

IT'S THE LAW:

D Day – the abolition of the s172 Consent Regime

In the beginning

For those of us of a certain age, we grew up with the need to get s9 Consent from the Housing Corporation every time a Registered Social Landlord wanted to dispose of land. Those with grey hair may even remember s2 Consents. In 2008, came the 'new improved' s172 Consent Regime. That was supposed to simplify things. It limited the situations where an RSL was required to get the consent of the Homes and Communities Agency. We all then spent the next few years trying to work out what the 128 pages of 'simplifying' legislation, guidance and general consent actually meant.

D Day (Deregulation Day)

But, as the sun rises on the 6th April 2017, the s172 Consent Regime will be a thing of history. Registered Providers will no longer need HCA consent for land disposals. Instead, there will be obligations to give notice to the HCA/Homes England of certain disposals.

This edition of IT'S THE LAW looks at how the new system will work. It is principally aimed at Private Registered Providers that are exempt charities. PRPs who are not exempt charities should definitely read all the way to the end. This edition does not apply in Wales.

The Basic Law

The new changes have been introduced by the Housing & Planning Act 2016 which, amongst other things, amends the Housing & Regeneration Act 2008 (which is where s172 used to sit). So s172 is deleted (along with s173 through to s175). Instead, there is a new s176. That provides: -

- If a PRP disposes of a social dwelling it must notify the HCA.
- If a not for profit PRP disposes of any other land it must also notify the HCA.

BUT

- The HCA can issue directions to dispense with the notification requirement; and
- The HCA can issue directions about the details of the required notifications.

The Prime Directive

The HCA has now issued its first Directions under s176. Whilst technically they are not amendments to s176, that's what they feel like.



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The Directions do the following: -

They provide that the HCA dispenses with any requirement to be notified in respect of the disposal of land other than where that land is a social housing dwelling. Even where the disposal is of a social housing dwelling, the HCA will only require notification in a limited number of situations (what they call Relevant Disposals). The Directions then go on to give details as to the timing and content of those notifications. We'll get on to that later.

So the combined effect of the HPA2016 and the Directions issued by the HCA is that, from April 6th 2017 (i) no HCA consent is needed to dispose of any land and (ii) if a PRP disposes of a dwelling which is social housing and the disposal amounts to a Relevant Disposal, then the HCA needs to be told about it.

I like you, but you're not my type

The Relevant Disposals are set out in the HCA's Directions. They are applied slightly differently to Large PRPs (1,000 social housing units or more) than they are to Small PRPs (less than 1,000 social housing units). They only apply to disposals of dwellings which are social housing.

There are, in total, eight types of Relevant Disposal which the HCA has grouped into three categories: -

- Landlord Disposals;
- Finance Disposals; and
- Guarantee Disposals.

If a disposal falls into one or more of the eight types, then it needs to be notified. If it doesn't fall into any of them, then it doesn't need to be notified. So, next, we'll look at the eight types.

Landlord Disposals

There are five types of Landlord Disposal which we detail below. In all five cases, notification will normally only be required where the disposing PRP will, as a result of the disposal, cease to be the landlord of the occupier.

First: **out of sector:** A disposal to someone who is not a PRP (other than a sale to a current occupier). This applies whether or not the dwelling is occupied. It still applies if the acquiring entity is in the same group as the disposing PRP (unless the entity is itself a PRP). Notification here is required from both Large and Small PRPs.

Second: **within sector:** A disposal to another PRP is only notifiable under this type if the dwelling is occupied (i.e. disposals of occupied stock). The requirement to notify applies to Large and Small equally.

Third: **last social housing:** If, following the disposal, the PRP will no longer own any social housing dwellings then the HCA must be notified. This applies whether the unit is occupied or vacant and whether or not the acquiring entity is itself an RP. This is not unexpected. In this scenario, the HCA will likely be considering the PRP's registration status. This 'type' applies to both Large and Small PRPs.

Fourth: **to a 'for profit' PRP:** A disposal to a 'for profit' PRP is notifiable whether or not the dwelling is occupied and whether the disposing PRP is itself for profit or not for profit. The requirement to notify applies to Large and Small PRPs.

Fifth: **more than 5% stock:** If a Small PRP disposes of more than 5% of its stock of social housing dwellings then notification will be required. This type does not apply to Large PRPs.

Finance Disposals

There are just two types of Finance Disposal that count as Relevant Disposals and so need to be notified. One type applies to Smalls exclusively and the other applies to Large PRPs only.

Before we get to the two types, there are some definitions you'll need to know about.

Finance: This is widely defined, it covers lending of a variety of types. It includes interest rate hedging. It includes loan notes, loan stocks and bonds.

Standard Finance: This covers Finance where the PRP gives a first fixed legal charge and where the provider of the Finance is a bank, building society, other regulated lending institution, an entity that issues securities on a recognised stock exchange, a local authority or a PRP (or group member).

Non-Standard Finance: Is any other Finance.

Sixth: **Finance – Standard and Non-Standard:** Any disposal by a Small PRP in connection with Finance being raised by the PRP will require notification. This applies to disposals (the most likely being a mortgage) connected to loans. It applies to bond financing arrangements. It applies to sale and lease back arrangements. The

requirement to notify under this 'type' only applies to Small PRPs.

Seventh: **Finance – Non-Standard:** The requirement on Large PRPs to notify disposals connected with Finance is narrower.

It only applies to disposals in connection with Finance arrangements which are Non-Standard.

Guarantees and Indemnities

This is the last type of disposal that requires notification.

Eighth: **guarantees:** The requirement applies equally to Large and Small PRPs. It applies where a disposal is connected to the guarantee of an associated entity. And it applies to any disposal (e.g. a charge or a lease) linked to the guarantee of a debt or an obligation which is not related to a Finance arrangement. This 'type' specifically excludes disposals which relate to obligations that arise as a result of the receipt of a grant from the public sector.

Timing is everything

As a rule, most Relevant Disposals will need to be notified on a quarterly basis through NROSH+. In respect of each quarter, notification must be given within 3 weeks of the end of that quarter.

The quarters in question are: -

- 1 April – 30 June
- 1 July – 30 September
- 1 October – 31 December
- 1 January – 31 March

The exceptions to this rule are what the HCA describe as Priority Notifications. Such notifications will need to be made within 3 weeks of the disposal having occurred. Priority Notifications are limited to the following: -

- Disposals of occupied dwellings out of sector.
- Disposal of a PRP's last unit of social housing.
- Disposal by a Small PRP of 5% or more of its social housing stock.
- Disposals made by Small PRPs to raise private finance.

Freedom to do anything?

So PRPs now don't need to secure HCA consent for land disposals under s172. Does that mean they can do anything with their land? Not so fast.

The requirement to secure s172 consent on a disposal was only one aspect of the legal framework that PRPs

(especially not for profit PRPs) had to consider before disposing of land. It's only the s172 Consent Regime that's gone. The following are examples of issues that still need to be considered.

Regulatory Framework: PRPs will still be expected to act in a way which is consistent with the Regulatory Framework. PRPs are expected to act in a way which does not put social housing stock at risk – so the transfer of social housing dwellings from a large PRP with significant reserves to a less stable entity may cause concern.

PRPs are expected to achieve value for money. So the disposing PRP will need to be able to demonstrate how a disposal programme is achieving that. PRPs have obligations as to consultation with tenants and, in fact, those obligations are being beefed up. Those obligations will still need to be complied with.

Vires: the board of a PRP must still act only in accordance with its objects (i.e. its purpose). They will need, in respect of any disposal, to be able to demonstrate how that disposal facilitates the furtherance of those objects.

Grant: if the dwellings in question have been funded by grant, then by disposing of them a PRP may be triggering requirements as to repayment. And, in fact, PRPs may find that the grant agreement they have signed up to specifically requires the consent of the grant giver to a disposal. That grant giver may be the HCA itself. The change in regime does not affect those obligations.

Loan covenant compliance: most PRPs will have a degree of bank borrowing. That borrowing will have come with a number of strings set out by the bank (known as 'loan covenants'). Breach of those will usually enable the bank to recall the loan (and/or impose penalties). A significant disposal programme may well trigger a breach of such covenants – so it will be important to check the position carefully.

s171(2) HRA 2008: this states that a not for profit RP may only dispose of property which is subject to a secure tenancy to another not for profit RP. This section is not being abolished – so the rule still stands.

Not exempt?

Most PRPs are what are known as 'exempt charities'. But not all. A PRP that is constituted as a company (as opposed to a registered society) will not be an exempt charity. And that distinction is important.

The disposal of land by most charities is restricted by s117 of the Charities Act 2011. Broadly (very broadly)

speaking that means that, to dispose of most land, a charity needs to jump through various hoops imposed in s119 or s120 of the CA2011 or get a consent from the Charity Commission.

- S117 doesn't, however, apply to exempt charities. It still doesn't. So most PRPs will still not be impacted by it.
- But the HCA and the Charity Commission are of the view that the abolition of the s172 Consent Regime has the knock on effect that s117 will now bite on disposals by PRPs that are non exempt. This will be new to them.

What does that mean for non exempts?

Going forward, PRPs that are non exempt charities will need to comply with s119 or s120 or get a consent from the Charity Commission every time they wish to dispose of land.

S120 applies where the disposal is of a lease for a term of 7 years or less. It requires the charity trustees (usually the board members) to obtain and consider advice on the proposed disposal and to decide that they are satisfied that the disposal is on the best terms that can reasonably be obtained.

S119 applies to all other land disposals and is more onerous. It requires the charity trustees to obtain a written report from a qualified surveyor acting exclusively for the charity and to advertise the proposed disposal (unless the surveyor advises against it). The charity trustees must then decide that the terms of the disposal are the best that can reasonably be obtained. All of this must be done before a contract for disposal is entered into. And there are specific statutory regulations which set out what needs to be in the surveyor's report with a host of specific issues that they are required to address.

Luckily ss119 and 120 don't apply to the day to day lettings that a non exempt PRP will be undertaking. The legislation specifically says that these provisions don't apply where a lease is made at less than best consideration to a beneficiary of the charity where the letting is in accordance with the trusts of the charity and the demised premises are to be occupied for the purposes of the charity. Phew!

PRP non exempt charities will also still need to comply with the notification obligations.

The tiny print

This is one of a series of leaflets published by Devonshires' Real Estate & Projects Department aimed at our property owning clients. No action should be taken on the matters covered by this leaflet without taking specific legal advice.

Find out more

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