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Law Society of Ireland

eCONVEYANCING: BACK TO BASIC PRINCIPLES VISION OF AN ELECTRONIC SYSTEM OF CONVEYANCING ('eVISION')

LAW SOCIETY eCONVEYANCING TASK FORCE

INTRODUCTION

In 2002 the Law Reform Commission established a Working Group to look at introducing a system of electronic conveyancing (eConveyancing) in Ireland. The Group identified three main areas which required examination. These were: changes to the existing law, changes in the conveyancing process itself and changes required to State services associated with the process.

Progress in relation to the first area has been rapid. A joint project established by the Law Reform Commission with the Department of Justice, Equality and Law Reform produced a consultation paper entitled Reform and Modernisation of Land Law and Conveyancing Law (LRC CP 34-2004). This was published in tandem with a major conference held in U.C.D. in November 2004 as a result of which the Land and Conveyancing Law Reform Bill 2006 is due to be enacted shortly.

In relation to the conveyancing process, the Law Society formed the view that it should endorse the development of eConveyancing as a means for solicitors to do the business of land transfer quickly and efficiently. This view was encouraged by the rapid and successful rollout of electronic and online services such as the Property Registration Authority's landdirect.ie, the Revenue Online Service and proposals for eStamping, all of which have been embraced by solicitors.

The Law Society, as a leading stakeholder, was very pleased to be asked by the Law Reform Commission to devise a vision for eConveyancing. In 2005 the Society established a Task Force to deal with this important issue. As the scale of the project became apparent, the Society appointed a full-time Executive to carry out research and to work with the Task Force.

This document sets out a vision for eConveyancing, as conceived by the Task Force, and reflects three years of research and consultation. This involved looking at systems in Canada, New Zealand, Australia, Estonia, Netherlands, England and Wales and many other countries, both in Europe and further afield. This gave the Task Force the opportunity to find out what has worked, or will work best, and to apply this to the Irish context.

1. WHAT IS CONVEYANCING?

Conveyancing is the process of transferring title to land from one person to another, typically, where one person buys another's house. The process ensures that the purchaser gets proper title to their property and that the property will be unaffected by matters which can currently attach to title e.g. charges for tax, non-compliance with planning, financial interests of spouses, judgments or otherwise. The process that is currently in place has evolved over several hundred years.

2. WHAT IS eCONVEYANCING?

eConveyancing, or electronic conveyancing, can be described as a secure, paperless, electronic, end to end, pre-sale to post-completion, conveyancing process.

3. WHY eCONVEYANCING?

Is the existing process broken? It isn't, but it is creaking at the seams. The current process is not adapted to deal with modern society, increased volume and diversity of transactions and market expectations for speed and transparency. It is hampered by a complex, cumbersome legislative framework and thus inherent delay.

We have taken the view that the introduction of eConveyancing provides an ideal opportunity for a root and branch

review of the entire conveyancing process. In particular, the introduction of the following major changes will, we believe, smooth the path towards full eConveyancing.

4. WHAT IS OUR VISION?

■ BACK TO BASICS

In developing a system of electronic conveyancing the Task Force strongly recommends that the process revert back to simply transferring title. How is that different to what is happening now?

The conveyancing process has been used by the State as a tool for implementing social policy, for the collection of tax, for statutory enforcement and various other aims, for which the process was not designed. As a result, even the most basic residential conveyance now requires multiple enquiries that have little to do with ownership, transfer and security of title. All these enquiries add to the complexity of the conveyancing process and ultimately, to the cost to the consumer.

Thus, our primary recommendation is that the process be pared back to its basics. Each element of the process should be examined and only those elements in the current process which impact on the transfer of title should be retained. Much detailed legislative, procedural and administrative reform will be required to achieve this. In particular, we believe that for eConveyancing to work, the following innovations will be required:

■ TITLE BY REGISTRATION, NOT REGISTRATION OF TITLE

Title to all land in the State, and any interests in land, whether as owner, lender or otherwise, must be registered in the Land Registry. No interest should affect title unless it is registered. The title Register should be definitive, conclusive and all encompassing.

This means that all rights which currently affect land without registration must be removed. For example:

- Section 72 of the Registration of Title Act 1964 should be repealed,
- The right of the official assignee of a bankrupt to deal with land should only arise on registration of the bankruptcy on the folio,
- No judgments or other court order should affect land unless and until they are registered,
- The Sheriffs' power to seize leasehold land should be repealed,
- Consideration should be given as to whether the objectives of Section 3 of the Family Home Protection Act 1976 are needed in a modern context.

These are only a few examples of the changes required. There are many instances where the title of a person can be undermined or devalued by the establishment of rights by some other party. The onus must be on that other party to assert their rights by registration. In the absence of such assertion, and registration, the registered owner should be able to freely deal with their interest in their property without a purchaser having to undertake numerous searches and without the vendor having to execute a myriad of documentation.

■ eCONVEYANCING, NOT eREGISTRATION

Many other jurisdictions, which we examined, have made what we consider to be a fundamental mistake. They have "electronified" their existing paper systems. We believe that this is the wrong

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APPENDIX 1

DIAGRAM TERMINOLOGY

Vendor = eV

Purchaser = eP

Vendor's Solicitor = eVS

Purchaser's Solicitor = ePS

Vendor's Lender = eVL

Purchaser's Lender = ePL

Auctioneer = eA

The diagram at Appendix 3 represents a transaction where no new covenants, conditions or easements are being created. Therefore no deed is required to be executed by the parties.

The diagram at Appendix 5 represents a transaction where covenants, conditions or easements are being created. Therefore a deed is required setting out the new covenants, conditions or easements.

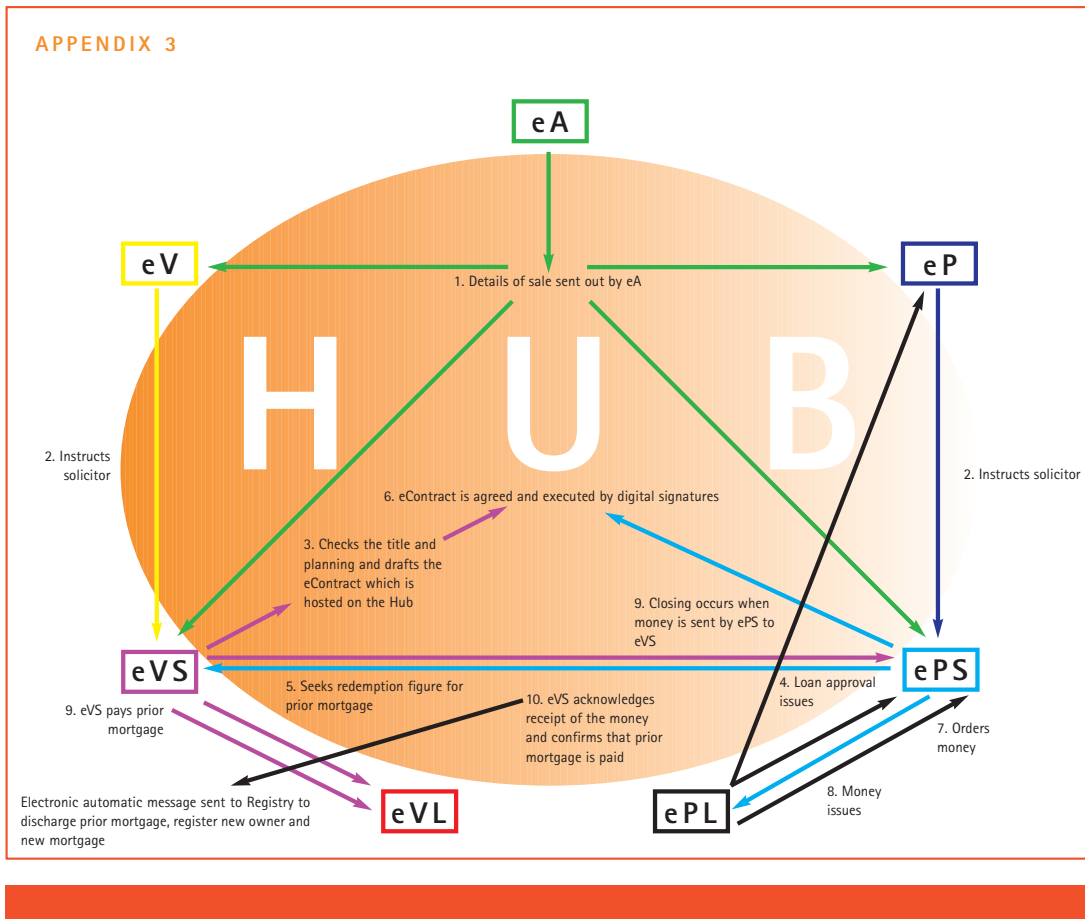
Both diagrams represent transactions where the purchaser's solicitor ensures that the mortgage is registered on behalf of the purchaser's lender. These diagrams require modification where the lender nominates a solicitor to act on its own behalf.

APPENDIX 2

SEQUENTIAL STEPS FOR DIAGRAM AT APPENDIX 3

Transactions where no new covenants, conditions or easements are being created i.e. one step system

- **Step 1**
eA electronically sends details of the sale agreed to eV, eP, eVS and ePS
- **Step 2**
eV and eP instruct their solicitors
- **Step 3**
eVS checks the title and planning through the Hub and drafts the eContract which is then hosted on the Hub
- **Step 4**
Loan approval issues electronically to eP and ePS
- **Step 5**
eVS applies electronically for redemption figure for prior mortgage
- **Step 6**
ePS and eVS agree terms of eContract and this is executed by digital signatures
- **Step 7**
ePS orders money from ePL



APPENDICES

■ **Step 8**
Money issues from ePL

■ **Step 9**
Closing occurs when the money is sent by ePS to eVS
eVS pays eVL the amount of the prior mortgage

■ **Step 10**
eVS acknowledges receipt of the money and confirms that the prior mortgage has been paid

This triggers an automatic electronic message to the Registrar to discharge the prior mortgage, register the new owner and the new mortgage.

APPENDIX 4

SEQUENTIAL STEPS FOR DIAGRAM AT APPENDIX 5

Transactions where new covenants, conditions or easements are being created i.e. two step system

■ **Step 1**
eA electronically sends details of the sale agreed to eV, eP, eVS and ePS

■ **Step 2**
eV and eP instruct their solicitors

■ **Step 3**
eVS checks the title and planning through the Hub and drafts the

eContract and eDeed which are then hosted on the Hub

■ **Step 4**
Loan approval issues electronically to eP and ePS

■ **Step 5**
eVS applies electronically for redemption figure for prior mortgage

■ **Step 6**
ePS and eVS agree terms of eContract and eDeed and then eContract is executed by digital signatures

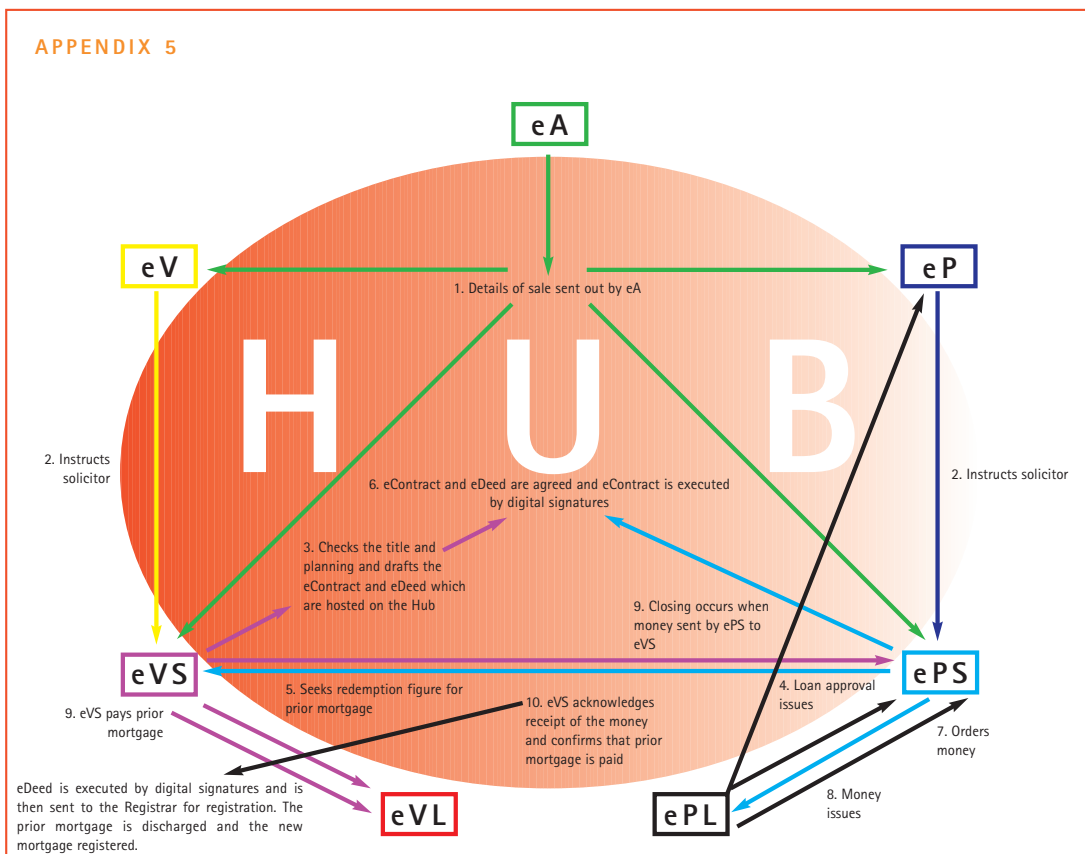
■ **Step 7**
ePS orders money from ePL

■ **Step 8**
Money issues from ePL

■ **Step 9**
Closing occurs when the money is sent by ePS to eVS
eVS pays eVL the amount of the prior mortgage

■ **Step 10**
eVS acknowledges receipt of the money and confirms that the prior mortgage has been paid

eDeed is executed by digital signatures and is then sent to the Registrar for registration. The prior mortgage is discharged and the new mortgage registered.



approach. The entire process should be re-engineered to suit the electronic and online environment, not the other way around.

■ FROM CAVEAT EMPTOR TO VENDOR DISCLOSURE

For several hundred years the law has been that the risk in buying property has been with the purchaser (*caveat emptor*). Therefore the various enquiries, searches and safeguards which evolved had to be put in place to protect the purchaser's position. After careful consideration of the options, and examination of practice in analogous commercial transactions and other jurisdictions, we have come to the view that *caveat emptor* is no longer appropriate to modern conditions. We recommend a move from *caveat emptor* to the vendor being required to make disclosure. The purchaser would however still be required to carry out his own survey of the property.

This will remove the current necessity for elaborate enquiries to be raised pre-contract with, essentially, the same enquiries being raised again after the contract has been signed. This will be achieved by the careful drafting of an eContract with comprehensive guarantees, covenants, warranties and certificates by the vendor.

■ PLANNING

A complete electronic, searchable Planning Register is required. It should include detailed information about all planning and environmental issues affecting a property, to include zoning, applications, permissions, enforcement notices, environmental data, C.P.O.'s, Preservation Orders, road widening proposals, energy rating etc.

A planning amnesty is required. Only the planning history of the property for the seven years prior to the transaction should need to be investigated.

At the completion of any development or exempted development the owner should be required to lodge an architect's certificate or opinion on compliance with planning and building regulations with the planning authority and a record of this should also form part of the electronic register. Thus the electronic Planning Register should confirm the planning and environmental status of the property.

All statutory registers should be conclusive, and the holder of any statutory register or database, should be liable for errors or omissions therein.

■ TAX

All taxes should be personal taxes, payable on a self-assessment basis. Revenue has extensive powers of enforcement and collection, and unpaid tax or a potential tax liability should not, as currently is the case, be a contingent charge on land. In practice, Revenue rarely use the powers they have to collect tax through property. Taxes should be charged on the transaction, and not on the deed or contract, and a system put in place, if required by Revenue, that facilitates the payment of tax as part of the transfer process. Hence, no enquiry in relation to taxes need be carried out and no clearance certificates required. At present, up to four separate tax clearances may be required.

■ LENDERS

The loan approval should issue and be signed electronically. This should contain all the terms and conditions of the mortgage and there should be no separate mortgage deed. Registration of the new loan should be virtually instantaneous with the release of the monies and thus there should be no requirement for a Certificate of Title to be furnished by the solicitor to the lender.

■ ELECTRONIC WORKSPACE OR HUB

All steps will be completed electronically and all stakeholders could communicate through an electronic workspace or Hub. It is recommended that this workspace or Hub prompt the parties at various points in the transaction so as to ensure that all deadlines

are met and the transaction progresses swiftly.

The workspace or Hub could provide a means for solicitors to access information electronically from the following:

- Lenders
- PRA
- Local authorities
- Companies Office
- Courts Service
- Law Searchers
- Probate Office
- Registrar of Births, Deaths and Marriages and other relevant stakeholders.

■ IDENTIFIERS

It is vital that all stakeholders agree common identifiers for the searching of data through the Hub e.g. postal address, name of owner, postal code, folio number.

■ MONEY

All monies should pass by electronic funds transfer, in real time, with same day value.

■ STEPS IN THE PROCESS

We see a typical transaction being processed in sequential steps as set out in Appendices 2 and 4 and represented by the diagrams at Appendices 3 and 5. The terminology used in the diagrams is explained in Appendix 1.

Where no new covenants, conditions or easements are being created by the transaction the process should involve a one step system. The eContract would be the only document executed. The eContract will specify the closing date i.e. when the money is to be transferred. Acknowledging receipt of the money should trigger an automatic electronic message from the Hub to the Registrar to discharge the prior mortgage, register the new owner and the new mortgage. This one step system is represented by the diagram at Appendix 3.

Where new covenants, conditions or easements are being created by the transaction the process should involve a two step system. The first step would be the execution of the eContract and the second step would involve the execution of the eDeed/eLease containing the new covenants, conditions or easements. This eDeed/eLease should be registered in the Land Registry. This two step system is represented by the diagram at Appendix 5.

■ ELECTRONIC SIGNATURE

It would be preferable for each client to have their own electronic signature so as to sign the eContract themselves but this will not be feasible for some time. In the interim the solicitor would have an electronic signature and sign on the client's behalf having been duly authorised by the client.

■ TIME FOR COMPLETION

In an eConveyancing environment the Task Force anticipates that, if the purchaser is in funds, the total transaction time for a residential conveyance, from initial viewing of the property to completion, registration of ownership and discharge of the prior mortgage, could be 5 working days.

5. WHAT NEXT?

The foregoing vision represents the distillation of three years of thought, consultation, discussion and research by the Law Society eConveyancing Task Force. We believe the vision, as presented in this document, provides a workable model for eConveyancing in Ireland.

This document is intended to provide a framework for discussion. It is our intention to stimulate other stakeholders to examine their procedures and involvement in the current conveyancing process and thus initiate the changes required to facilitate eConveyancing.