Land Registration etc. (Scotland) Bill 2011

Stage 1 Written Evidence to the Economy, Energy and Tourism Committee

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1. INTRODUCTION

I am a writer and researcher on land issues in Scotland and author of a number of books on the topic as well as a range of reports. I also run the www.whoownsscotland.org.uk website. I advocate transparency and accountability over landownership in Scotland.

LAND REGISTRATION BILL

In broad terms I welcome the publication of this Bill as it delivers a much-needed statutory revision of the inadequate and outdated Land Registration (Scotland) Act 1979. I commend also the thorough work of the Scottish Law Commission and the diligence of their review which underpins the Bill. As a means of oiling the wheels of land registration there is little in the Bill with which I take exception.

However, the Bill should not be seen as merely a piece of technical legislation or a measure designed to underpin "*modern market economies*" and ensure the "*smooth running of a vibrant property market*". (1) Admittedly, much of the Bill is technical, but there are also important public policy dimensions to the Bill which have not been addressed.

Revision is certainly needed. As the years have gone by, the remedies to many of the deficiencies of the 1979 Act have been essentially made up by the Keeper and incorporated into the Registration of Title Practice Book. This is highly unsatisfactory and provides the rational for the current Bill. However, land registration is not simply a process of technical issues faced by conveyancers or the Keeper. It is the legal basis for providing real rights to own property.

This is the first time in the history of Scotland that a democratically-elected Scottish Parliament has considered the statutory basis for sanctioning who owns land in Scotland and providing the benefits that accrue to landowners with a recorded title. It is therefore vital that Parliament consider some wider questions of public interest that come within the scope of the Bill. Now is the perfect time for the Scottish Parliament to provide some leadership on wider questions of what and what is not desirable from a public policy point of view in terms of Scotland's system of land registration.

In this submission, I will focus on four of these, namely prescription and a non domino titles, registration of commons, beneficial ownership, and access to the Registers.

PRESCRIPTION AND A NON DOMINO TITLES (Section 42 - 44 of the Bill)

Prescription is a legal device introduced in 1617 which has the effect of exempting a title from legal challenge provided that the land has been occupied "*peaceably, openly and without judicial interruption*" for at least 10 years (20 years in case of Crown land). The principle was established in its "modern" form in 1617, along with the Act of Registration to provide legitimacy for land that the nobles had appropriated from the Church in the 16th century. It is telling that the Prescription and Limitation (Scotland) Act 1973 (which governs

prescription) states in the preamble that it replaces the Acts of 1469, 1474 and 1617. This is an ancient device and it has served landed interests well.

These laws continue to underpinning modern property law but have (and continue) to represent little more than a form of post hoc legitimised theft which, were it to involve ordinary criminal theft would have the party doing the thieving in the dock for criminal reset.

For example, the Duke of Argyll admitted in the House of Lords in 1815 that the principle of prescription provided the foundation of a "v*ery good deal of the property held by Members*". (2)

And John Rankine, author of the magisterial *The Law of Landownership in Scotland* went so far as to remark that, "*The words of the protection given in the Act of 1617 to this favoured conjunction of title and possession are very full and sweeping, and have been applied …. to many cases which were not properly within the purview of the Act*" (3)

The particular form of prescription covered by the Bill is provision for individuals to lodge a claim of ownership over land they do not own – a non domino titles (literally, "from one who is not the owner"). This is where a deed is recorded for land not owned by the applicant in order to found prescription – in other words to start the clock ticking on the prescriptive period. The Bill provides a statutory basis for anyone claiming prescriptive title to have it recorded. This is an area on which the 1979 Act is silent. But should such claims even be entertained in the first place?

The Keeper's rules for accepting a non domino deeds have been tightened up in recent years and the Bill tightens matters further by insisting that any claims must relate to land that has been abandoned for the previous seven years and that must have been possessed by the applicant for one year. The applicant must also submit evidence that they have attempted to trace the true owner and must inform the Crown as the ultimate owner of land in Scotland.

But despite such tightening of the rules, the question remains as to whether such first-come, first-served land seizure is desirable in the first place and whether alternative arrangements should be made to deal with land that has no apparent owner.

The admission of a non domino deeds causes the law contort itself. Section 42(1) in the Bill admits openly that such deeds are to be treated as valid **despite not being so** and limits the grounds on which the Keeper can rule that they are invalid in Section 42(2). The Bill effectively conspires to accept as valid something which is not, so long as the applicant conceals the fact that it is not.

Is this the kind of law the Scottish Parliament is comfortable with? This kind of contorted logic has been developed by landed elites and their legal representatives over centuries. Vast swathes of land have been acquired on the basis of deeds that purport to transfer land that the disponer does not own.

Prescription and a non domino deeds have provided for widespread theft of land over the centuries by the greedy and powerful being able to get their claims in the door first whilst the innocent bystanders, being ignorant of the attempt, have lost their land. Under the current rules, the Keeper is even prohibited from notifying the true owner that a hostile claim has been lodged. It is time to end this abuse of the law. Instead of the (admittedly stricter) rules set out in the Bill, a far more public process should be adopted.

Any claims to “unowned” land should be lodged with the Keeper and then advertised publicly on the Registers of Scotland website for a minimum period of one year. The publicity should include the name of the claimant and their grounds for the claim, the extent of the land being claimed, a report on investigations into its legal history and the conclusions of the research conducted to identify the true owner, and an invitation to lodge rival claims. The view of the Crown should be sought and publicised as it is the ultimate owner of land and could legitimately lay claim.

Only after the expiry of this period should the Keeper have any power to admit an a non domino deed for registration. Any contested claims should be settled by the Lands Tribunal.

COMMONS

Scotland’s laws of landownership have been devised to favour private property. For centuries, common land has been under attack. As Tom Johnston observed in his The History of the Working Classes in Scotland,

“…*adding together the common lands of the Royal Burghs, the common lands of the Burghs which held their foundation rights from private individuals, the extensive commons of the villages and the hamlets, the common pasturages and grazings, and the commons attaching to run-rig tenancies, we shall be rather under than over estimating the common acreage in the latter part of the sixteenth century, at fully one-half of the entire area of Scotland*.” (5)

It has now virtually all disappeared. What marks Scotland out is the scale of this onslaught compared with other European countries. The situation stands in stark contrast to that in England and Wales, for example, where common land has statutory protection and registration can be applied for through local authorities by members of the public. The UK Government DEFRA provides full details of the topic and you can even download a list of ALL the common land in England and Wales. (6)

For the avoidance of doubt, there is very little common land left in Scotland. Exactly how much is unclear and obtaining any accurate statistics is not helped by the fact that many lawyers and government officials deny that commons even exist in the first place. A couple of examples might assist in understanding the problem.

The first concerns a 400 acre commonty in Perthshire.

Within the past 25 years, three local landowners drafted and lodged a deed splitting the commonty among themselves. The deed claims that they have sole rights to the common. This is doubtful in the extreme. Nevertheless the deed was accepted in the Register of Sasines but not before the Keeper had made a note in the margin that “*Agent aware that granters apparently only have title to rights in pasturage in [name of commonty*]”. In other words, not only did the landowners know that they had no property rights, their lawyer also knew. Nevertheless, the deed stands. This is what I refer to as legalised theft.

It is worth remembering that in the London riots last summer, an engineering student was jailed for 6 months for stealing a £3.50 case of bottled water.

In another case, in the parish of Carluke, there is a happier story. A landowner registered a title in the Land register and, as part of his title was recorded his rights of use of the parish common together with the rights of access over the loan leading to it. This is probably the

sole example of a common registered in the Land Register. The common itself, however, is not registered for the simple reason that there exists no mechanism to do so.

Some would argue that since there is so little common land left, that there is little point in making any effort to preserve it. A more intelligent response is to argue that what little is left is such an important part of our cultural heritage that every effort should be made to identify and preserve it. That is my position and the Land Registration Bill can help is the will exists

The Bill is relevant here for the simple reason that the law of prescription and a non domino titles have been (and continue to be) responsible for the theft of our commons. As the Bill stands, those devices can continue to be used to appropriate commons. The central problem is that in Scotland there is no means to register common land and it stands vulnerable to prescriptive claims. A means needs to be devised to protect them by assertive action by citizens to register them. What is needed is a simple solution that provides a statutory mechanism for members of the public to submit an application for recording titles to areas of common land. This could take the following form.

The Land Register recognises commons as a class of property and admits applications for registration from any member of the public residing in the civil parish in which the land is situated. For so long as the application is pending, no other private claims will be entertained by the Keeper. The application will advertised publicly on the Registers of Scotland website for a minimum period of six months and circulated to the local authority, community councils and published in local newspapers. The publicity should include the name of the claimant and their grounds for the claim, the extent of the land being claimed, a report on investigations into its legal history, and an invitation to lodge rival claims.

The Lands Tribunal shall adjudicate on any contested claims but if none are made, then the Keeper shall record a title and the land shall be registered as a common. Statutory power for their management would be vested in local authorities.

If this can be done though local authorities in England and Wales I don't see what the problem should be in Scotland other than that for centuries, landed and legal elites have conspired to airbrush commons from our history and from the map of Scotland.

BENEFICIAL OWNERSHIP

Two days after the 9/11 attacks in the USA, Andrew Edwards, a former deputy secretary of the UK Treasury stood up at the Cambridge International Symposium on Economic Crime to give a presentation on taxation and money laundering in which he argued that,

"*As we all know, serious criminals mostly commit crime and launder its proceeds, not under their own names, but through company or trust formats. In most countries, however, tax and company registration authorities don't even require to know who the true or beneficial owners of private companies, trusts or foundations are. In most countries, similarly, land registration authorities don't try to establish who the true or beneficial owners of property are*." (7)

Edwards later carried out the Quinquennial Review of Her Majesty's Land Registry in England and Wales in 2001. In it, he argued that

"*In these days when economic crime and money laundering have become major issues for the world economy and society, and when property assets are a significant vehicle for*

holding the proceeds of crime, the fact that the Registry neither records on the Register nor knows who the true owners of property are becomes ever harder to defend. There must be a strong case, therefore, for including in the Register details of the true or beneficial owners of registered properties where these differ from the nominal owners.

... The disclosure of such information on the Register, and the index of true or beneficial property owners that the Land Registry could compile from it, would be invaluable for law enforcement, regulatory and tax authorities, as would similar information on ownership of private companies. Without such information, the transparency of land registration must always be seriously qualified. The existence of the requirement would itself do something to deter the unscrupulous from putting the proceeds of crime into property assets." (8)

Such concealment also formed part of the background to the Mohamed Al Fayed court case against the Inland Revenue Commissioners in 2002 where the Special Compliance Office of the Inland Revenue had launched a Who Owns Scotland project to try and investigate the tax affairs of landowners in Scotland who had registered land in offshore jurisdictions. (9)

Section 108 of the Bill introduces a new statutory offence designed to assist in tackling serious organised crime in Scotland. I do not have a view on this proposal but would merely point out that the Scottish Parliament should take note of Andrew Edwards' proposals and amend the Bill so as to eliminate the secrecy that surrounds the registration of titles by companies in offshore tax havens. This would not only assist in deterring money laundering but assist the tax authorities in collecting tax and improve transparency over who owns land in Scotland.

I happen to disagree with Edwards' specific proposal to insist on a declaration of beneficial ownership. Such a mechanism could be cumbersome and within 48 hours of a land registration being accepted, this information may well change.

My proposal is simply to make it incompetent to register title to land in Scotland's Land Register in any legal entity not registered in a member state of the EU. This provides compliance with Treaty of Rome obligations and means that any US orJapanese company that wishes to buy land and build a factory can happily do so – they simply need to set up an EU entity to do it.

Of course, the owners of such a company may be another company in an offshore tax haven BUT at least the entity is governed by EU law and the Directors are named and are legally responsible and accountable for the affairs of the company. All of which takes us a long way forward from where we are right now.

Any tax liabilities or money laundering allegations could thus readily be chased up and such a reform would greatly boost transparency, accountability and the collection of taxes.

ACCESS

Currently the Registers of Scotland charge for access to search the Sasines and Land Register. Moreover, there is no online facility for the public to use to conduct their own search. Registers Direct is an online service but demands an account be set up and a high level of familiarity with the structure of the Registers (particularly Sasines) to use effectively. By contrast, the Land Register in England and Wales has a box where one can enter a postcode and a checkout where you pay for the result.

Future land registration should be based upon an easy interface for the public and should be free. In 2010/11 the income from searches yielded a total of £2,604,000 (5.3%) out of a total operating income of £48,621,000. Such a shortfall could easily be made up from other income sources and would contribute to transparency and efficiency by making it painless for anyone, anywhere to find out who owns Scotland.

REFERENCES

(1) Policy Memorandum, para 2.

(2) Hansard Parliamentary debates 3rd series, vol 192, col. 1815, 19 June 1868.

(3) Rankine The Law of Landownership, 4th Edition, pg. 32.

(4) See Aberdeen College v. Youngson at 14

(5) The History of the Working Classes in Scotland, pg 164

(6) See www.defra.gov.uk/rural/protected/commons/ &
http://archive.defra.gov.uk/rural/documents/protected/common-land/common-land.pdf

(7) Andrew Edwards address is available here.

(8) HM Land Registry, Quinquennial Review, June 2001 pgs 104-105

(9) Al Fayed vs Lord Advocate, Court of Session, 31 May 2002 at [61]