THE CASE AGAINST THE CONVEYANCING MONOPOLY

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A monopoly of conveyancing was granted to Britain's Solicitors in 1804. It is now enshrined in s22 of the Solicitors Act 1974, which states:

> any unqualified person who directly or indirectly
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> (a) draws or prepares any instrument of transfer or charge for the purposes of the Land Registration Act 1925 or makes any application or lodges any document for registration under that Act at the registry or
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> (b) draws or prepares any other instrument relating to real or personal estate, or any legal proceeding shall, unless he proves that the act was not done for or in expectation of any fee, gain or reward be guilty of an offence and liable on summary conviction to a fine not exceeding £50.

The British Government has recently taken a tiny bite out of the monopoly and allowed some licenced conveyancers to do the job. However, the conveyancing system remains as an example of how a monopoly can effectively force totally useless work on a public only too ready to fall into the comforting arms of 'professionals' when large sums of money are involved.

WHAT CONVEYANCING CONSISTS OF

The present conveyancing system purports to have two main aims: the first is to protect the purchaser against 'quasi legal defects'; the second is to establish the title of the vendor. And solicitors quite naturally claim that it fulfils those objectives. The truth of their claim appears to be borne out by the fact that relatively few things do go wrong with the conveyancing in most ordinary house purchases. In fact that is not due in the main to solicitors' work but to the fact that in domestic conveyancing there are relatively few things that can go wrong. Even if something does go awry the law is designed so that it will soon be corrected - so after twelve years a boundary put in the

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wrong place will be in the correct position (Limitation Act 1980). Assuming good will between neighbours (I appreciate that this does not always exist!) there will be no problem. Even if boundary disputes do arise, that is usually a good way of taking out aggression on neighbours without actually resorting to physical violence - so Barristers can take comfort that they do have a useful role in conveyancing matters!

When conveyancing a house, the Solicitor uses three basic methods to ensure there are no quasi legal defects and the vendor has good title - the local search, preliminary enquiries and requisitions on title. The local search is conducted by sending a local search questionaire to the local Council - and the purchaser may fondly imagine that this will warn him of the six lane motorway that is proposed and will go right through the centre of his house. It probably will not. First, the search only concerns the house that the purchaser is buying - not the house next door where a developer may have just applied to build a 12 storey block of flats for 'young singles'. Secondly, it only reveals such things as have been actually put on the register and not those which are still in 'committee stage'. It is therefore possible to arrive at your new clean house only to find a leaflet inviting you to join the residents action committee to prevent the proposed new motorway - and, especially if the solicitors office is many miles away, that can and does happen. It is far better to go to the local Council offices yourself and ask the questions of the right departments. Then you will be told if a major new road is planned but is not yet on the register. But the Solicitor is not equipped to do that - his role is sitting behind his desk dictating letters to secretaries.

ASKING THE VENDOR

The second method the Solicitor uses is the preliminary enquiries of the vendor. A moment's thought will soon reveal the inherent absurdity of asking the vendor for information - it is like writing to an antique dealer asking him to vouch for the genuineness of his own stock. ('Is it really Constable?') Even if the vendor does actually lie about the house to his own Solicitor he will be careful not to reveal his new address so that suing him will be virtually impossible. The actual questions asked in the preliminary enquiries tend to shed a thick fog upon the subject rather than establish useful information about a house. Take this gem of forthrightness:

> 7(A) 'Is the Vendor aware of any rights or informal arrangements specifically affecting the property, other than any disclosed in the draft contract, or immediately apparent on inspection which are exercisable by virtue of an easement, grant, wayleave, licence, consent, agreement relating to an ancient monument or land near it or otherwise or which are in the nature of public or common rights?'

What are 'informal arrangements'? Perhaps some conveyancing Solicitors may know. I do not. As an example of the draftsman attempting to obfuscate the issue that could hardly be bettered. To make matters even worse the form incorporates a note stating that the accuracy of the answers 'is not guaranteed'. Of course the vendor may not be a liar and may simply not appreciate the significance of the things on the form. All that would be bad enough but there is one more factor that makes the form totally worthless: the vendor's solicitor is concerned to make the answers as vague as possible. To do that he uses a series of circumlocutions such as 'the question is too wide to permit a spcific reply' or 'the deeds are silent, but inspection may reveal'. Of course the purchaser's solicitor is protected - he can point to the form he sent out.

The third tool the Solicitor (since you have bothered to read this far I can reveal that it is usually his clerk or secretary) uses is Requisitions on Title. In unregistered land title is a very vague concept no matter how much it is wrapped up in technical verbiage. First, houses are conveyed by reference to a plan which is invariably 'for identification purposes only'. In other words the plan is small and inaccurate. In urban areas that does not matter very much - but in the countryside the plan is often a source of dispute. In one case I saw there was a dispute about whether two whole houses were within a boundary on some deeds. The lawyers decided not even to bother to try to rely on the documentary title (surveyors fees would have added to the costs) but chose to base the case on the payment by an alleged tenant of groundrent. Secondly, a builder who sells off several plots from an original purchase will not give the original deed to the buyer of the plots. The only thing to stop the builder selling the plots time and again is a note stapled to the deeds. Thirdly, when a house is sold off from a larger area there will often be nothing on the plan to show that it is part of the large area owned by the developer. The way the Solicitor denotes the sale on the larger plan in the possession of the builder is by a pencil cross. Thus conveyancing in unregistered land turns on a pencil cross, a note stapled to the deeds and a plan which is rough and ill drawn.

A SYSTEM WIDE OPEN TO FRAUD

The situation is perhaps even worse when it comes to the question of leasehold properties. The usual period for the investigation of title is now 15 years (Law of Property Act 1969) - there would be an uproar from Solicitors if the vendor merely had to produce the conveyance to himself. Yet with leaseholds there is no investigation of the title of the person who grants the lease at all. I suspect that very few Building Societies

have failed to grant a mortgage because of a 'flaw' in the vendor's title. When it comes to registered land it is impossible to investigate title - it is, after all, guaranteed by the state and compensation is generally available to those who fall through the net. (Libertarians may want to consider whether the state should be involved in land law in that way - should people be restricted by statute to certain forms of ownership of land? Should the Queen be the theoretical owner of all the land in Great Britain?) Amazingly Solicitors still submit requisitions on title when they are dealing with registered land - presumably to generate enough work for their secretaries. The system is also wide open to fraud - in unregistered conveyancing one merely has to type out a conveyance to oneself going back 15 years and then find an empty house to sell. In registered conveyancing I believe one can merely send a transfer to oneself to the Land Registry and then sell an empty house. A Solicitor will provide no protection against these eventualities.

Of course the Solicitor's clerk or secretary does not do these things for nothing. With the leap in house prices, and by charging a straight percentage fee for the work, the charge works out at about £200 an hour. Not at all bad for routine administrative work. The limited amount of work involved in each separate conveyance (an applicant for the post of Solicitor's clerk would be ill advised to admit he could not handle sixty or seventy domestic conveyancing transactions at once) is disguised by the long length of time between the first informal oral contact is made and the date of completion. This is what causes the problems of gazumping. It is possible to reach exchange of contracts in a morning if the Solicitor, sends a clerk to the local Council offices and rings the vendor's Solicitor, which would prevent almost any possibility of gazumping. But it would also reveal to the client the limited amount of work involved, and the exhorbitant fees. The nature of the system was almost flushed out in 1971-2 when the market went completely wild and purchasers rang up at 9 a.m. giving explicit instructions for exchange by 1 p.m. But the market settled down again and the Solicitors' perks remained unchanged.

NEGLIGENCE WILL BE HOTLY CONTESTED

Your reaction to what I have said so far might be to say: 'But if your Solicitor makes a mistake you can still sue him, can't you?' Of course you can - go right ahead. But it is very difficult to prove negligence in a Court of Law - it is difficult enough where the duties of the Defendant are well defined. But in this case it is even uncertain whether a Solicitor is obliged to make the usual searches and enquiries. (Emmet on *Title*, p. 2.) Secondly, any allegation of professional negligence will usually be hotly contested - and usually one ends up fighting an insurance company whose profits are dependent on paying out as little as possible. Thirdly, if a client fights the action he has to take the risk of having to pay his own costs and the other side's. For many clients a bill of £15,000 to £20,000 may mean ruin, quite apart from the nervous strain of appearing in Court (the case will usually take four years to come to Court). I have seen a case in which a Solicitor knew about a 'live' restrictive covenant and apparently failed to advise his client about it. A plea of negligence was, needless to say, being firmly resisted.

But what about all those frightening restrictive covenants that clutter up the deeds and land register? Are they not a trap for the unwary? This is a misconception, because it ignores the problem of who can enforce the covenants. Usually it is expressed to be 'X and his successors in title'. But the 'successors in title' are never noted on the deeds so it is virtually impossible to find out who can enforce the covenant. Of course the land may be subject to a building scheme so that everybody on an estate can enforce against everybody else. But usually Solicitors expressly state in the deeds that no building scheme is intended. Also the land to benefit from the covenants is rarely stated in the deeds. Once the developer has sold all his remaining land he will of course have no land to benefit from the covenant and will be unable to enforce it (unless the developer is a Local Authority which enters into an agreement under s52 of the 1971 Town and Country Planning Act - in that case the Authority is deemed to have imaginary land). Many covenants are positive in nature - for instance imposing a duty to repair a fence - and as they require the spending of money they cannot be enforced.

HOW THE MONOPOLY SURVIVES

So why have Solicitors been able to get away with charging exhorbitant fees for so long for such manifestly useless work? The main answer lies in their monopoly position - nobody may prepare a transfer or a contract for sale for a fee (s22 of the Solicitors Act 1974 and s6 of the Administration of Justice Act 1985). In fact a case was brought against a Solicitor for allowing a clerk to do the conveyancing - but the clerk conveniently died before the matter could be brought before the Court of Appeal - and the Government has now regularised the position in the Administration of Justice Act 1985. The Government appears fondly to imagine that it has broken the monopoly and thus secured a further free market triumph by the introduction of licensed conveyancers. But in May 1988 there were only 146 of them compared to 45,000 Solicitors. And they have to complete almost as many exams as Solicitors do. Basically their introduction is a monumental irrelevance.

Secondly there is also the law of libel. Anybody who criticises the Solicitors' profession always fears an avalanche of writs from lawyers. In fact it is a

defence to libel that what you say is true (justification) subject to the exception that it must not be written in a spirit of malice. Therefore as long as each demolition of part of the conveyancing system can be justified no writ would stand up in any Court of Law. But it is a brave journalist who would tempt fate in that way - and most journalists do not stay on a particular topic long enough to gain truly deep insights into it; they simply do not have the time.

THE LAWYERS IN PARLIAMENT

Thirdly, Parliament is full of lawyers - until recently the Prime Minister was one. Some of the more intelligent MPs may be aware of the uselessness of the conveyancing system but will obviously be unwilling to attack the profession in which they may still earn their fees.

Fourthly attention appears to focus on the law relating to conveyancing - for instance the Law Reform Commission has recently had one of its suggestions put into place in s2 of the Law of Property (Miscellaneous Provisions) Act 1989. That repeals s40 of the Law of Property Act 1925 and demands that the contract for the sale of land be in writing rather then evidenced in writing. Basically such a change is irrelevant and it will no doubt lead to a further flood of litigation concerning what happens to any money paid if the contract is void. No notice is taken of the systems Solicitors use.

Fifthly the Land Registry, originally set up to help people to do their own conveyancing, has been subverted to help Solicitors. For instance it runs an enquiry service which has legal back-up and is meant to help the general public. In fact it is used almost exclusively by Solicitors. The fees for the Land Registry are of course paid for by the Solicitor's clients.

ADVERTISING

Sixthly the absence of advertising in the true sense of the word has meant that the system is perpetuated. Some advertising is now permitted, but Solicitors may not knock the competition's claims. Therefore the advertising is bland and insipid, with none of the clout of, say, lawnmower adverts. Advertising is even more important in this area because non-Solicitors cannot otherwise judge whether what is going on is furthering their interests or not. As with all monopolies, vast asymmetries of information are created by the monopolists.

Seventhly there is the ethic of the professional, developed during the early part of this century. The ceaseles propaganda of the Law Society, the Solicitors' Trade Union, tells us that professionals have gone into business purely to further their clients' interests: they are in some way a moral cut above everybody else. I am a professional myself: and I still do not understand what it is in my training that makes me so morally special. Three years at a university law faculty hardly teaches one to put others' interests before one's own. Solicitors set up in business like everybody else to make a profit, and putting others' interests first is only done because if one goes too far the other way one's reputation suffers badly - in other words the market keeps Solicitors up to the mark, not their professional status.

RHYTHMIC INANITIES MASKING INTELLECTUAL BANKRUPTCY

Finally, I think that most Solicitors who do this sort of work genuinely believe that what they do is useful. They are addicted to by the verbal formulae and rhythmic inanities that pass for information in the conveyancing world: this is their drug, and perhaps the rhythm is the same as the beat of the maternal heart. And few people dare question their work - Solicitors after all have a respected position in society and are often pillars of the community (if not members of the Freemasons). The drug, though, is harmful, for it prevents them from asking awkward questions and seeing the intellectual bankruptcy of the conveyancing system. This may well be why they delegate the work to such a great degree - no partner would dream of doing anything more than a smattering of such routine work. This is true in another field as well: the same verbal drug appears constantly in the litigation sphere. One only has to look at 'Instructions to Counsel' and pleadings to see the truth of that. Incidentally, do not be deceived by the flashing lights of modern computers in solicitors' offices - the same nonsense is transmitted and the system remains the same.

MEANWHILE, DO IT YOURSELF

As a libertarian I am in favour of the repeal of the conveyancing monopoly. It enables Solicitors to hide the uselessness of their systems. Those who did not come within the auspices of the Law Society (which would then be a voluntary professional body as far as conveyancing is concerned) could begin to use advertising to its full effect, free from restriction. But as with much libertarian thinking that is for the moment utopian - although it might not be by 2020. What can libertarians do in the meantime? I suggest that you learn how to do your own conveyancing and save yourself a considerable sum of money. If you can fill out a passport form you can do the job. I recommend *The Conveyancing Fraud* by Michael Joseph (available from his address: 27 Occupation Lane, Woolwich, London SE18 3JQ) as the best book concerning practical conveyancing (although I disagree radically with most of his conclusions). And if you do find an insoluble problem I am sure that you will be able to find a Solicitor, who, at £200 an hour, will be willing to take on the case.