

Electronic discharges – A brave new world or a natural evolution?

Professor Stewart Brymer outlines what needs to be done to enable all discharges to be effected electronically in Scotland and considers the resultant changes in conveyancing practice.

Introduction

The purpose of a discharge of a standard security is two-fold: (1) to release the debtor from his/her continuing personal obligation to the creditor; and (2) to release the security subjects from the burden of the standard security as a real security thereon. The process for discharging a standard security is regulated by the Conveyancing and Feudal Reform (Scotland) Act 1970, s.17 and Form F of Schedule 4 to the Act. On the registration of the discharge in statutory form, the security subjects are discharged thereof. In 1970, it was only envisaged that this is done by way of formal deed.

Since 2007, it has been possible to register discharges electronically using the Automated Registration of Title to Land system (“ARTL”). To date, some 37,000 discharges have been completed using this process. ARTL was introduced using subordinate legislation in 2007.

As part of its Digital Transformation Programme, Registers of Scotland is keen to improve the registration process overall in order to help make the Land Register more transparent.

The Law Society of Scotland also feels that it would help acceptance of E-Registration and E-Conveyancing generally by the profession, if there was a demonstrable improvement in the current system at an early stage. It was therefore agreed that E-Discharges was a priority.

A prototype system is to be developed by Registers of Scotland in conjunction with CML Scotland and The Law Society of Scotland. It is envisaged that an interim solution will hopefully be put in place by Autumn 2016. This would be an operational system rather than merely a pilot, though Registers may well want to run a pilot as part of the development process. There may be some need for subordinate legislation to support the streamlined process that is envisaged.

Digital Transformation Strategies

Registers of Scotland recently launched its Digital Transformation Strategy for the period up to 2017. See www.ros.gov.uk/about-us/news/2015

This will see Registers take significant steps forward to enable it to fulfil its functions and requests made of it to complete the Land Register by 2024. This ambitious programme is set to be delivered by the end of 2017 – in time to mark the 400th anniversary of the creation of the world's first register of property deeds, the Register of Sasines. The Strategy has a number of threads all of which will impact on conveyancing practice which, as a result, should be rendered more efficient and cost-effective for all concerned.

Scotland is not alone in this approach. Other Land Registries are involved in similar transformation programmes. In Ireland, for example, the Law Society is forging ahead with its Conveyancing Project in conjunction with Teranet from Canada. Their aim is to establish an electronic process which will become the *de facto* conveyancing system for all purchasing solicitors. The new process has the support of lenders.

One of the key changes for practitioners in Ireland will be the move from *caveat emptor* to full vendor disclosure. Negotiation and resolution of any title issues will be done pre-contract and the e-conveyancing system will facilitate the production of the contract of sale which will be digitally signed and securely stored within the new system.

This interim solution would involve the authentication and submission of an electronic deed, but it is thought that the process need not be significantly more complex than a deed-free solution, and that the interim solution would be built to allow for authentication and submission of the discharge by the lender rather than the solicitor.

What does this mean for Conveyancing?

There are demonstrable benefits to lenders, borrowers and their solicitors by introducing E-Discharges. The key difference will be that the process will be undertaken by the lender using an automated process. As in Ireland, the borrower's solicitor will have limited involvement but will require to be one of those notified when the discharge has been completed.

This will greatly improve the settlement process which can often be delayed by reason of a delay in the discharge process. Under the new system, it will be a streamlined process. Obviously, safeguards will be required within lender offices so as to avoid discharges being wrongly processed. Such checks as will be required will be considerably less costly than the current cost in manual administrative systems.

Another consequence of an electronic discharge system operated by the lender should be reduced costs to the borrower both in the form of legal fees and registration fees. In England and Wales, as in Ireland as mentioned above, no registration fee is payable for the registration of electronic discharges.

Settlement will be by electronic funds transfer directly to a system-controlled escrow account from which funds will be transferred on completion. One of the payments will be a guaranteed payment of the redemption monies (on confirmation of the redemption sum from the lender) in order to allow for a discharge to be generated with regard to the loan secured in favour of the outgoing lender. This, in turn, will activate an e-discharge which will have been pre-approved by the lender when the discharge figure was agreed.

These developments in Ireland have been advanced in conjunction with the Irish Land Register who have introduced a fully-automated e-discharge process. See <https://www.eregistration.ie> Their system is designed to utilise an Advanced Digital Signature and cannot be used for partial discharges. The process is triggered and operated by the lender and the borrower's solicitor is advised automatically – the solicitor having previously completed an E-Discharge form and sent same to the lender. There are internal checking systems within the Registry which must be complied with before a discharge can be finalised. Under the Irish system, discharges are processed on a nil fee basis.

So what about Scotland?

As mentioned above, we have a dual system operating in Scotland. Discharges are currently processed for a fixed fee of £60, fees being fixed by Ministerial Order. It is not currently possible for discharges to be processed electronically other than through the ARTL system, and even then, a deed is required. Discharges processed through ARTL are charged a restricted fee of £50.

While accepting that the fixing of such fees is a matter for Ministers rather than the Keeper and that it depends on an assessment of fee income and registration costs generally, it is hoped that significant savings in registration fees can be achieved.

Conclusion

A new system for E-Discharges does not, of itself, represent the advent of a full-blown E-Conveyancing system. It is another significant step along the way however towards Scotland having a fully-automated digital registration and conveyancing system and it is to be welcomed.

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