purpose of the clause is to give the buyer advance notice of the seller's situation, in order to provide an opportunity for the buyer to seek to expedite the registration application with the Land Registry.

(8) Clause 2: The buyer indemnifies the seller against any losses, expenses etc attributable to the seller, or otherwise reasonably and properly incurred by the seller, as registered proprietor of the property, from actual completion until the buyer is registered at the Land Registry. This provides some protection for the seller during the registration gap.

(9) Other management matters: Note that the clause does not cover the following management transactions and issues, for the reasons given below:

- **Granting a lease:** a buyer can grant a lease during the registration gap – the seller does not need to be a party to such a grant. This is pursuant to the provisions of the Land Registration Act 2002; section 23 sets out owner's powers in relation to a registered estate – these include the power to make a disposition of any kind permitted by general law (which includes granting a lease). Section 24 provides that a person is entitled to exercise owner's powers if they are entitled to be registered as the proprietor. When the buyer acquires legal title, this will 'feed' to the tenant.
- **Forfeiting a lease:** the clause does not oblige the seller to assist the buyer where the buyer wishes to forfeit a lease between completion and registration. This is based on the decision in the case of *Scribes West Ltd v Resla Anstalt [2004] EWCA Civ 1744* – which interpreted section 141(2) of the

LPA – and suggests that such assistance is not necessary. Section 141(2) provides that “*any...rent, covenant or provision shall be capable of being recovered, received, enforced...by the person from time to time entitled*”; this wording does not distinguish between a legal and an equitable owner, but in *Scribes West* it was held that the provision is not limited to a party with a legal interest. It was simply an enforceable right to the relevant income – as an equitable owner, the buyer has (during the registration gap) an enforceable right as against the seller and, following notice, against the relevant tenant.

In the case, the buyer had been assigned the equitable right to receive rent and it had given the tenant notice to pay the rent to the buyer – accordingly, the buyer could forfeit the lease in question before registration of the transfer. Provided that the buyer is entitled to receive the income from the property post-completion, it is therefore considered that the buyer would not need any assistance from the seller in order to forfeit a lease. As the seller can also forfeit for relevant arrears during the registration gap, standard contracts will often prohibit the seller from doing this without the buyer’s consent.

- **Exercising Commercial Rent Arrears Recovery:** CRAR can be exercised by the ‘landlord’ - the Tribunals Court and Enforcement Act 2007 defines this to mean the person entitled to the immediate reversion to the lease. There is no requirement in the Act for this to be the legal owner, although some commentary suggests that (as with the law of distress) only a legal owner can exercise the right. In any event, the clause does not apply to arrears covered separately under the contract.

(10) Double registration gap: The clause does not cover double registration gap situations, for example, where the buyer sells on the property before its own registration has been completed. The ultimate buyer may want to include provision for its seller to be obliged to enforce its own registration gap rights against its seller (the registered proprietor).