

Guidelines 5 - Preserving Title Deeds

Preservation of Pre-Registration Title Deeds - A Guide for Professionals

Introduction

For some time now the whole of England and Wales has been an area of compulsory registration. Recently the categories of disposition that 'trigger' a requirement to apply for first registration have been increased. These factors, when coupled with the high cost of document storage and a resultant reluctance by lending institutions to receive documents not strictly necessary to prove title to mortgaged property, mean that solicitors and other conveyancing professionals often have to advise about the disposal of redundant title deeds.

The purpose of this leaflet is to highlight the historical value of such documents and to recommend how title deeds can be disposed of in a manner that reconciles the interests of historical research and the possible future needs of solicitors' clients.

Although there is no general legal definition of 'title deeds', the term is used here to refer to documents deliberately bundled together to provide evidence of title to land.

Who owns title deeds to freehold land?

Although not entirely clear, there is ancient authority that they are 'incident to' the possession of the land to which they relate and should pass with it, by conveyance or inheritance, without being expressly mentioned. The person entitled to land is generally entitled to the deeds relating to it.

The immediate freeholder of the land has, both at law and in equity, a *prima facie* title to possess the deeds and may maintain actions for their recovery. Legal ownership of inherited freehold land absolutely vested in one person and custody of its deeds is usually beyond question. However, the great variety of interests and estates which can be taken in land (for instance where settlements, mortgages, co-ownership and leasehold interests are involved with source documents in common) can give rise to different claims to entitlement and custody.

Who owns title deeds to leasehold land?

The law relating to leasehold deeds mirrors that relating to freehold land. The lease and all subsequent documents relating to the title belong to the person(s) in whom the legal estate in the lease is vested but they have no claim to any of the deeds relating to the freehold title. Lessor and lessee are equally entitled to the custody of an expired lease.

When does title to the deeds pass from seller to buyer?

It is clearly established that upon completion of a sale and conveyance of absolute title to unregistered land, the buyer is entitled to all the deeds.

What happens when not all of the land to which the deeds relate is sold?

The general rule is varied where the deeds are common to the titles of more than one owner and where land is subject to different, simultaneous and/or successive interests. A seller is entitled to retain deeds when he retains part of the land, or an interest in it, but he can be compelled to produce retained deeds and will usually enter into a covenant for their production.

Where else and how do covenants for production apply?

The law has developed rules to deal with custody and provision of attested copies of deeds where land is sold in lots with a common root of title. Where deeds are so retained, the buyer is entitled, at his own expense, to have attested copies and the seller will give a covenant or acknowledgement for production of the originals. Even if there is no express covenant, the authorities suggest that production of deeds may be enforced as an equitable right. The covenant for production binds the possessor of the deeds only as long as he possesses them but the benefit of the acknowledgement runs with the land. In pre-registration conveyancing a buyer would normally obtain an examined abstract of title at the seller's expense. It would not usually abstract deeds predating the legal root of title.

Obligations imposed by an acknowledgement (to allow inspection of earlier deeds and their comparison with an abstract, to prove or support the title of a person entitled to production, and to

deliver copied documents) would still hold even if that acknowledgement were included in a post-registration transfer whether or not it was legally necessary.

Can title to the deeds pass separately from title to the land?

Deeds can be separated from the land to which they relate. An owner may simply give them away. The mere gift of itself does not pass the estate and interest in the deeds or the affected land, even in equity. Similarly, it is presumed that a landowner can destroy or sell his deeds. 'Missing' deeds may therefore (quite apart from the complex issues surrounding covenants) have been separated from the land by gift (or sale) or even destroyed by a previous owner.

Do pre-registration title deeds have legal significance after registration?

Generally the pre-registration title deeds are redundant following land registration. The Land Certificate replaces them as proof of title. Moreover, registered titles carry a guarantee indemnifying any person suffering loss through an error appearing in the register. However, it may be difficult to identify an error or prove that one has been made without the original deeds as evidence. Nevertheless, most pre-registration deeds do not need to be retained for legal purposes after registration. From a common sense point of view much depends on the thoroughness and precision of the Land Registry in examining a title, and on whether in practice the register can and does convey as much information as perusal of the deeds would have done. It also depends on the thoroughness of the checks applied by the solicitor to whom the completed certificate is sent. The decision whether or not to destroy any document should involve careful consideration of its contents and the land to which it relates.

Do the pre-registration deeds have historical value?

Deeds with a continuing legal value will often be of enduring historical value. However, other deeds will have 'evidential' and 'informational' content worthy of long-term retention for historical research. 'Appraisal' (i.e. selection of such material) of historical value is a task for the archivist, not the lawyer. Ruoff and Roper on registered conveyancing envisages the deposit of pre-registration deeds in a Local Authority Record Office for safekeeping where they will always be available for consultation or withdrawal. In most cases those Offices will wish to appraise the material themselves, particularly the more recent deeds. There are existing guidelines for the conduct of this process.

Can the ownership of deeds be abandoned?

The possible abandonment of ownership might be questioned when deeds are stored long-term in a solicitors' office. It is a moot point whether title to chattels personal or property can be lost by mere abandonment. Recent authority has shown that very strong evidence ('a clear and unequivocal intention to abandon') will be required to show that abandonment has in fact occurred. Such strong evidence is normally only found in regard to articles of trivial value and it would probably be very difficult indeed to prove a client's abandonment of his deeds.

Such an argument presupposes that pre-registration deeds are treated as personalty or chattels but deeds are 'incident to' the land to which they relate. The classification of deeds as realty appears to be unaffected by registration. Deeds therefore must continue to run with or attach to the land and belong in principle *de jure* to the owner of the land.

Statutes of limitation prescribe periods within which proceedings must be taken to recover adversely possessed land or else the right of action will be barred. The computation of time depends on the circumstances of each case. When the limitation period expires, the dispossessed paper owner's right of action to recover the land is extinguished and their title to the land ceases to exist. This does not however create a title in, or transfer title to, the adverse possessor.

There is no case law which addresses the question whether the adverse possessor is entitled to demand the deeds to the land, on the basis that entitlement to the land confers entitlement to the deeds. It is for the adverse possessor to establish title to the land, with or without the deeds.

Can a solicitor dispose of title deeds?

The manner of disposing of redundant title deeds requires careful consideration by the solicitor or other conveyancing professional.

Title deeds are commonly held by solicitors on behalf of their clients. It would be clearly improper for solicitors to destroy or dispose permanently of deeds without the client's authority. Title deeds

and related drafts are made at the expense of the client and are within the category of documents that arise during the solicitor's retainer that belong to the client.

If a solicitor were to destroy or dispose of deeds without the client's consent he would risk both legal liability and loss of goodwill. Such action is also likely to be a breach of professional misconduct and would be investigated by the Office for the Supervision of Solicitors. In particular, the sale of deeds may give rise to civil liability under the tort of trover or conversion.

Notwithstanding this, some solicitors' firms, fortunately a small minority, have been reprimanded for selling clients' documents.

When the client's consent can be obtained, there is, of course, usually no difficulty about disposing of deeds. It is recommended that it is good practice to place redundant deeds with the appropriate Local Authority Record Office for safe keeping, as contemplated by Ruoff & Roper. This will not only preserve the historical potential of the documents for the cultural benefit of the wider community but also ensure that the solicitor or any future client or interested party can have access to them in the event that a query arises with regard to the registered title.

It may be that the ownership of the title documents is unclear or the solicitor does not know the owner's whereabouts. This is most likely to arise where the solicitor's retainer with that client ceased many years' ago. In such circumstances, it is again recommended that the solicitor, having made reasonable enquiries to identify or trace the client, places the deeds with the appropriate Record Office on permanent loan, rather than by outright gift. They can then be recovered if the owner of the deeds is subsequently traced or identified.

How can they be deposited?

Deposit of title deeds with a Local Authority Record Office can be easily arranged. The British Records Association has produced a [Guidelines leaflet](#) entitled *Deposit your title deeds - and help preserve our archival heritage*. As well as including general guidance, this includes a form of consent for completion by the client or the solicitor. If you need advice in identifying the record office to which the deeds should be sent, or have any other query, you can contact the British Records Association (details below). The National Archives, Historical Manuscripts Commission has published on its [ARCHON](#) (Archives On Line) website a complete list of local authority record offices and archive services and their addresses.

The deeds should then be sent or delivered to the relevant Record Office with the form of consent. It is recommended that the solicitor should obtain the reference/accession number allocated to the documents so that this can be placed with the Land or Charge Certificate.

Further information

For further information, see *The Guide to Professional Conduct of Solicitors*, The Law Society, 1999, Annex 12A: Guidance - ownership, storage and destruction of documents, especially paragraphs 11 and 12.

The text of this leaflet is a summary based on Kevin Ward's paper *Pre-registration Title Deeds. Part 1: the legal issues of ownership, custody and abandonment*, published in the Journal of the Society of Archivists volume 16 No.1 (Spring 1995) pp.27-39, which was a summarised version of the paper *Ownership, custody and abandonment of pre-registration title deeds: an analysis for the use of lawyers, archivists and others* by Kevin Ward (1995) available from Bedfordshire and Luton Archives and Records Service. Contact details:

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Copies of this Guideline may be obtained from the British Records Association, c/o Finsbury Library, 245 St John Street, London EC1V 4NB. it is issued free, but donations to help our work are greatly appreciated.