

## Scott Swainson

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**From:** Scott Swainson  
**Sent:** Wednesday, 15 February 2017 3:13 PM  
**To:** 'Reid, Debbie G.N.'  
**Cc:** mstone@wq.bm; kgeorge@mglaw.bm; 'Lorren Wilson'; Moniz, Trevor G.; 'Shawn A. McKee'; dsummers@bcec.bm; dkuhn@brcl.bm; 'Sara Schroter Ross'; hkitson@clarienbank.com; j.d.massa@hsbc.bm; 'shaun.morris@butterfieldgroup.com'  
**Subject:** RE: Land Title Registration Amendment Bill and Rules [APPLEBY-BM\_LEGAL.FID1586144]  
**Attachments:** Land Title Registration Amendment Bill 2017 - 10 Feb.PDF; Pamplin P ltr 19-2-14.PDF  
**Importance:** High

Dear Debbie,

Further to my email earlier and to our telephone conversation on Friday of last week, please find below comments (in yellow) in respect of each of the points raised. The comments are offered within the context of the Conveyancing Committee's proposal letter dated 19<sup>th</sup> February 2014 ("the 2014 Letter"), which I attach once again for ease of reference, as well as the most recent version of the Amendment Act as directed to me last Friday (also attached).

Regards,

Scott

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**From:** Reid, Debbie G.N. [mailto:dgnreid@gov.bm]  
**Sent:** Wednesday, February 08, 2017 2:50 PM  
**To:** Scott Swainson  
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**Subject:** RE: Land Title Registration Amendment Bill and Rules [APPLEBY-BM\_LEGAL.FID1586144]

Dear Scott

Thank you for your email dated the 16<sup>th</sup> of January and for once again taking the time to conduct a thorough review of the Land Title Registration legislation and give your detailed comments. I have looked at them and consulted with the AG Chambers and our comments are as follows (using the same numbering as in your message): -

**Letter dated the 19th of February 2014**

The 'Existing Problems' outlined in your letter were:-

Please note for the sake of clarity, that the items listed (i), (ii) and (iii) below identified concerns in respect of the Land Title registration Act 2011 itself, as passed by Parliament ("the 2011 Act") (as opposed to Existing Problems). Meanwhile, items (a) to (e) comprised a non-exhaustive list of the "Existing Problems."

i) **"the indicative as opposed to fixed boundary system"**; indicative boundaries have been removed and replaced with surveyed boundaries (See sections 10 and 21 of the Amendment Act). This point should no longer be an issue. Agreed

ii) **"the potentially inequitable and unconstitutional title classification system"**; the classification of titles has been amended to take your wishes into account so that attorneys will continue to certify titles (See section 15 of the Amendment Act). This point should no longer be an issue. Unfortunately this is still a major issue. While the Amendment Act may provide that attorneys continue to certify title, as proposed in the 2014 Letter, none of the supporting conditions that were tendered to help facilitate this approach ("the Facilitating Conditions") have been factored in. The Facilitating Conditions include establishing a new hybrid system that would serve to directly address the Existing Problems and by implication assist with the title certification process, establishing a deeds registry as a first step toward Land Title Registration ("LTR") for the purpose of facilitating a smooth transition into LTR (rather than leaping into it immediately and causing unnecessary market uncertainty), establishing a single compulsory trigger event for registration, namely the completion of a conveyance or a long term premium lease (here meaning an open market sale and purchase transaction involving an entire legal estate for valuable consideration) (a "Single Trigger") and incorporating provisions that specifically enable law firms to *"remain liable to our individual clients"* (only), as well as provisions that enable our liability and insurance arrangements to *"essentially continue in substantially the same form and to the same extent as they always have"*.

The fact that the Facilitating Conditions have been ignored, raises liability and insurance related concerns that are likely to impede and possibly even preclude law firms from providing certificates in the manner contemplated in the Amendment Act. These concerns are compounded by the provisions of sections 26 and 27 of the 2011 Act, which will (as drafted) threaten the validity of documents that require registration (see item d below). The bottom line is that if law firms (or a significant number of them) are not for practical reasons, actually able to provide certificates, this could destabilize the local property market and cause the new system to fail.

iii) **an indemnity scheme "likely to expose Government and ... the public purse to unnecessary liability"** on the Government purse. The Government backed indemnity fund and matters associated with it e.g. insurance cover as contained in sections 10, 11 and 12 of the original Act have all been removed. This point should no longer be an issue. The concerns that were raised in respect of the indemnity fund in 2013, were directly linked to the title classification system specified in the 2011 Act. This system would have placed LTRO staff members in full control of the title determination/certification process, which would have proven problematical because none of the LTRO staff members had local practice experience. This lack of local practice experience, which continues to feature, would as a consequence, have presented continuing risks such as potentially flawed title classification determinations. Such risks would have presented liability challenges that would have ultimately put the indemnity fund (and by implication the public purse) at risk. We offered our title certificates in good faith for the purpose of assisting with this problem, but only on the basis that the Facilitating Conditions would also be addressed. As currently drafted, the Amendment Act will simply shift the title certification obligations and all associated liability and risks from Government to law firms (and surveyors), without providing the key support components that the Facilitating Conditions would have offered. This approach will in all likelihood, result in a system that is less viable and less sustainable than the Government backed indemnity system that the 2011 Act would have offered. If Government is not prepared to deliver upon the Facilitating Conditions, then the indemnity fund component may actually need to be reinstated.

a) **"inadequate system for recording "Encumbrances"** (by your definition judgments, mortgages, matrimonial court orders and other rights affecting land etc.). This has been addressed with the creation of the new 'judgments register' which was specifically requested by the AG and is contained in sections 11, 13 and Schedule 11 of the Amendment Act and inserts the new register into s. 20A of the original Act. Under s. 23 of the original Act, estates vested in a mortgagee can be registered voluntarily or they are required to be registered under s. 24. (1) (d). Court orders are also covered by s. 24 (1) (a) (iii) and s. 24 (1) (b) (iii). Other rights such as easements will be picked up by



LTRO staff when the deeds to a property are examined at the point of registration. Please also see paragraphs 2, 3 and 4 of Schedule 6 of the original Act, which specifically talk about changes of the register pursuant to a court order and the rules which will govern this process. The new provisions to which you refer deal with future encumbrances (only). The focus of the 2014 Letter was of course on the existing (or historical) encumbrances that currently present difficulties in respect of confirming good title. The failure to address these difficulties will once again negatively affect the title certification process contemplated in the Amendment Act. In this context historical judgements that fetter title, present one of the most significant challenges. For this reason the 2014 Letter (see page 5) specifically focused on them and offered a solution for the underlying problem, being the inability to procure definitive judgement search results due to the unacceptable state of the Judgement Books. Paragraph 11 of the 2014 Letter suggests, as a remedial step, placing existing judgement creditors under a direct obligation to register any existing judgements that may currently attach to land at the LTRO within a finite period of time (such as 6 years) following the implementation of the new regime, failing which the affected judgements would cease to attach to the subject land. This would assist in tidying up existing judgement records and also facilitate a smoother transition into LTR with fewer title related risks.

b) **“the glaring absence of legislation that governs priority positions as between ‘Encumbrances’.** As has been mentioned previously, such matters (but only those created after the Land Title Registration Act has come into force) will be registered in chronological order. Attorneys will still have to carry out a search of the Causes Book in the existing manner at the Supreme Court until such time as the information contained in the book has either been integrated into LTRO records or the Court has created its own electronic register. As you may already be aware the LTRO has been in discussions with the Supreme Court Registrar to try and obtain the information in the Causes Book but unfortunately to date this has not happened. It has also created the judgments register referred to above to specifically record judgments and other Cause Book related information. You will note, however the Act and Rules do contain specific provisions which might alter the chronological rule, e.g. sections 63 (3), 70 and 71 in the original Act and Rule 55 deal with specific changes to the priority of such matters in certain situations. The general position is that a matter which is already protected by registration will have priority over any later matters which are required to be registered. You will also have noted I am sure that section 88 of the original Act makes provision for priority searches (including exclusive priority periods) which will protect an application from all others whilst the ‘priority period’ (as specifically defined in Rule 118 in Part 13 of the Rules) granted with the search result is still in effect. Very specific details about what information will be in the results are set out in Schedule C of the Rules (this includes paragraphs H and J in Part 2 which will set out the exact time a search expires). The bottom line is make your application on time and no other application will be able to trump it. Paragraph 8 in Schedule 6 of the Act also refers to very specific instances where the priority of matters on the register may be altered in accordance with the relevant Rules. Rule 98 also permits the order of priority of matters to be altered on the register pursuant to a direction of the court or Rule 100 following agreement between the owners of the relevant charges. Rule 99 of course, specifically sets the order of priority of all charges as being the order in which they appear in the register (as mentioned previously). Since the amendment Act is future looking (only), as confirmed by the bracketed language contained in the first sentence of your note above, it does not in fact address the priority issue that formed the basis of the difficulty referenced in item (b) of the 2014 Letter. This difficulty relates to the absence of legislation that can be relied upon for the purpose of comprehensively confirming the priority position as between existing mortgages and existing judgements. Permitting the current uncertainty surrounding this issue to subsist will negatively affect the title certification process.

Lastly, Rules 130 to 137 are extremely detailed as to the priority of applications lodged in different situations (e.g. at the same time) and how they may be altered.

c) **“the glaring absence of legislation that could assist in definitively resolving title and boundary disputes between property owners in an economical and timely manner.”** A mechanism for helping to resolve such disputes was contained in the original Act (the Adjudicator in s.93) However in consultation with the Attorneys it was suggested that a Lands Tribunal be created instead. This has happened and is contained in s. 26 of the Amendment Act, which inserts sections 92A, B and C into the original Act. While the Amendment Act contemplates a Land Tribunal as proposed in the 2014 Letter, the functional value of this facility will be negatively affected if the Facilitating Conditions continue to be ignored and also if the work volume and gearing issues that will necessarily impact the processing of claims are not properly considered. As matters presently stand, uncertainty appears to surround key issues such as whether the Tribunal will in fact have the capacity to process a steady flow of claims based on the registration triggers that are currently being contemplated within a reasonable period of time. Given



that Tribunal members are likely to be participating on a part time basis (only) this ought to be a priority issue. Further uncertainty seems to surround the impact of adding potentially 9 additional compulsory trigger transactions to the equation, as contemplated in the 2011 Act. The fact of the matter is that if the Tribunal component does not work efficiently and significant delays extending for say 6 plus months following the commencement of a claim are experienced (in other words a "log jam" result crystalizes), then this will negatively affect the property market and prove difficult to reverse.

d) **"the unnecessary mortgage registration/perfection time lags that are experienced, which are directly due to protracted adjudication and other Governmental procedures"**. Under Land Title Registration ('LTR') the registration of a mortgage will be much quicker provided all documents are in order and there will also be no need for the property to be re-conveyed to the owner once the mortgage has been paid off. This is because mortgagors will be shown as the owner of the property from the point of registration under the terms of s. 23 of the original Act rather than mortgagees as currently happens. Mortgages will be registered as legal charges as soon as possible under the new system and it will therefore be quicker, simpler and more efficient. Provided an attorney keeps their priority search up to date, then the mortgage will be protected whilst the registration process takes place. This is an extra level of protection which attorneys and their clients do not currently have in Bermuda and is another benefit of land registration. If a priority period is due to expire the party in whose favor it is will receive a reminder of this from the LTRO and it will ask them if they wish to renew it or not. Provided this is done in time then the protection will last until the mortgage has been registered. Any difficulties that you experienced with the previous system should no longer apply. This will be one of the main benefits of LTR. Unfortunately, any benefits that the new mortgage registration system may stand to offer, will be significantly diminished by the provisions of section 26 of the 2011 Act (as currently drafted), which provide that a mortgage may (like any other document being registered), be rendered void ab initio on a retroactive basis following completion (here meaning after the subject loan has been advanced). The language also suggests that basic procedural failings will be capable of bringing about this result in circumstances that may be beyond an applicant's control and also beyond the control of any attorney/surveyor acting for him. This is unacceptable.

In response to your comments above regarding current mortgage completion issues, please note that as matters presently stand both legal and equitable mortgages take full legal effect upon completion, meaning that either title passes (in the case of a legal mortgage), or a valid charge is created (in the case of an equitable mortgage) at the point when the subject document has been properly executed and dated. Thereafter, two post completion steps need to be completed, in order to fully perfect the lender's security position, namely applying the appropriate stamp duty (which ensures admissibility in the Courts) and registering the document in the Book of Mortgages for the purpose of protecting the lender's priority position vis-a vis third party creditors/mortgagees (the latter being an optional step). Currently, there is to my knowledge, no provision in law that operates to render a mortgage void on a retroactive basis in the manner contemplated in the 2011 Act. While the current system may present registration and (in some instances) stamp duty adjudication challenges that cause concern, a lender is likely to find the possibility of a void security result far more concerning, particularly after a loan has been advanced.

Unfortunately, the provisions of section 26 (as drafted) will be capable of catching any conveyance or other document (in addition to mortgages) that may need to be registered at the LTRO from time to time, meaning that the above mentioned retroactive void ab initio result could negatively affect any number of property owners over time. The fact that section 27 of the 2011 Act proceeds to contemplate the re-execution of any documents that are rendered void, with all the practical challenges liability/cost issues that this normally entails, causes additional concern. The bottom line is that the provisions of sections 26 and 27 (as drafted) will raise the current level of title uncertainty and heighten third party liability and insurance related concerns.

e) **"the glaring absence of legislation that governs information disclosure, within the context of land law now or formerly held in trust"** All documentation held by the LTRO (except for Trust Deeds) will be disclosed as it is a public register save for any information redacted from it in accordance with an application pursuant to Rule 122. Any land held in trust will list the name of the relevant trustee as being the owner of the land/property. The names of the beneficiaries to the trust will not be disclosed and if a copy of the Trust Deed is required to be seen by the LTRO it will not be kept by it in its records. This Existing Problem does not in fact relate to the disclosure of trust documents within the proposed LTRO regime, but rather to the disclosure of such documents in the current system (for transactional purposes). The difficulty here is that where trustee owners feature in a title chain, full disclosure in respect of the relevant trust documents has, owing in particular to provisions of the Bermuda Immigration and



Protection Amendment Act 2007, come to be considered necessary for the purpose of both avoiding criminal liability and proving good title. If for whatever reason these documents have been lost, or are not otherwise available in any given instance, then title to the subject property can effectively, be rendered un-marketable. The legislative reform process should therefore, specifically address this problem by (for example), enabling title to be certified in the absence of these documents, perhaps by relying on uncontested historical recitals instead.

#### Email dated 16<sup>th</sup> January 2016

(i) There is no need for the Act to comprise of two parts. It is very clear in its current format how the system works. Please clarify what the "serious transnational challenges that are likely to flow from the new advertisement requirements" are? As you may recollect you did make the request that we remove the notice from the Rules and place them in the Act. You confirmed that such notices are already issued by Departments such as Planning and Immigration in accordance with the legislation which governs them. You and your colleagues will therefore be used to dealing with and looking out for such notices. This should put you in a strong position for dealing with LTRO notices when they are issued. As indicated in c) above, the advertisement or notice requirement proposed in paragraph 2 of the 2014 Letter (see page 2), was raised within the context of a Single Trigger approach (only), with a view to bringing any credible title and/or boundary related challenges to a head and resolving them before a sale and purchase transaction completes and also before money changes hands (and the subject purchaser takes title). In this regard parallels may be drawn between such an approach and the pre-completion notice based procedures that feature in the Development & Planning Act and the Immigration Act respectively. However, the advertisement requirement was not suggested in respect of mortgages and other transactions that have never included public notice components. It may in fact transpire that pre-completion notice requirements raise insurmountable client confidentially and other challenges in respect of mortgages, as well as some of the other transactional triggers that are being contemplated.

(ii) As I have highlighted above all of the Existing Problems have clearly been catered for in either the original Act or the Amendment Act and have therefore been resolved. As stated above, this conclusion is incorrect. I note that you have raised two new concerns, namely the Companies Act 2014 and the case of Burch v Westend Properties Limited 2011 no. 445 (10<sup>th</sup> February 2016) in relation to LTR. These new concerns have arisen since our communications in 2014.

Any concerns that you have re the Companies Act should be rightfully raised with the appropriate Ministry. While our concerns have already been raised with the appropriate Ministry, the material point is that all of the relevant Ministries should be diligently participating in the reform process for the purpose of addressing the Existing Problems and facilitating a smooth transition into LTR.

LTR is designed to fit neatly into current Bermudian land law. Unfortunately this is not the case. LTR will in fact bring Companies Act difficulties, as well as any other unaddressed Existing Problems to a head in an immediate and unprecedented way and this will negatively affect the title certification process and the property market generally. Further given the validity challenges presented by sections 26 and 27, as well as the provisions of paragraph 11 of Schedule 3 to the 2011 Act, which effectively enable the Registrar to unilaterally usurp privately owned land on Government's behalf in certain circumstances (such as where adequate title information is not produced), it would appear difficult to describe LTR as fitting "neatly into current Bermudian land law."

In terms of the Companies Act issue, the most serious difficulties affecting same relate to the unusual provisions that have been included in the new section 4AA, which governs land holding, as well as in the conditions that are being included in land holding consents issued pursuant to section 4AA. The combined effect of section 4AA and the resulting consents is to empower the Minister of Economic Development to unilaterally vary any conditions that are specified in a consent (notably after a consent has been relied upon for the purpose of acquiring land). Further, if a land holding company then breaches the relevant conditions, whether as originally specified, or as varied, then the said Minister is ultimately empowered to order the affected company to sell the subject land within three years following the date of the breach, without there being any legal basis for an extension. The position is compounded by the fact that the Companies Act (as amended) does not provide for an appeals procedure through the courts, meaning that an affected company is left to rely upon judicial review (only). Further the Companies Act does not confirm the legal position in the event that the subject land is not in fact sold within the said three year period. The difficulties presented by section 4AA



which will necessarily affect any title certificate issued by a law firm, may only be addressed through legislative reform and this really needs to occur before LTR is implemented. The gravity of this issue is illustrated by the fact that property developers and Government are currently taking legislative steps (on a case by case basis) to navigate around section 4AA difficulties.

As regards the case of *Burch v Westend Properties Limited* this does no more than clarify existing adverse possession law on island. LTR will still be able to be introduced in spite of it. You will have noted that s. 108 in Part 17 of the Act already specifically states how LTR will affect adverse possession. In short, it will be much harder to claim once a property has been successfully registered. This is yet another benefit of LTR which your clients will greatly appreciate. The judgement in *Burch v Westend Properties Limited* has done more than simply "clarify existing adverse possession law on the island." The difficulty raised by this judgement is that the Judge seems to have refused to accept a fully executed dated and stamped 48 year old conveyance as tendered by the defendant, as prima-facie evidence of good title. The judge chose instead to rely on a prior "Heads of Voluntary Conveyance" memorandum tendered by the plaintiff in the absence of any supporting title deeds. This result fundamentally affects our ability to deduce good title based on root conveyance deeds that are at least 20 years old and highlights the need for urgent legislative reform.

(iii) The Existing Problems have been addressed. This conclusion is incorrect. As stated above and in my email below, the Existing Problems have yet to be properly discussed and the Amendment Act (as drafted) completely ignores the most significant Existing Problems.

(iv) Your firm and any others will not be exposed to any more liability than they are at the moment. This is incorrect. Our reports are currently issued to our clients (only) and are relied upon by our clients (only), unless otherwise agreed. Third party sharing and third party reliance as contemplated in the Amendment Act will necessarily increase exposure and potential liability levels. This is why the 2014 Letter specifically addressed this issue. You proposed that the certification process be carried out by attorneys in the same way that they currently do and this was accepted some time ago by the LTRO to remove your concerns about the establishment of indemnity fund – a fund set up to give your clients' title protection. Once a property is in the process of being registered your client will want to become the legal owner and this will not happen until you have successfully registered it at the LTRO in accordance with the provisions of the Land Title Registration Act 2011 (as it may be amended). It will be your duty to do so in order to comply with the law (and act in the best interests of your client which you are also duty bound to do). As per our telephone conversation on the 10<sup>th</sup> February, any delay in respect of the transfer of title beyond a contractual (or agreed) completion date in any given instance would prove unworkable. This is because the successful completion of conveyance and mortgage transactions, typically turns on the transfer of title, as well as the transfer of insurance and other risks and (potentially) large sums of money, on a specified completion date and before a specified time. Interfering with this long standing time sensitive market driven process in the manner suggested in your note above, would serve to destabilize the property market. Validity concerns arising from sections 26 and 27 of the 2011 Act would compound this problem. The LTRO will accept your certification and record it on the registers kept by it. If anything untoward is found at a later date then it is highly likely that your client will have a property which it cannot sell and would make a claim against your firm's insurance policy in the usual (existing) way. Without the Government indemnity fund there would be no other option available to them. Once again our liability concerns extend to assuming additional liability to our clients, as well as to potential third parties. Interestingly, the new section 3A (6) that is included in the Amendment Act and section 6 of the 2011 Act (as currently drafted) specifically limit LTRO/Government liability. It is therefore difficult to understand why law firm/surveyor liability should not be specifically addressed as well.

(v) We did consult with the surveyors before when drafting the original Act and the surveyors were happy with its form and contents. We don't see anything in the changes which should cause them any undue concern. It is apparent on the basis of the amendments specified in sections 3 and 4 of the Amendment Act, that survey plans and survey reports are intended to feature as part of the LTR regime in a way that they would not have before (based on the provisions of the 2011 Act as currently drafted). Once again, based on my discussions with Shawn McKee, who chairs the land or boundary surveyors committee, I have been given to understand that surveyors are also likely to have liability and insurance related concerns in respect of the filing of their reports and plans at the LTRO. Additionally, he stated that uniform surveying standards would need to be adopted by local surveyors in order for their survey reports (and plans) to be legitimately relied upon in the manner contemplated in the Amendment Act.



(vi) Assumptions and reservations are not strictly required in the Act as they will no doubt be contained in your report on title or in the surveyor's report/plan which are both specific to your client as part of the process of them engaging you (or the surveyor) to act for them. The bottom line here is that neither the assumptions, or the required form of attorney certificate have been properly discussed, which is unacceptable given the anticipated level of reliance.

Obviously, as the LTRO system is new we want it to be accurate and reflect the correct position re a property as to its owner, size and location. It therefore makes perfect sense for all such information to be supplied to the LTRO as this will be up to date, accurate information available concerning a property. While this is objective is fully agreed, it will only be fulfilled on the basis of wider consultation and input.

(vii) Only certain triggers will become operational when LTR come into force. Those are the three which your Committee specifically asked for (being sales for value, mortgages of \$750,000 or more and leases above the threshold term (21 years or more)). This is incorrect. We proposed the Single Trigger approach (only) specifically because this approach is consistent with current market standards and (as a consequence) more likely to be successful. The other triggers will remain in the original Act as drafted and be introduced by the Government of the day at a later date when it considers it an opportune time to do so. Rather than having to return to the Legislature for approval before activating each additional trigger, the negative resolution procedure would be the most appropriate method of activating those triggers. As indicated above, too many potential triggers currently feature. This raises gearing and work volume concerns, especially insofar as issues such as Tribunal capacity and the title certification process are concerned. Section 24 of the 2011 Act would, after taking into account the amendments to this section that are specified in the Amendment Act, appear to present the possibility of at least 10 compulsory triggers that will be available for activation. In this regard it is interesting to note that paragraph 2 of Schedule 3 to the 2011 Act (as currently drafted), enables these triggers to be unilaterally activated by the Register (at the Registrar's sole discretion) at any time and without any wider consultation. This is prima facie unacceptable and also unworkable given the far reaching impact that trigger activation will have on Tribunal capacity, the issuance of title certificates and the transactional cost base that underpins the current system.

In terms of the current cost base, a voluntary conveyance (for example), being one of the potential compulsory trigger documents, would normally be completed by an attorney for a fee of approximately \$1,500.00 based on the Bar Scale (which takes into account risk/insurance related considerations). A voluntary conveyance would also generally be completed without the need for a boundary survey or a new deed plan (meaning that the associated costs would not be incurred by the subject property owner). If a voluntary conveyance were to be activated as a trigger event, then the resulting title certification costs would (assuming an average property value of say \$1,000,000.00), add another \$5,000.00 plus to the legal fee component based on the Bar Scale, while additional surveying/new deed plan charges would be likely to exceed say \$2,000.00. This means that moving a voluntary conveyance from a non-trigger event to a trigger event could easily add a further \$7,000.00 to the subject property owner's transactional costs. This is clearly unreasonable within the context of the current economic climate. In contrast the Single Trigger approach would enable current cost levels to be maintained.

Kind regards

Debbie G N Reid

Land Registrar